

How Far Is Too Far?

The Line Between "Offensive" and "Indecent" Speech

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I. Introduction

On February 22, 1994, the Federal Communications Commission (FCC or Commission) settled a case against Evergreen Media Corp.⁽²⁾ The case originated when Evergreen refused to pay an indecency fine issued by the Commission in 1989.⁽³⁾ The FCC referred the case to the Department of Justice, which initiated a collection action in the U.S. District Court for the District of Columbia.⁽⁴⁾ After the district judge refused to grant the government's motion for summary judgment, the FCC initiated talks with Evergreen about a settlement. As part of that settlement, the Commission agreed to issue enforcement guidelines to better help broadcasters identify material that is potentially indecent. These guidelines were supposed to be released within ninety days of the settlement. Almost three years later, the FCC legal staff is still working on these guidelines.⁽⁵⁾

Given the FCC's inability, or unwillingness, to issue the promised indecency guidelines, the purpose of this article is to evaluate dismissed indecency complaints to determine if it is possible to identify the range of "permissible" speech in this controversial area of the law. Specifically, the author will attempt to answer the following questions: What types of sexual or excretory expressions or offensive language has the FCC found to be *not actionably indecent*? And, what generalizations, if any, can be made from the dismissed cases to better help broadcasters steer away from potential violations of the indecency statute?

To facilitate discussion and make this article more readable, brief excerpts of the material that led to each complaint are provided. More extensive excerpts are provided in footnotes. The dismissed complaints are divided into three categories: (A) expletives or vulgar words; (B) descriptions of sexual or excretory activities or organs; and (C) double entendre. These three categories are very general and were devised after examining all cases in which the Commission has issued fines for indecent broadcasts. Within each section, and whenever possible, the complaints are organized in chronological order.⁽⁶⁾

Part II explains the scope and method of this study. Part III discusses the concept of "indecent" and the procedure the FCC follows when handling indecency complaints. It also discusses how the Commission has used the concept of "context" when determining whether material is indecent. Part IV examines the complaints that the FCC dismissed as "not actionably indecent" and, whenever possible, contrasts the dismissed language with material that the Commission has found indecent. The discussion is in Part V and the conclusion is in Part VI.

II. Scope and Method

As the legal notion of "indecent" extends to cable and other newer communication technologies, such as the Internet,⁽⁷⁾ examining broadcasters experiences with FCC enforcement efforts may prove beneficial. At the very least, this Article provides examples of the types of speech that the FCC has found not actionably indecent. This may be useful for broadcasters and media attorneys because dismissed complaints are usually not published by the FCC.

This study includes the most relevant indecency complaints involving radio stations that the FCC dismissed as "not actionably indecent" between 1989 and 1995.⁽⁸⁾ Complaints involving television stations were excluded from this study for two reasons. First, the enforcement of the indecency statute has greatly affected radio stations,⁽⁹⁾ with no television station to date having been subjected to an FCC fine.⁽¹⁰⁾ Second, since television pictures can be as or more offensive than speech, unless the author had the opportunity to look at every videotape included with every complaint against a television station, it would be difficult to assess the offensive nature of television programs.⁽¹¹⁾

Complaints deemed "defective" by FCC staff were not used in this study because when the Commission dismisses a complaint as defective, it does not make a finding as to whether the material is indecent or not. A defective complaint is one that fails to include a transcript or tape of the program, stations call letters, and time and date of broadcast. In addition, complaints that were unlikely to provide any guidance were left out. For example, if a complaint *only* claimed that words like "faggots," curse words like "damn," or racial slurs were "indecent," the complaint was excluded because such terms fall outside of the FCC's definition of indecency, which is only supposed to include patently offensive depictions or descriptions of sexual or excretory activities or organs.⁽¹²⁾

The thirty-one complaints discussed in this study were chosen according to the criteria explained in the previous paragraphs. Of those, FCC staff dismissed twenty-eight cases because the language was "not actionably indecent."⁽¹³⁾ Since the complaints were dismissed as not actionably indecent, the FCC did not send a letter of inquiry to the twenty-eight licensees whose stations had been the subject of the complaints. Thus, the only guidance available for those trying to study the reasoning behind the FCC's dismissals are the letters the Commission sent to the complainants. Unfortunately, the Commission seldom provided detailed explanations as to why material was deemed not actionably indecent, using instead form letters to dismiss the complaints.

Of the remaining three complaints, two were dismissed after the Commission evaluated the licensees responses to the FCC's letters of inquiry. This means that the FCC staff found that the material broadcast appeared to be actionably indecent, but after receiving the stations responses the FCC decided not to issue a fine due to, what appears to be, mitigating factors. A final complaint was dismissed at the discretion of the agency without any explanation--and after a letter of inquiry had been sent to the licensee--despite the fact that the language appeared to be in line with other cases in which the Commission has issued fines.

A breakdown of the thirty-one dismissed complaints reveals that there were seven about the use of expletives or vulgar words, thirteen about descriptions of sexual or excretory activities or organs, and eleven about use of double entendre.

III. Indecency and the FCCs Complaint Investigation Process

A. Definition of Indecency

The FCC has defined indecency as language that, in context, depicts or describes, in terms patently offensive by contemporary community standards for the broadcast medium, sexual or excretory activities or organs.⁽¹⁴⁾ The use of indecent speech over the airwaves constitutes a violation of 18 U.S.C. 1464.⁽¹⁵⁾ The Communications Act authorizes the Federal Communications Commission to enforce section 1464.⁽¹⁶⁾ The Commission's most commonly used enforcement tool in the regulation of indecency is the fine.

Although indecent speech is protected by the First Amendment, in the 1978 landmark decision *FCC v. Pacifica Foundation* the U.S. Supreme Court said that the FCC may channel indecent speech to times when children are less likely to be in the audience.⁽¹⁷⁾ For many years, broadcasters knew that if they aired material that contained indecent words like "shit, piss, fuck, cunt, cocksucker, motherfucker, and tits"⁽¹⁸⁾ late at night, the FCC would not take any punitive action. Since 1987, however, the times when indecency can be aired and what actually constitutes indecency have been less clear.⁽¹⁹⁾ After several court battles, it appears that it is safe for broadcasters to air indecency from 10:00 p.m. until 6 a.m.⁽²⁰⁾

B. Context

The Commission has said that for a finding of indecency "[t]he ultimate determinative factor . . . is whether the material, when examined in context, is patently offensive."⁽²¹⁾ While the Commission has not clearly explained what is "patently offensive," after evaluating numerous indecency cases, it appears that the use of humor and the intent to pander and titillate the audience may contribute to a finding of patent offensiveness. On the other hand, the FCC has done a somewhat better job at explaining the term "context." This term is supposed to encompass a host of variables. For example, when determining a program's context the FCC will take into account whether language is "vulgar" or "shocking" or whether allegedly indecent material is isolated or fleeting,⁽²²⁾ or dwells on patently offensive descriptions of sexual or excretory activities or organs. In addition, as part of the context, the FCC will take into account whether children are likely to be in the audience.⁽²³⁾ Finally, the Commission has said that the merit of a work will not automatically preclude a finding of indecency.⁽²⁴⁾ The merit of a work may include its literary, artistic, political, or scientific value, or such things as how serious is the discussion of sexual topics.⁽²⁵⁾ For example, frank discussions of sex, including sexual techniques, are not necessarily indecent unless presented in a pandering or titillating manner.⁽²⁶⁾ On the other hand, the FCC has said that "while a humorous context will not necessarily exacerbate the offensiveness of certain remarks, it will also not ameliorate the impact of otherwise patently offensive speech."⁽²⁷⁾ In fact, if one examines all the FCC actions that led to fines, it will be obvious that the language found indecent contained expletives, descriptions of sexual or excretory activities or organs, or double entendre in a nonserious, non-news, nonscientific/educational context. Thus, humor and the use of language falling into any of the three categories mentioned above are likely to be a very dangerous combination.

Still, what exactly is context and how the FCC factors it in when it evaluates an indecency complaint remains somewhat of a mystery. This may be in part due to the fact that, according to the Commission, "indecency determinations are highly fact-specific and are necessarily made on a case-by-case basis."⁽²⁸⁾ Thus, for example, the FCC has said that no words are *per se* indecent.⁽²⁹⁾ This suggests that words that may be indecent in one context may not necessarily be so in another context; for instance, one in which there is no attempt to pander or titillate the audience. So, after examining past FCC decisions, it appears that discussions that dwell on sexual and excretory matters--including scatological functions--in a pandering and titillating fashion are indecent.⁽³⁰⁾ Sexual references that make the sexual or excretory meaning of double entendre or innuendo inescapable are also indecent.⁽³¹⁾ References to the mutilation of sexual organs have been found indecent.⁽³²⁾ The Commission has also said that it is indecent to broadcast frequent, explicit, patently offensive references to sexual intercourse, orgasms, masturbation, and other

sexual conduct. Patently offensive references to female breasts, nudity, and male or female genitalia have also been found to be indecent.⁽³³⁾

Broadcasters have insisted that the concepts of "context" and "patent offensiveness" do not provide enough guidance to avoid the broadcast of indecency. However, the Commission has rejected these claims and has suggested that in exercising editorial judgments, broadcasters must take into account past FCC findings. On the other hand, the Commission has said that "material which is indecent is not the less so, nor is it rendered immune to our enforcement authority, simply because it is less egregious than material we have heretofore found actionable."⁽³⁴⁾ So, it appears that the FCC expects broadcasters to look at past decisions and determine whether material scheduled for broadcast is likely to fall along the lines of the Commissions prior indecency rulings.⁽³⁵⁾

It is important to mention that while it may appear that the FCC allows very little room for mistakes when it comes to its enforcement of indecency, the Commission has suggested a couple of factors that may mitigate a finding of indecency. First, the Commission has said that the fact that a broadcast is live does not serve as a mitigating factor. The reason: Whether live or not, the licensee has the obligation of exercising editorial responsibility.⁽³⁶⁾ However, a live broadcast in which a "fleeting" or "isolated" indecent word is used may be excused from a finding of indecency.⁽³⁷⁾ Second, some FCC actions suggest that prompt and effective remedial action by a stations management, after a program containing potentially indecent material is broadcast, may be considered as a mitigating factor. As will be pointed out in the discussion that follows, two of the dismissed complaints may be the result of the FCC weighing these mitigating factors.

C. The Complaint Investigation Process

When the FCC receives an indecency complaint, staff at the Enforcement Division evaluate whether the complaint is properly documented. The FCC requires that a complaint includes the stations call letters, the date and time of the broadcast, and either a copy of the program or a partial transcript that allows the staff to determine the context in which the allegedly indecent language was used. If a complaint lacks any of these elements, the Commission usually asks the complainant to supply the missing information. If the complainant is unable to do so, FCC staff dismisses the complaint as "defective."

When a complaint is fully documented, the FCC staff determines whether the material is actionably indecent or not.⁽³⁸⁾ If the staff finds that the material is not actionably indecent, it simply sends a letter to the complainant indicating that it is dismissing the complaint and it states the reason.⁽³⁹⁾ Since the letter dismissing a complaint is usually not published, licensees are often unaware that the Commission dismissed complaints against them.⁽⁴⁰⁾ On the other hand, if the FCC staff finds that a complaint is actionably indecent, the broadcaster receives a letter of inquiry (LOI) asking for information about the broadcast in question. Once the broadcaster has an opportunity to respond to the LOI, the Commission decides whether to issue a Notice of Apparent Liability (NAL) or to dismiss the case.

IV. Dismissed Complaints

A. Expletives or Vulgar Words

When it comes to expletives, it seems fairly clear what are some of the words the FCC is not willing to tolerate. The "seven dirty words" that George Carlin used in the monologue aired by Pacifica Foundation in 1973 are perhaps the best examples.⁽⁴¹⁾ Thus, words like "fuck," "fucking," and "shit" are likely to bring a finding of indecency if broadcast outside of the safe harbor, unless the Commission determines that within a particular context the words were not patently offensive. On the other hand, words like "ass" and "asshole," and the use of the word "dick," in a context that does not refer to male genitalia, appear not to meet the FCCs criterion of patent offensiveness.

A dismissed complaint that received great publicity dealt with National Public Radios broadcast of a news story about Mafia figure John Gotti. WSMC-FM, Collegedale, Tennessee aired the story on February 8, 1989 at about 6:25 p.m. in *All Things Considered*. In the news story, Gotti used the word "fuck" or "fucking" 10 times.⁽⁴²⁾

Although the FCC dismissed the complaint as not actionably indecent,⁽⁴³⁾ the complainant, Mr. Peter Branton, requested that the decision be reconsidered. Eventually, the Mass Media Bureau referred Branton's petition to the full Commission, which issued an opinion affirming the dismissal. The opinion said that although the news story contained material that could be offensive to many, it did not find that the use of such words in a legitimate news report had been "gratuitous, pandering, titillating or otherwise 'patently offensive, as the term is used in our indecency definition."⁽⁴⁴⁾

In the Gotti opinion the FCC said that while in the past it had found the "f-word" to be patently offensive,⁽⁴⁵⁾ "no terms are *per se* indecent, and words or phrases that may be patently offensive in one context may not rise to the level of actionable indecency if used in other, less objectionable circumstances."⁽⁴⁶⁾ The FCC opinion continued:

When analyzing whether particular material meets this definition, the Commission looks first and foremost to the context in which the language was presented--a review that encompasses a host of variables, including, among other things, an assessment of whether the language was used in a "shocking" or "vulgar" fashion or was without merit.⁽⁴⁷⁾

The Commission also noted that it had traditionally been reluctant to intervene in the editorial judgment of broadcast licensees on how best to present "serious" public affairs programming to their listeners.⁽⁴⁸⁾

Commissioner Irvin Duggan dissented. Duggan was concerned that the Commission was creating an exception for the use of otherwise indecent material in the context of news stories. Such an exception, he said, could open the "floodgates to the repeated, gratuitous use of language that has historically and legally been considered indecent."⁽⁴⁹⁾

While in the Gotti case the Commission clearly explained why it found the complaint not actionably indecent, most of the complaints that will be discussed hereafter lack such detailed analysis. For example, on February 23, 1990, the Commission dismissed a complaint against KPKE-FM, Los Angeles.⁽⁵⁰⁾ The complaint alleged that KPKE had aired an early morning interview containing the words "shit" three times; "fag/faggots" fifteen times; "queer" five times; "niggers" three times, and "spics" one time.⁽⁵¹⁾ There was no indication about whether the interview was live.

In the "form" letter dismissing the complaint, the chief of the Complaints and Investigations Branch of the Enforcement Division said that although the material could be offensive to many, it was not actionably indecent and the Division staff could not find the "necessary legal basis for further Commission action."⁽⁵²⁾

An examination of the program's transcript showed that it was an interview with a member of a hate group called "The Blue Boys." The interview was part of a show dealing with anti-homosexual violence. The transcript shows that the station bleeped the word "fuck" or "fucking" on several occasions. The only "indecent" word left in the interview was "shit." One of the times when the word was used, "CAP," the hate group member being interviewed, was explaining the types of activities his group engaged in: "What the [censored] do you think they do? We go out and beat the [censored] *shit* out of these *faggots*!" The other two times the word "shit" was used involved the following statements: "Were out there [censored] chicks every night and we have nothing to do with any *fag shit*;" and, "[w]hats in the future? Well, a whole *shit-pile* of dead *queers* is on the horizon."⁽⁵³⁾ While the FCC did not explain why it dismissed the complaint, based on the Gotti case, discussed earlier, it is possible that the Commission took the context of the program into account and decided that in a serious interview the use of the word "shit" was not patently offensive.

On November 21, 1991, the Commission dismissed a complaint against WFLZ-FM, Tampa, FL.⁽⁵⁴⁾ The material involved two DJs using the expression "kiss my ass" and the word "dick."⁽⁵⁵⁾

While these words may be offensive to some, the word "dick" was not used to describe a sexual organ. In addition, the Commission has never specifically said that the word "ass" or "asshole" is indecent. This probably explains why the FCC also dismissed the complaint against WSB-AM, Atlanta, GA, which aired a call-in show called "kiss my butt day."⁽⁵⁶⁾ After numerous instances in which callers told someone they knew to "kiss their butt," one caller used the expression "kiss my ass."⁽⁵⁷⁾

If one looks at cases in which the FCC has made a finding of indecency, and which involved the word "ass," it appears that in those cases the word was part of a more offensive discussion of sexual or excretory activities. For example, the Commission determined that the following comments made by Howard Stern were indecent: "He writes all the articles for the magazine, do you have a broom in your ass so you sweep up too? I can just picture him, like taking pictures with a broom in his ass and like typing. . ." ⁽⁵⁸⁾ In this example, the use of the word "ass" appears to be patently offensive in light of the joke. Another example of the word "ass" used in a patently offensive manner involves a song aired by KNON-FM, Dallas, TX. The song, titled "I Want to be a Homosexual" included lyrics such as: "Shock the middle class. Stick it up your punkrock ass. . . . I wanna be a homosexual. . . . You're so full of shit. Why don't you admit, you don't have the balls to be a queer." ⁽⁵⁹⁾ The Commission in this case found that the song was patently offensive, and, therefore, indecent. The fact that the song graphically describes sexual activities and uses four-letter words was probably the predominant factor for the finding of indecency, rather than the fact that the word "ass" was used several times.

In another case, the FCC dismissed an anonymous complaint against WGR-AM, Buffalo, NY. ⁽⁶⁰⁾ The station had broadcast a post-game interview after the Buffalo Bills lost to Miami. The player being interviewed said, "[W]e got our ass kicked today, point blank, Im not going to bull shit around." ⁽⁶¹⁾ Although the FCC did not explain why it did not deem the word "shit" indecent, the Commission has suggested that "fleeting and isolated" utterances in the context of *live and spontaneous* programs may not warrant Commission action. Since, in the WRG-AM broadcast the word "shit" was in the context of a live sports interview, which would be a serious context, the word was used only once, and there was no obvious attempt to pander, titillate, shock, or humor the audience, it is likely that the FCC took these elements into account in dismissing the case. ⁽⁶²⁾

On May 5, 1994, the FCC dismissed a complaint against WALE-AM, Providence, RI. The fifteen members of the Providence City Council complained that Geoff Charles, host of WALE-AM morning show, used indecent language on the air. The station management claimed that Charles use of indecent language was an outburst in reaction to a city meter-checker, who apparently had "illegally" been issuing tickets against Charles and other station staff. On the day of the indecent broadcast, Charles observed the traffic officer "illegally booting" the car of the programs producer and yelled at him "[y]oure a dick head. You scum sucking douche bag. . . . that asshole is on the top of my hit list." ⁽⁶³⁾

The station management, responding to an FCC letter of inquiry, explained that the program's producer, unaware that the delay mechanism of the audio board was not working at the time, thought that Charles comments were being deleted from the air. Frank Battaglia, a CEO of North American Broadcasting Co., Inc., the stations licensee, told the FCC that the producer had been fired after the incident and that Charles had apologized on the air for his actions and agreed to perform forty hours of community service. Eventually Charles left WALE. The Commission said that in view of all of these circumstances, it would take no further action on the case and dismissed the complaint. ⁽⁶⁴⁾

Another complaint involving the broadcast of an expletive or vulgar language was dismissed on March 13, 1995. The complaint dealt with the early morning broadcast of a commercial by KFBI-FM, Las Vegas, NV. ⁽⁶⁵⁾ During the commercial, the narrator, Howard Stern, used the expression "use your fucking head." ⁽⁶⁶⁾

The FCC said that the commercial was not indecent because the offensive word, which was used once during the commercial, was bleeped out so that it could not be heard. ⁽⁶⁷⁾

While these examples of dismissed cases do not provide an exhaustive list of expletives or vulgar words that the FCC may deem indecent, it appears that in this category of offensive speech the Commission is pretty much adhering to the list of words that the U.S. Supreme Court found indecent in 1978 in *FCC v. Pacifica Foundation*. ⁽⁶⁸⁾ Moreover, it appears that the FCC is willing to accept some mitigating factors that will preclude a finding of indecency.

B. Descriptions of Sexual or Excretory Activities or Organs

On the other hand, how far a broadcaster can go before offensive discussions of sexual or excretory activities or organs become indecent is not quite so clear. This section will examine thirteen indecency complaints dismissed by the FCC.

On October 26, 1989, the FCC dismissed a case involving WAAV-AM, Wilmington, N.C.⁽⁶⁹⁾ The guest of the mid-morning call-in program was Dr. Joyce Brown, a sex therapist. Part of Browns discussion included the following language:

Brown: First of all the vagina is, think about it, you can get a baby through the vagina and you may be well-endowed but you are not the same size as a nine pound baby, fella. Number one, so the vagina stretches, all right. Number one. Number two, Im certainly not denying that there can be painful sex especially if the woman is relatively small and the man is relatively large. However, the body provides for that; it provides in a number of ways. The first way it provides is the fact that the vagina itself is very elastic tissue. . . . Or you go find a sex therapist who shows you different positions that will take, will be a little easier for her, the obvious possibility is the woman on top but the point is that as long as you view it as the two of you having incompatible [sic] plumbing, youre stuck, literally.⁽⁷⁰⁾

To understand why the FCC dismissed this complaint, it may be helpful to contrast it to a case involving KLOL-FM, Houston, TX. In that case, the FCC found that a call-in "sex survey" was indecent. In the course of the program, the DJs and a doctor discussed, among other things, a medical procedure to enhance penis size and discussed, in a humorous context, the potential problems that sexually mismatched couples could have. For example, one of the DJs said that a man had called the program and complained that "he was so large that it was ruining his marriages." A female caller responded that "big is good if the guy knows how to use it." The DJ replied "she is so big she could handle anything."⁽⁷¹⁾

Rejecting KLOLs claim that the program intended to provide listeners with clinical information, the Commission said that a review of the transcripts showed that the "clinical" or "news" context of these programs was "at most superficial." Instead, the predominant characteristic of the programming was "a pandering and titillating exchange of sexual banter about penis size and shape." The Commission said that it appeared that the intent of the program was to seek vulgar and explicit descriptions of sexual organs and activities and issued a fine of \$33,750.⁽⁷²⁾ In light of the KLOL-FM case, Dr. Joyce Browns discussion, while frank, appeared to be in a more serious context. Such a context may have precluded a finding of "patent offensiveness," necessary in an indecency case.⁽⁷³⁾

On October 26, 1989, the Commission dismissed a complaint against WYSP-FM in Philadelphia.⁽⁷⁴⁾ The allegedly indecent language was broadcast as part of the *Howard Stern Show*. Stern, imitating CNNs Larry King, said that he would like to ask Jamie Lee Curtis her "breast size" because "Larry doesnt have the balls to ask any good questions." Referring to other DJs, Stern called them "a bunch of dickheads," and made a farting noise while saying "butt-plug jerk-off." Finally, he said that if he was married to a woman named Kitty, he would "masturbate and asphyxiate" himself.⁽⁷⁵⁾

The complaint included the song "First Train to Brownsville." Although the transcript does not say so, the song appears to have been an in-house production and it made references to masturbation, rape, sodomy, and erection. The song also referred to female body odor: "Ladies, take my warning, especially if you are a dish, you can probably recognize him if his fingers smell like fish."⁽⁷⁶⁾

While the *Howard Stern Show* excerpts were fairly mild compared to some of his other programs,⁽⁷⁷⁾ the references to body odors and rape in the song "First Train to Brownsville" could, in light of previous FCC decisions, be patently offensive; however, the Commission did not reach that conclusion. This seems inconsistent with at least one case in which the FCC found that Sterns discussion of female body odor was patently offensive. In that case, Sterns wife--who called him by phone--asked what he was eating. Stern answered "something that tastes like you . . . tuna fish." He then made the statement "girls have a special scent . . . when theyre all hot and theyre not wearing panties. . . ."⁽⁷⁸⁾ For this and other discussions about sexual and excretory activities or organs the Commission issued a \$400,000 fine against

several radio stations that aired the *Howard Stern Show*.⁽⁷⁹⁾

On February 5, 1992, the FCC dismissed a complaint against station WUFX-FM, Buffalo, NY. The complaint involved the broadcast of a song that apparently had been produced by the morning show DJs.⁽⁸⁰⁾ The song referred to singer Madonna: "Madonna has no real blonde hair, so say the girls who've been down there. I'd hate to be her underwear in summertime. . . . Sleep with girls who hate all men and want you for lunch. . . . [S]he likes gay men and likes gay girls, what's next you queers, sex with a steer."⁽⁸¹⁾

While this song contains sexual references that appear inescapable--including references to bestiality and female body odor--the Commission dismissed the case without even issuing a letter of inquiry. This appears to be inconsistent with the Commission's finding in the *Howard Stern Show* in which the FCC assessed the \$400,000 fine.

On February 28, 1992, the Commission dismissed a complaint against WBCN-FM, Boston, M.A.⁽⁸²⁾ The complaint involved radio announcer Charles Laquidara, who, on the morning of March 8, 1991, called his daughter at home while he was on the air. The transcript submitted with the complaint revealed that Laquidara tried to coerce his daughter into saying to another guy "lick me." According to the complaint, the girl was eight years old. Although the complainant was outraged at what he described as Laquidara's use "of power and influence over his child to manipulate her into saying something she felt was wrong," the Commission said that subject matter alone did not render material indecent and dismissed the complaint.⁽⁸³⁾

The dismissal of a complaint against station KCHV-AM, Coachella, CA, on July 2, 1992,⁽⁸⁴⁾ was one of the few ones in which the Commission sort of issued an explanation. The material included the following excerpts: "Billy Squire, 'She Goes Down. And that's why she has so many dates on the weekend . . .'" Another excerpt involved a discussion about the "sperm ovulation count for the day . . . a service . . . for you people who are into family planning." In addition, a DJ asked a female caller to name three things that were constantly being grabbed. The woman was unable to answer and the DJ responded for her "taxes, a downtown parking space and Madonnas crotch." Finally, a female caller said on the air "I am so totally turned on right now I could spit."⁽⁸⁵⁾

The FCC staff evaluating the transcripts said that the material was "not descriptive enough or explicit or extreme in terms of sexual acts. [While] some of the comments can be interpreted as sexual acts . . . they are vague."⁽⁸⁶⁾ This explanation, however, was noted on the transcript, not in the letter of dismissal the Commission sent to the complainant.

While Howard Stern often complains on the air that the FCC has a vendetta against him, this study reveals that the Commission dismissed quite a few complaints about Stern's program. Between September 3, 1993 and February 1995, the FCC dismissed three complaints against three radio stations that aired various *Howard Stern Shows* containing descriptions of sexual or excretory activities or organs.

The first dismissal involved KFBI-FM, Las Vegas, NV.⁽⁸⁷⁾ In the program Stern had a guest called "Gina," who supposedly undressed and gave him a sensual massage. Stern described Gina's anatomy in detail with comments like "Wow, you're a piece of ass. . . . Man, are you totally shaved for today's nude appearance?" Stern also made numerous references to his state of sexual arousal, eventually asking "Gina" to describe her favorite sexual scene. When "Gina" said "my favorite is one guy on each side sucking your," Stern stopped her and said "she doesn't understand the FCC rules."⁽⁸⁸⁾

The second dismissed complaint involving the *Howard Stern Show* dealt with excretory, instead of sexual, activities.⁽⁸⁹⁾ The station airing the program was WYSP-FM, Philadelphia, PA. In a discussion about flatulence, Stern asked "[w]hat[,] a rat crawl up your ass and die[?]" and "[w]hat are you smelling? Farted five minutes ago."⁽⁹⁰⁾

The third *Howard Stern Show* dismissal involved WRNO-FM, New Orleans, LA.⁽⁹¹⁾ The program included discussions about a woman's lesbian experiences and a man who needed to inject his penis every time he wanted to get an erection. There was also an excerpt where Stern told a female caller "I love you no matter what, as long as you still got a vagina I'm with you."⁽⁹²⁾

While Stern made references to excretory activities and sexual organs, his comments in the dismissed complaints were perhaps less graphic, explicit, and patently offensive than some of the ones the FCC has deemed indecent in previous *Howard Stern Shows*. An interesting question is whether the FCC tends to compare Howard Stern's broadcasts to the Stern broadcasts the Commission has previously found indecent, and whether some of the dismissed complaints against Stern's programs would have been found actionably indecent had they been broadcast by other stations.

Another case dismissed by the FCC involved the *Stevens and Pruett* morning show, airing on KLOL-FM, Houston, Texas.⁽⁹³⁾ The material object of the complaint involved a discussion about "testicle castration in remote cultures."⁽⁹⁴⁾

Stevens: As a sign of bravery a man would cut off one of his testicles. [A]s a sign of loyalty to the chief, a man would cut off both his testicles.

Pruett: I know why they did that.

Stevens: oh ya why was that?

Pruett: That old chief just wanted to have all the women to himself.

Stevens: ya.

Pruett: That *son-of-a-bitch*. (emphasis in original)

Unlike Howard Stern, who tends to engage in lengthy and graphic discussions involving sexual organs,⁽⁹⁵⁾

the "Stevens and Pruett" example is pretty mild and fleeting.⁽⁹⁶⁾ Moreover, the FCC has never said that the phrase "son of a bitch" is indecent.

Another dismissal involved WWMM-FM, Greenville, S.C.⁽⁹⁷⁾ The complaint dealt with a morning call-in show, which broadcast the following call (FC: Female Caller; AN: Announcer):

FC: I just wanted to call to tell you a brush-off my mother told me, but you can't use this on the radio.

AN: Oh, come on. I'm sure you can clean it up enough so that we can hear it.

FC: No, I don't think so. It's not something that's very pretty.

This is what my mother told me. If you're ever at a bar, and someone is making sexual advances to you, just do this. Put your hand down to your crotch and just start scratching and scratching. Then put your hand up to your nose and go "Whew!!!" real loudly and make it a big deal! I tell you what, if this doesn't turn them off, nothing will!!⁽⁹⁸⁾

The caller's comment, while vulgar, was probably not explicit enough for a finding of indecency.

On February 17, 1994, the Commission dismissed a complaint against station WLAV-FM, Grand Rapids, MI. The complaint, which involved the *Mel and Frank Morning Show*, contained a discussion between the DJs and a female caller. At the request of one of the DJs, the caller began to describe her body. As she began to say "[w]ell, got two very . . ." one of the DJs stopped her.⁽⁹⁹⁾

This quick response to the live call may have very well averted a discussion that could have become "indecent."

However, as broadcast, the discussion about the woman's physical attributes was probably not "patently offensive"--that is, did not dwell for long on lewd sexual themes; although it did have definite sexual overtones.

A complaint dismissed on June 29, 1994, involved station WRIF, Detroit.⁽¹⁰⁰⁾ The FCC apparently found that the material broadcast was potentially indecent because it issued a letter of inquiry to WRIF. In the LOI to WRIF the Commission included some excerpts that dealt mostly with excretory activities, such as "I was also going to bring a live buffalo and have him squirt me right out of his ass."⁽¹⁰¹⁾

Despite issuing the LOI, the Commission eventually dismissed the complaint against WRIF-FM. In a letter to Great American Television and Radio Co., Inc., licensee of WRIF-FM, the Chief of the Complaints and Investigations Branch of the Enforcement Division said that the division had determined to take no further action in the case. The letter emphasized that by dismissing the complaint, the Commission was exercising its discretion in enforcement matters.⁽¹⁰²⁾ The letter failed to explain why the FCC had decided not to issue a NAL against WRIF despite the obvious description of excretory activities--including the word "shit"--and the use of the terms "cock" and "dick" to describe a male's sexual organ.

Finally, the FCC dismissed as not actionably indecent a complaint involving WABC, New York.⁽¹⁰³⁾ The material aired during the *Bob Grant Show*. During several days, and at different times, people called the station and sent messages to Governor Mario Cuomo. All the messages basically said, "Mario, you are just sperm."⁽¹⁰⁴⁾ The dismissal of this complaint suggests that the word "sperm," without further references to sexual activities or organs, is not patently offensive. This explanation finds support in a case involving the *Howard Stern Show*. In that case, the Commission found that Stern's comments about Pee Wee Herman being caught masturbating in an adult theater were indecent and issued a fine. Stern said of Herman: "If he makes a deal, don't shake his hand. . . . Imagine I go to the movie theater and I'm sitting in Pee Wee's mess."⁽¹⁰⁵⁾ Thus, although Stern didn't really refer to the word "sperm" in his discussion of the Pee Wee episode, the context made clear the sexual tone of his comments, which the FCC found patently offensive.

C. Double Entendre

The category of indecent speech that is perhaps most challenging to broadcasters is the one dealing with double entendre. Here, broadcasters must determine--within seconds and in programs that are usually live and extemporaneous--whether the sexual meaning of a joke or comment is inescapable and patently offensive, rendering it, thus, indecent. Of the thirty-one dismissed complaints discussed in this study, eleven involved the use of double entendre; and the language was usually part of a song, a joke, or a live call-in program.

On April 7, 1988, the Commission dismissed a complaint against WTRG-FM, Rocky Mountain, N.C.,⁽¹⁰⁶⁾ for the morning broadcast of the song "I Want to Kiss Her, But . . ." The lyrics, "I want to whisper sweet nothings in her ear. I want to hold her behind, [c]losed doors and more. I want to kiss her, but she won't let me. . . ." had a veiled sexual connotation.⁽¹⁰⁷⁾

However, in its letter dismissing the complaint, the FCC said that the song was not actionably indecent because it was not patently offensive and could have two meanings: an innocent and a sexual one.⁽¹⁰⁸⁾ This statement is consistent with an earlier case involving the song "Candy Wrapper," where, according to the Commission, the sexual meaning was more explicit. Here is an example of the song's lyrics: "It was another pay-day and I was tired of being a Mr. Goodbar, when I saw Miss Hershey standing behind the Powerhouse on the corner of Clark and 5th Avenue, I whipped out my whopper and whispered, Hey Sweet-tart, how'd you like to Crunch on my Big Hunk for a Million Dollar Bar? Well, she immediately (?) my Tootsie Roll and you know, it was like pure Almond Joy."⁽¹⁰⁹⁾ The Commission found that the song "Candy Wrapper" contained "lewd and vulgar language dwelling on depictions or descriptions of sexual organs and activities." The FCC said that the language used in each passage of the "Candy Wrapper" song was "clearly capable of a specific sexual meaning and, because of the context, the sexual import was inescapable."⁽¹¹⁰⁾ The Commission issued a NAL for \$10,000.

On October 26, 1989 the Commission dismissed a complaint against WSPN-FM in Saratoga Springs, New York.⁽¹¹¹⁾ The complaint involved the late afternoon broadcast of a song titled "Slip it in," which contained lyrics such as "[y]ou can tell how it felt . . . [Y]ou tried to fit all loose . . . [S]ay you dont want it . . . [T]han you slipped it on innnnnnnnn!"⁽¹¹²⁾

Although the Commission's form letter did not provide any detailed explanation as to why the FCC had decided that the lyrics of the song were not actionably indecent, in a later case the Commission explained why it dismissed the complaint against station WSPN-FM. The Commission said that:

The individual words, in the context of the music, are barely audible, and thus would not be easily understood by children (or for that matter adults, without the aid of a written transcript). Further, there is not a single graphic or explicit reference to sexual or excretory organs or activities. The sexual import of the song was barely intelligible, much less inescapable to adults, so children who may have randomly tuned into WSPN during the airplay of "Slip It In" would not have been likely to continue listening. If they had, they would not have been likely to discern the song's sexual meaning.⁽¹¹³⁾

Another complaint dismissed by the FCC involved noncommercial station WDTR-FM, Detroit, MI.⁽¹¹⁴⁾ The song that led to the complaint aired in an afternoon, student-run *Hip-Hop-Show*. While some of the lyrics were somewhat explicit in their descriptions of sexual acts--"Slow and easy; Ill put the seat back. Pumpin down as I climax"--the predominant theme of the song was one of sexual innuendo.⁽¹¹⁵⁾

The FCC staff appears to have determined that the song was potentially indecent because it issued a LOI; however, the Commission ultimately dismissed the complaint.

The FCC said that WDTR-FM had indicated, in its response to the Commission's LOI, that the *Hip-Hop-Show* was no longer on the air and that the student volunteers who hosted the program were no longer at the station or in the school system.⁽¹¹⁶⁾ The licensee apparently changed its policies as a result of the complaint and claimed that management control was now vested on "well qualified administrators who possess a recognized expertise in understanding and implementing the mission of the station."⁽¹¹⁷⁾ The licensee also stressed that the indecency complaint was the first of its kind against the station in its forty-four year-history. In view of the station's effort to avoid similar problems in the future, the FCC dismissed the case.

The Commission also dismissed a complaint about a song broadcast by WAPI-FM, Birmingham, AL.⁽¹¹⁸⁾ The song, "Baby Got Back," exalted the attractiveness of women with "big butts." While some of the lyrics were not particularly explicit, "I like big butts and I cannot lie," others, such as "your waist is small and your curves are kicking and Im thinking about sticking. . . ." had a more definite sexual meaning.⁽¹¹⁹⁾

A song exalting body parts, which the FCC did find indecent was "Penis Envy," broadcast by WZTAs, Miami, FL.⁽¹²⁰⁾ The WZTA song included lyrics such as "[i]f I had a penis, Id climb every mountain[,] Id force it on females, Id pee like a fountain."⁽¹²¹⁾ The FCC issued a \$2,000 fine against WZTA for broadcasting the song. Although the songs are quite different, both songs extol body parts. The main difference between the songs is that "Penis Envy" deals with a topic that the Commission has found objectionable in numerous occasions, namely discussions involving male or female genitalia, while "Baby Got Back" deals with a body part whose reference appears to be less offensive to the Commission.⁽¹²²⁾

On October 26, 1989, the Commission dismissed a complaint against WEBN-FM, Cincinnati, Ohio.⁽¹²³⁾ The object of the complaint was a morning show's segment featuring the "jokes of the day." Most of the jokes, such as the one transcribed next, were fairly innocuous: "Two Bishops talking about the decline in morals in the modern world. . . . One clergyman said to another somewhat self righteously, 'I didnt sleep with my wife before I was married, did you?' 'I dont know,' said the other, 'What was her maiden name?' (Laughter.)"⁽¹²⁴⁾

The following joke, however, had a more definite sexual meaning:

Theres this lady right whos been married 9 times . . . and I want to tell you what was wrong with each of my husbands. Okay. My first husband he was a musician all he wanted to do was play with it. You know what I mean. Second husband was a doctor all he wanted to do was examine. Third husband well he was a photographer and all he wanted to do was take pictures of it. My fourth husband was a politician, all he wanted to do was make promises to it. My fifth husband was a psychologist, all he wanted to do was talk about it. My sixth husband was a policeman, all he wanted to do was keep it under lock and key. My seventh husband was a hairdresser, all he wanted to do was tease it. My eighth husband was a gourmet, all he wanted to do was taste it. And my ninth husband and the last husband to which I am married now is the one I like the best. Hes a mechanic. He tore it up the first night and hes been working on it ever since. . . . [\(125\)](#)

Despite the sexual innuendo of the joke, the Commission said that the material was not actionably indecent. Since the Commission did not provide any explanation, one could assume that perhaps the complaint was dismissed because the language was neither explicit enough nor as patently offensive as some of the examples of indecency discussed earlier. However, this is precisely the type of analysis that can create trouble for broadcasters, for a member of the FCC legal staff could easily reach a totally different conclusion in cases involving double entendre.

Another complaint the FCC dismissed on October 26, 1989 involved KWTO-FM, Springfield, Missouri. [\(126\)](#) The program object of the complaint was Max Barrooms *Friday Free Ride Show*, which aired between 5 and 6 p.m. Among the jokes the FCC found not actionably indecent were:

Free Ride Advisor:

Q: Im a rich bimbo Just ended a relationship with a religious man who left a bad taste in my mouth. . . . Is there anyone who can come close to my expectations?

A: . . . If the last one left a bad taste in your mouth, this time take a different approach. Dont blow it.

. . . .

Recipe of the Week

Chicken, including 2 legs and 2 breasts, breasts, breasts, breasts

Banana, couple of nuts and a cherry

Put tender chicken in your arms and take 2 handfuls of breasts and hold gently, take the 2 legs and spread them apart. Drop in the banana, stir rapidly until it creams, creams, creams, and the cherries pop and the nuts explode. If the cake rises, leave town. [\(127\)](#)

Most of the jokes broadcast by KWTO-FM had a double sexual meaning; but the "Recipe of the Week" contained sexual references similar to those in the song "Candy Wrapper," which the Commission found indecent. However, the Commission dismissed the complaint against KWTO-FM as not actionably indecent. Was the reason for dismissal that the sexual meaning of the joke was not inescapable, or that it was not as long as the song "Candy Wrapper?" Without an explanation for the dismissal, it is difficult to ignore the apparent arbitrariness of this decision.

Continuing the discussion about "offensive jokes," on April 19, 1991, the Commission dismissed a complaint against KLPX-FM, Tucson, Arizona. [\(128\)](#) The joke, aired in a morning show, went as follows:

Two trees were talking in the forest . . . one tree said to the other, is that tree over there a son of a beech? The other said, no, its a son of a birch. This went on for awhile then a woodpecker was asked to check the tree out. He was gone a long time and when he returned, he had a smile. Well, asked the trees, what was it, a son of a beech or a son of a

birch? The bird replied, neither . . . but it was the best piece of ash I ever stuck my pecker in. [\(129\)](#)

The term "pecker" obviously referred to the male sexual organ. If one compares this joke with a song aired on KSJO-FM, San Jose, California, which the FCC found indecent, it is not clear why the FCC dismissed the KLPX complaint. The lyrics of the song "Pecker, Pecker," aired by KSJO, included the following lyrics: "Listen to me, Chief, it's Pecker, it's coming. Pecker is getting bigger all the time and once it becomes big, it's going to be hard to stop it. Stop spanking the monkey, this is serious. This Pecker, he's dangerous." [\(130\)](#) In this case, the Commission issued a \$20,000 fine against KSJO. What makes a reference to a sexual organ clear and inescapable in one context and not in another is not particularly obvious, unless the Commission took into account the length of the joke and determined that the reference was fleeting and, therefore, not patently offensive. Regardless of the Commission's reasoning--which for outsiders remains a mystery--these guesses can be rather dangerous for a broadcaster who may be trying to determine whether certain words or lines of discussion are acceptable or not.

Of course, in some cases it may be easier to see why the FCC dismissed a complaint. For instance, on February 23, 1990, the FCC dismissed a complaint against KJOY-FM in Stockton, California. [\(131\)](#) The complaint involved an early morning broadcast of a commercial about a "Princess Di diaphragm." The commercial included the statement "[i]f you want to be royally screwed, get the new Princess Di diaphragm." [\(132\)](#) Based on the language the Commission has previously found actionably indecent, there was nothing in the commercial that could be considered patently offensive; although the choice of words referring to sexual intercourse may seem vulgar to some. Moreover, the Commission has said that the subject of sex is not forbidden in the broadcast medium; rather the Commission objects to the discussion of sexual material with the intent to pander and titillate the audience. [\(133\)](#)

On August 5, 1991, the Commission dismissed a complaint against WZLZ-FM, Quincy, Illinois. [\(134\)](#) The material aired in the *Ron Crook and Newsman Show*. According to the complainant, the disc jockeys had crossed the line of propriety by making fun of a local high school teacher who had been arrested for possessing child pornography. Although the comments of the DJs touched on the topic of child pornography, the only comment capable of a sexual meaning was "Im not going to get down on him." [\(135\)](#)

and it was probably not graphic enough to be considered patently offensive. An example of the type of sexual jokes about children that the Commission is not willing to tolerate was aired in a *Howard Stern Show*. Stern, joking with his on-air partner about Santa Claus fondling two children, said, "[Y]es son theres a Santa. And hes got a boner." [\(136\)](#) The Commission fined KLSX-FM \$105,000 for this and other numerous indecency violations.

On July 2, 1992, the FCC dismissed a complaint against WQBZ-FM, Macon, Georgia. [\(137\)](#) The "offensive" material aired on the *Bear OBrian* morning show, and it included sexual innuendos, such as "you got something for me? . . . If I was to chew on it, would I enjoy it?" The complaint also included a transcript of a song that ridiculed the Kennedys problems with the law due to their sexual drive: "Kennedy clan is in trouble once more. William want to sky dive right into her panties Couldnt get a thought of another night of handies." [\(138\)](#)

While the *Bear OBrian Show* phone conversation included some double entendre, the sexual references were fleeting and not particularly graphic to be considered "patently offensive." The Kennedy song, however, had several sexual references, some more obvious than others, but apparently none "patently offensive" enough for the Commission to issue a letter of inquiry.

The last dismissed complaint dealing with double entendre involved a call-in program. On August 13, 1993, the FCC dismissed a complaint against KRZR-FM. [\(139\)](#) The station was holding a "manly cup competition." One of the callers gave the following reason as why he should win the contest: "Im a manly man because I exude the manliness . . . I go out and unlock the bubble-headed girls that lock their keys in their car How manlier can you get when you walk up with your probing tool and stick it way down deep into their key hole?" Another caller said that his "manly introduction" was "as long as I have a face, you got a place to sit." [\(140\)](#) The "manly cup competition," is an example of vulgar language that, by FCC enforcement standards, appears to be not descriptive or extreme enough to be found

indecent, although to this author, the sexual meaning appeared inescapable and at least one of the sexual expressions was offensive.

V. Discussion

A major finding of this study is that the FCC is fairly consistent in its enforcement of the indecency rules when it comes to expletives and other offensive words. However, when it comes to discussions or descriptions of sexual or excretory activities or organs and double entendre, the Commission's actions appear somewhat inconsistent, at least in light of some of the examples discussed in this study. As a result, this author argues that predicting with any degree of accuracy what types of speech the FCC is likely to find indecent is very difficult.

Context is probably the single most important variable for a finding of indecency; it is also the most difficult to assess because what seems "patently offensive" to some may or may not be so for the FCC legal staff. Thus, broadcasters should keep in mind that if discussions about sexual or excretory activities or organs--or containing double entendre--take place in a humorous environment that panders and titillates, or dwells in discussions of sexual themes, a finding of indecency is likely. This is particularly relevant for stations that have live morning and afternoon shows. On the other hand, as mentioned before, when it comes to expletives or vulgar words, the Commission's enforcement appears to be pretty straightforward, so broadcasters should avoid the famous "seven dirty words" that led to the *FCC v. Pacifica*⁽¹⁴¹⁾ decision.

After evaluating all the dismissed complaints, the author identified several generalizations that may be of some help to broadcasters. First, the Commission has suggested that as long as the use of an indecent word--and by looking at the examples provided in this study, it is obvious which ones those are--is isolated and fleeting, no finding of indecency will take place; unless, of course, the word is uttered in a context that seeks to shock, pander, or titillate. Second, the Commission has also said that for a finding of indecency language has to be graphic and explicit. For example, vulgar expressions or jokes which may have a slight sexual overtone will, most likely, not be found indecent. But this generalization is a very feeble one. Throughout this study, the author identified several examples of language that the Commission found not actionably indecent despite the fact that a look at cases in which the FCC has issued fines would have suggested otherwise. This confirms the author's concern that, without more guidance from the FCC, context makes the assessment of what is "patently offensive" very difficult at best and practically impossible at worst. Third, based on the material evaluated in this study, it seems that terms like "ass" and "asshole" by themselves are not likely to bring an indecency fine to a station. However, broadcasters should be careful about the context in which that language is used. Finally, a couple of examples suggest that if a broadcaster receives a letter of inquiry from the Commission, he or she should make a good faith effort to explain what happened. It also appears that broadcasters who take steps to avoid future incidents--for example, by establishing a policy that clearly explains the FCC's indecency rules to on-air staff--and inform the FCC about it, have some chance to find a sympathetic Commission. There is, of course, no guarantee that this will actually be the case.

VI. Conclusions

While the FCC has been unwilling to clearly state how it weights things like merit and context to arrive at its indecency findings, prior FCC decisions suggest that the seriousness of the program and the degree of explicitness of the comments are crucial. However, there seems to be some inconsistency in what the Commission deems "patently offensive," if one examines, for example, some of the dismissed complaints against the *Howard Stern Show* and other programs. Such inconsistency may very well be a function of the fluidity of concepts such as "context" and "patent offensiveness," but it is still troubling to think that to date the Commission has not been able to provide more concrete guidelines.

This author argues that if context is to be the determining factor in a finding of indecency, the FCC must not only provide clear guidelines to broadcasters but also allow some leeway to make up for the lack of specificity in the evaluation of indecency cases. For instance, if decisions are going to be made taking into account elements as amorphous as "context" and "patent offensiveness," the Commission should establish an innocent construction rule for double entendre, or give broadcasters good faith judgment some deference--at least for first-time offenses. Moreover,

the Commission may be more effective in its regulation of indecency if it institutes a warning system by which a first-time offender receives a letter of warning--clearly stating the nature of the offense and how the FCC arrived at its determination. A second-time offender could receive a letter of reprimand, which would go on the stations record, and a fine could be assessed on the third and subsequent violations. Clearly, this approach would give broadcasters an opportunity to become educated and would protect stations that, for whatever circumstance, commit only one offense.

In addition, the Commission should seriously consider sending broadcasters copies of its letters of dismissals. This would alert licensees about audience reactions to their programs.⁽¹⁴²⁾ In the letters of dismissal the Commission should clearly explain why specific language was not actionably indecent. In the alternative, the FCC could issue a yearly list of the cases it dismissed--only the ones likely to be of help to broadcasters--and the explanations of why the cases were dismissed.

Given the anti-censorship clause of the Communications Act and the restrictions that the First Amendment places on the regulation of non-obscene speech, the Commission probably does not want to engage in blacklisting certain types of expressions or words. This may be the reason why the long-awaited indecency enforcement guidelines are yet to be issued. However, until the FCC takes an approach that is more educational and less punitive, broadcasters will continue crossing the line that separates offensiveness from indecency.

1. Ph.D., University of Florida, 1993; M.A., University of Florida, 1987; B.A., University of Puerto Rico, 1983. The author wishes to thank Matt Jackson, Ph.D. student at Indiana University, and Dr. Susan D. Ross, Assistant Professor at Washington State University, for their comments and suggestions during the early stages of this article. In addition, very special thanks to Marcia Diamond, formerly an attorney with the Federal Communications Commission, Mass Media Bureau's Enforcement Division. Obtaining the materials used for this article would have been impossible without her help.

2. *United States v. Evergreen Media Corp.*, 832 F. Supp. 1179 (N.D. Ill. 1993).

3. Letter from Roy J. Stewart, Chief, MM, to Evergreen Media Corp., 6 FCC Rcd. 3708 (1989).

4. When the FCC issues a fine against a broadcaster, the licensee has the option of petitioning the Commission for reconsideration. If the FCC denies the petition, the licensee can either pay the fine or decline to do so and let the Commission initiate a collection proceeding. Under 47 U.S.C. 504(a) (1994), the U.S. Government may initiate a civil suit in the U.S. District Court to collect an unpaid forfeiture from a broadcaster. Section 504(a) states that "any suit for the recovery of a forfeiture imposed pursuant to the provisions of this chapter shall be a trial *de novo*" A trial *de novo* is a trial being treated "as if it had not been heard before and as if no decision had been previously rendered." *Blacks Law Dictionary* 300 (6th ed. 1990). Thus, while section 504(a) does not directly provide licensees with the opportunity to obtain judicial review, the trial *de novo* in district court allows for a full review of the Commission's findings. *See Pleasant Brdcst. v. FCC*, 564 F.2d 496, 500 (D.C. Cir. 1977). The Communications Act also states that the FCC may issue a forfeiture after an administrative hearing. The decision resulting from the hearing may be appealed to a federal court. *See* 47 U.S.C. 402(a) (1994); 47 U.S.C. 503(b)(3)(A) (1994). The FCC can choose which forfeiture procedure it will use--issuing a fine or scheduling an administrative hearing to issue a fine. In the area of indecency, the Commission has used the issuing of a forfeiture (without the hearing) because of its simplicity.

5. The FCC still has not issued the guidelines. Telephone communication with Marsha McBride, Special Assistant of the Bureau Chief, Mass Media Bureau (December 11, 1996). *See also Indecency Guidelines Imminent*, *Brdcst. & Cable*, July 1, 1996, at 14.

6. For the purposes of simplifying the presentation and discussion of the complaints, it may be necessary at times to group them in an order different from chronological.

7. Telecommunications Act of 1996, Pub. L. No. 104-104, 502-505, 110 Stat. 56, 133-36 (to be codified in scattered sections of 47 U.S.C.). *See also In re Implementation of Section 505 of the Telecommunications Act of 1996, Order and Notice of Proposed Rulemaking*, 11 F.C.C. Rcd. 5386, 2 Comm. Reg. (P & F) 633 (1996). In addition, on June 11, 1996, a U.S. District Court stated that the Communication Decency Act, which prohibited knowingly disseminating

indecent or patently offensive messages by any "telecommunications device" to individuals under the age of 18, was unconstitutional. *American Civil Liberties Union v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996). The district court opinion has been appealed to the United States Supreme Court.

8. A total number of dismissed complaints could not be determined due to poor FCC record keeping. For example, of over 15 records the author asked to examine, she found none, despite the fact that the FCC record books showed that the files should have been in the boxes examined. As a last resort, the author was allowed to examine the files of a legal staff member, who had "most" of the documents related to stations complaints. In addition, while it would be helpful to provide figures about the number of indecency complaints the FCC receives and how many of those are complete, how many are defective, and how many are dismissed after the allegedly indecent material is evaluated, the FCC keeps all its indecency complaint figures lumped together. Thus, obtaining an accurate number of fully documented dismissed complaints per year is not possible. Electronic Communication from Marcia Diamond, Employee, MM (July 23, 1996) (on file with author).

9. *See, e.g.*, Letter to KFI, Inc., 6 FCC Rcd. 3699 (1989); Letter from Roy J. Stewart, Chief, MM, to Guy Gannet Publ. Co., 6 FCC Rcd. 3702 (1989); Letter from Roy J. Stewart, Chief, MM, to Indep. Group Ltd. Partnership, 6 FCC Rcd. 3711 (1990); Letter from Roy J. Stewart, Chief, MM, to Gregory Barber, President, Narragansett Brdcast. Co. of Cal., Inc., 5 FCC Rcd. 3821, 67 Rad. Reg. 2d (P & F) 1506 (1990); Letter from Roy J. Stewart, Chief, MM, to Carl Wagner, 6 FCC Rcd. 3692, 68 Rad. Reg. 2d (P & F) 686 (1990); Letter from Roy J. Stewart, Chief, MM, to Merrell Hansen, Vice President, Pacific and Southern Co., Inc., 6 FCC Rcd. 3689 (1990); Letter from Roy J. Stewart, Chief, MM, to L. M. Communications of SC, 7 FCC Rcd. 1595, 70 Rad. Reg. 2d (P & F) 1140 (1992); Letter from Donna R. Searcy, Sec., to The Rusk Corp., 8 FCC Rcd. 3228 (1993); Letter from Roy J. Stewart, Chief, MM, to Mr. Mel Karmazin, President, Infinity Brdcast. Corp., 8 FCC Rcd. 6740, 73 Rad. Reg. 2d (P & F) 982 (1993); Letter from William F. Caton, Acting Sec., to Americom Las Vegas Ltd. Partnership, 9 FCC Rcd. 1753, 74 Rad. Reg. 2d (P & F) 959 (1994).

10. On June 23, 1988, the FCC voted to issue a Notice of Apparent Liability (NAL) to Kansas City Television, Ltd., licensee of KZKC-TV in Kansas City, Missouri. KZKC had aired the movie "Private Lessons" on May 26, 1987, beginning at 8 p.m. The NAL was for \$2,000. However, on August 5, 1988, the FCC issued an order staying the proceeding, *In re Kansas City Television, Ltd., Order*, 4 FCC Rcd. 7653 (1988), in light of the U.S. Court of Appeals for the District of Columbia decision in *Action for Children Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988), which directed the FCC to establish a time when indecency could be aired. On September 6, 1989, the FCC vacated the KZKC-TV proceeding, *In re Kansas City Television, Ltd., Order*, 4 FCC Rcd. 6706 (1989).

Another case dealing with the indecency rules and a television station involved KYW-TV, Philadelphia. The Commission issued a letter of inquiry (LOI) asking the station to provide more information regarding the broadcast of a program that showed "couch dancing," a form of dancing that puts a woman's crotch inches away from the face of a member of the audience, who is sitting on a couch. The couch dancing demonstration was aired at 10 a.m. During the talk show, which was hosted by Jane Wallace, callers used the word "fuck," and discussed topics that included masturbation and dildos. Joe Flint, *FCC Launches Indecency Investigation of Group Ws KYW-TV Philadelphia; Brdcast. & Cable*, April 26, 1993, at 51. According to FCC staff, the case is still under consideration.

11. The staff of the FCC Enforcement Division usually transcribes verbatim the content of radio programs. In the case of television stations, the transcripts of programs are more sketchy, and therefore, more difficult to evaluate without the author looking at every videotape. The author believes that a future study examining dismissed television indecency complaints would be very helpful in establishing some level of comparison between the enforcement of indecency for radio and television stations.

12. *See In re Citizen's Complaint Against Pacifica Found., Memorandum Opinion and Order*, 56 F.C.C. 2d 94, 32 Rad. Reg. 2d (P & F) 1331 (1975); *In re Pacifica Found., Inc., and The Regents of the Univ. of Cal., Memorandum Opinion and Order*, 3 FCC Rcd. 930, 64 Rad. Reg. 2d (P & F) 211 (1987). The term "descriptions" is more appropriate for the purpose of this study since it will only examine complaints against radio stations.

13. The term "not actionably indecent" is a term of art used by the FCC.

14. *See In re Citizen's Complaint Against Pacifica Found., Memorandum Opinion and Order*, 56 F.C.C.2d 94, 32 Rad.

Reg. 2d (P & F) 1331; *In re Pacifica Found. Inc. and The Regents of the Univ. of Cal.*, *Memorandum Opinion and Order*, 3 FCC Rcd. 930, 64 Rad. Reg. 2d (P & F) 211.

15. 18 U.S.C. 1464 (1994) provides: "Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both."

16. 47 U.S.C. 503(b)(1)(D) (1994).

17. *FCC v. Pacifica Found.*, 438 U.S. 726 (1978); *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988).

18. These were the words that George Carlin used in his satiric monologue "Filthy Words," which the FCC found indecent in 1975. *In re Citizen's Complaint Against Pacifica Found.*, *Memorandum Opinion and Order*, 56 F.C.C.2d 94, para. 14, 32 Rad. Reg. 2d (P & F) 1331 (1975). In 1978, the U.S. Supreme Court, in *FCC v. Pacifica Found.*, sided with the Commission and said that although indecent speech was constitutionally protected, the Commission could channel indecency to late at night, to protect children. 438 U.S. 726.

19. *See Action for Children's Television*, 852 F.2d 1332.

20. *Id.*; *Action for Children's Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991), *cert. denied*, 503 U.S. 913 (1992); *Action for Children's Television v. FCC*, 11 F.3d 170 (D.C. Cir. 1993), *rehg en banc, granted, vacated*, 15 F.3d 186 (D.C. Cir. 1994); *Action for Children's Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995), *cert. denied*, *Pacifica Found. v. FCC*, 116 S.Ct. 701 (1996).

21. *In re Pacifica Found. Inc.*, and *The Regents of the Univ. of Cal.*, *Memorandum Opinion and Order*, 3 FCC Rcd. 930, para. 17, 64 Rad. Reg. 2d. (P & F) 211 (1987).

22. In fact, the FCC has said that "indecency of a merely fleeting and isolated nature may in some instances be undeserving of a sanction." *In re Liability of Evergreen Media Corp. of Chicago*, *Memorandum Opinion and Order*, 6 FCC Rcd. 502, para. 12, 68 Rad. Reg. 2d. (P & F) 1293 (1991).

23. *In re Pacifica Found. Inc. and The Regents of the Univ. of Cal.*, *Memorandum Opinion and Order*, 3 FCC Rcd. 930, 64 Rad. Reg. 2d (P & F) 211.

24. *Id.*

25. The Commission has said that the seriousness of a program may be part of the merit of a program, and, thus, may be taken into account when evaluating a programs context. *In re Liability of Sagittarius Brdcast. Corp.*, 7 FCC Rcd. 6873, para. 10, 71 Rad. Reg. 2d (P & F) 630 (1992) (citing Letter from Donna R. Searcy, Sec., to Peter Branton, 6 FCC Rcd. 610, 68 Rad. Reg. 2d. (P & F) 1134 (1991)).

26. *In re King Brdcast. Co.*, *Memorandum Opinion and Order*, 5 FCC Rcd. 2971, 67 Rad. Reg. 2d (P & F) 1124 (1990).

27. Letter from Roy J. Stewart, Chief, MM, to Mr. Mel Karmazin, President, Sagittarius Brdcast. Corp., 5 FCC Rcd. 7291, 68 Rad. Reg. 2d (P & F) 851 (1990).

28. *In re Liability of Sagittarius Brdcast. Corp.*, *Memorandum Opinion and Order*, 7 FCC Rcd. 6873, para. 8, 71 Rad. Reg. 2d (P & F) 630 (1992).

29. *See Letter from Donna R. Searcy, Sec., to Mr. Peter Branton*, 6 FCC Rcd. 610, 68 Rad. Reg. 2d (P & F) 1134 (1991), *aff'd, sub nom. Branton v. FCC*, 993 F.2d 906 (1993), *cer't denied*, 114 S.Ct 1610 (1994).

30. *In re Pacifica Found. Inc.*, and *the Regents of the Univ. of Cal.*, *Memorandum Opinion and Order*, 3 FCC Rcd. 930, para. 17, 64 Rad. Reg. 2d (P & F) 211 (1987). *In re Petition for Declaratory Ruling Concerning Section 312 (a)(7) of the Communications Act*, *Memorandum Opinion and Order*, 9 FCC Rcd. 7638, paras. 11-12, 76 Rad. Reg. 2d (P &

F) 1062 (1994).

31. Letter from Donna R. Searcy, Sec., to the Rusk Corp., 8 FCC Rcd. 3228 (1993); *In re* Liability of San Francisco Century Brdcast., *Memorandum Opinion and Order*, 8 FCC Rcd. 498, 71 Rad. Reg. 2d. (P & F) 1148 (1993); *In re* Liability of Evergreen Media Corp. of Chicago, *Memorandum Opinion and Order*, 6 FCC Rcd. 502, para. 16, 68 Rad. Reg. 2d. (P & F) 1293 (1991); *In re* Liability of Guy Gannett Publ. Co., *Memorandum Opinion and Order*, 5 FCC Rcd. 7688, para. 9, 68 Rad. Reg. 2d (P & F) 1131 (1990); Letter from Roy J. Stewart, Chief, MM, to Mr. Carl J. Wagner, Executive, Great American Television and Radio Co., Inc., 6 FCC Rcd. 3692, 3693, 68 Rad. Reg. 2d (P & F) 686 (1990).

32. Letter from Donna R. Searcy, Sec., Evergreen Media, 8 FCC Rcd. 1266, 72 Rad. Reg. 2d (P & F) 135 (1993).

33. *In re* Liability of Sagittarius Brdcast. Corp., *Memorandum Opinion and Order*, 7 FCC Rcd. 6873, 71 Rad. Reg. 2d (P & F) 630 (1992).

34. *In re* Liability of Guy Gannett Publ. Co, *Memorandum Opinion and Order*, 5 FCC Rcd. 7688, para. 9, 68 Rad. Reg. 2d (P & F) 1131.

35. Likewise, broadcasters have repeatedly tried to convince the FCC that the contemporary community standards for the broadcast media should be determined by the popularity of the show in its community, not by a national community standard, which is determined by the FCC. However, the Commission has rejected this argument by saying that the popularity of a show is irrelevant to a finding of indecency for the FCC's concern is "with protecting children." Letter from Donna R. Searcy, Sec., to the Rusk Corp., 8 FCC Rcd. at 3229.

36. *In re* Liability of San Francisco Century Brdcast., *Memorandum Opinion and Order*, 8 FCC Rcd. 498, para. 7, 71 Rad. Reg. 2d (P & F) 1148.

37. For example, the FCC dismissed a complaint against WYBB, South Carolina. A DJ apparently used the expression "mother-fucker" in the course of a live broadcast. Letter from Edythe Wise, Chief, Complaints and Investigations Branch, Enforcement Division, MM, to L.M. Communications of South Carolina, Inc. (April 24, 1991) (on file with author). *See also*, Transcript of WYBB-FM, Folly Beach, South Carolina (Aug. 24, 1990, 6:06 a.m.) (on file with author).

38. One interesting finding of this study was that the staff at the FCC Enforcement Division appears to, at some point in time, have routinely passed transcripts of the complaints to its legal staff to establish a consensus as to whether or not the language contained in some complaints raised to the level that warranted action by the Commission. The excerpts that most legal staff members agreed were indecent were the ones the FCC included in its letters of inquiry to stations.

For example, in a case involving station WRIF-FM in Detroit, it appears that four members of the legal staff reviewed the excerpts of the *Ted Nugent* show that was broadcast on September 25-28, 1990 between 9 a.m. and 1 p.m. Letter to Great American Television and Radio Co., Inc., June 29, 1994. (The letter contained a transcript with handwritten notes from FCC staff). The names of the legal staff did not appear in the transcript of the show; only their initials by which they noted "yes" (material was actionably indecent), "no" (material was not actionably indecent), or "?" (not sure). The following is an example of an excerpt the legal staff found "not actionably indecent". (N: Ted Nugent; ODJ: Other DJ; S: Sharmaine):

ODJ: You know, if it wasnt for red meat, Id be a dead man.

N: Thats right. Theres a young lady who faxed us a while ago, she said shes pregnant and she wants to know if its all right for her to eat meat. (Laughter). Baby, if you hadnt eaten meat you wouldnt have gotten pregnant. Yeah, its oke [sic], man, itll make you strong. Like I said, Rocko is only eight weeks old, man, and he is suckin on frozen backstraps already. Sharmaine, you eat venison when you were pregnant, didnt you?

S: Yeah, thats what that girl wanted to know. I ate meat when I was pregnant, but we wont talk about that, will we,

Honey? On occasion.

....

N: . . . I rock my ass off on stage every night and I chase bears through the woods, and as far as food, I kill shit and eat it.

If the FCC staff had consistently used this method to evaluate every indecency complaint, it would have been interesting to spend some time discussing it in this study. However, the author was able to find only one example of the practice described above. When she asked an FCC staff member whether this was the method used regularly to examine indecency complaints, the staff member responded that it had been used at some time, but apparently some other method had taken its place.

39. A form letter usually states that while the Commission realizes that the material in the complaint may be offensive to many, there is no legal basis for the FCC to issue a fine.

40. Unless the complainant has sent the licensee a copy of the complaint.

41. The seven words were "shit, piss, fuck, cunt, cocksucker, motherfucker, and tits." *In re Citizen's Complaint Against Pacifica Found.*, *Memorandum Opinion and Order*, 56 F.C.C.2d 94, para. 14, 32 Rad. Reg. 2d (P & F) 1331 (1975).

42. Letter from Donna R. Searcy, Sec., to Mr. Peter Branton, 6 FCC Rcd. 610, 68 Rad. Reg. 2d (P & F) 1134 (1991), *aff'd sub nom.* *Branton v. FCC*, 993 F.2d 906 (1993), *cert. denied*, 114 S.Ct. 1610 (1994).

43. Letter from Edythe Wise, Chief, Complaints and Investigations Branch, Enforcement Division, MM, to Mr. Peter Branton, (Oct. 26, 1989) (on file with author).

44. Letter from Donna R. Searcy, Sec., to Mr. Peter Branton, 6 FCC Rcd. 610, 68 Rad. Reg. 2d (P & F) 1134, *aff'd sub nom.* *Branton v. FCC*, 993 F.2d 906, *cert. denied*, 114 S.Ct. 1610.

45. *In re Citizen's Complaint Against Pacifica Found.*, 56 F.C.C.2d 94.

46. Letter from Donna R. Searcy, Sec., to Mr. Peter Branton, 6 FCC Rcd. 610, 68 Rad. Reg. 2d (P & F) 1134, *aff'd sub nom.* *Branton v. FCC*, 993 F.2d 906, *cert denied*, 114 S.Ct 1610.

47. *Id.*

48. *Id.*

49. *Id.*

50. Letter from Edythe Wise, Chief, Complaints and Investigations Branch, Enforcement Division, MM, to Ms. Liz Vaaranen (Feb. 23, 1990) (on file with author).

51. *Id.*; Letter from Ms. Liz Vaaranen to FCC (Jan. 15, 1990) (on file with author).

52. Letter from Edythe Wise, Chief, Complaints and Investigations Branch, Enforcement Division, MM, to Ms. Liz Vaaranen (Feb. 23, 1990) (on file with author).

53. Letter from Ms. Liz Vaaranen to FCC (Jan. 15, 1990) (on file with author).

54. Letter from Edythe Wise, Chief, Complaints and Investigations Branch, Enforcement Division, MM, to Ms. Mary Jo Zkiab (Nov. 21, 1991) (on file with author).

55. Transcript of WFLZ-FM, Tampa, Fla. (Apr. 23, 1991, 7:22 p.m.) (on file with author). The following is a partial

transcript of the program (MV: Male Voice; M2: 2nd Male Voice):

MV: Hugh Smith is still having sex. Tom of Tim and Tom still having sex. Its the Tom show now I ran Tim outside to check on his tires 'cuse they are all.

M2: Hey.

MV: Huh? What?

M2: I didnt do it. I did not flatten your tires.

MV: Yes you did.

M2: Dick.

MV: Someone had come back, youre a pud-head.

M2: Well, blow me.

. . . .

MV: Bye, Im not coming back either. You can kiss my.

M2: Yea.

MV: Kiss my ass.

Id.

A case dismissed probably for similar reasons involved WKBQ-FM, Granite City, Ill. The material aired on the "Steve and D.C. Morning Show" and involved an interview with John Goodman (MV: Male Voice; M2: 2nd Male Voice; MC: Male Caller):

MV: Do ever try or worry about your weight?

MC: Uh huh. . . .

MV: John, John, what a dick.

M2: Did John hang up on us?

MV: He is a dick.

M2: John is gone?

MV: An absolute asshole.

M2: We were hung up on by John Goodman?

MV: Son of a bitch. . . .

Letter from Norman Goldstein, Chief, Complaints and Investigations Branch, Enforcement Division, MM, to Ms. Angela Phillips (Nov. 15, 1993) (on file with author); Transcript of WKQB-FM, Granite City, Ill. (Mar. 1, 1993) (on file with author).

56. 55. Letter from Edythe Wise, Chief, Complaints and Investigations Branch, Enforcement Division, MM, to Mr.

Edouard D. Cournoyer (May 22, 1992) (on file with author).

57. 56. Transcript of WSB-AM, Atlanta, Georgia (Nov. 15, 1991, 3:00 p.m.) (on file with author). The following is a partial transcript of the program (MC: Male Caller(s); DP: David Paul):

MC: I got two people I want for them to kiss my butt.

DP: Okay.

MC: Number one, his name [is] Jerry.

DP: All right.

MC: He is my acting boss and make me go in blizzard (?) runs. . . . The other guy is Chris.

DP: Yeah.

MC: Even on rotten days hell say, what a fan-tab-u-lous day. Were tired of hearing the word fantabulous.

DP: Fantabulous?

MC: Yeah. Isnt that a terrible word?

DP: It would drive me nuts.

MC: Tell them, tell them both to kiss my ass.

DP: Fan-tab, all right see you later.

58. Letter from Donna R. Searcy, Sec., to Mr. Mel Karmazin, Pres., Sagittarius Brdcast. Corp., 8 FCC Rcd. 2688, 2711, 71 Rad. Reg. 2d (P & F) 989 (1992).

59. Letter from Roy J. Stewart, Chief, MM, to Agape Brdcast. Found., Inc., 9 FCC Rcd. 1679, 1680, 75 Rad. Reg. 2d (P & F) 128, 129 (1994).

60. Anonymous letter to FCC (Oct. 5, 1992) (on file with author).

61. Transcript of WGR-AM, Buffalo, New York (Oct. 4, 1992, 4:50 p.m.) (on file with author). The full transcript of the interview follows (MV: Male Voice):

MV: We just didnt get our running game going. We ah, we tried to get it going and they, what can you say when you play a game like today, and they shut you down and, you know, theres no excuses, we got our ass kicked today, point blank, Im not going to bull shit around, when you play against good team like this, you know, you cant make mistakes, you cant have turnovers, I cant throw interceptions, its just one of those things where, when the games over the team with the least amount of mistakes, least amount of penalties is going to win.

There was no letter of dismissal. The file included only the original complaint filed with the FCC (No. 92100234), by a "concerned citizen," and a transcript of the interview that contained the "indecent" words. The transcript indicated that the complaint had been dismissed on November 23, 1992, but stated no reason.

62. In a case involving station WYBB, Charleston, S.C., the FCC issued a NAL because the station broadcast the word "shit." The episode is transcribed below (MV: Male Voice; MV2: 2nd Male Voice):

MV: (Unintelligible) Maybe it's nine.

MV2: I don't know and who really gives a crap?

MV: Oh, oh.

MV2: No, we can say crap.

MV: We can say crap?

MV2: Yeah.

MV: Crap, crap, crap, crap, crap, crap.

MV2: That's right, just can't say shit.

MV: Oh, then we won't.

MV2: That's right.

Letter from Roy J. Stewart, Chief, MM, to L.M. Communications of SC, 7 FCC Rcd. 1595, 1596, 70 Rad. Reg. 2d (P & F) 1140, 1141 (1991).

The Commission said that while the broadcast occurred in the course of a live program, "the scatological material as broadcast involved a deliberate and repetitive use of the word 'crap to heighten the audience's awareness of and attention to the subsequent use of the term 'shit by the announcer. Such willfully focused use is patently offensive." On the other hand, the Commission dismissed a segment in which a DJ from WYBB used the word "motherfucker." In its NAL to WYBB, the FCC said that the DJs use of the word had been fleeting and isolated and suggested that such utterances, in the context of live and spontaneous programs, did not warrant Commission action. *Id.*

63. Transcript of WALE-AM, Providence, Rhode Island (Nov. 19, 1991, 9:00 a.m.) (on file with author). The following is a partial transcript of the outburst (GC: Geoff Charles; MV: Male Voice):

GC: No, no, no. He cant. Is that outside mike on? Oh, look at this as it happens. Unbelievable. Unbelievable. Dick head. Youre a dick head. Youre a boot squading dick head. . . .

MV: What the hell, I.

GC: Im calling you, Im calling you a douche bag and a dick head. You scum sucking douche bag. Why dont you go get a life? Go get a life. Yeah, you have no life. . . . Thats Ill tell you this, let me tell you something. When the revolution comes, that asshole is on the top of my hit list. . . . Well drag every one of those dick bags who work for the boot squad out by the God damn heels.

64. Letter from Norman Goldstein, Chief, Complaints and Investigations Branch, Enforcement Division, MM, to Mr. Frank Battaglia. (May 5, 1994) (on file with author).

65. Letter from Norman Goldstein, Chief, Complaints and Investigations Branch, Enforcement Division, MM, to Mr. Al Westcott. (Mar. 13, 1993) (on file with author).

66. Transcript of KFBI-FM, Las Vegas, Nevada (Jan. 2-13, 1995) (on file with author). The following is the transcript of the commercial (HS: Howard Stern; MV: Male Voice; GP: Group singing):

HS: Fletcher Jones Imports is the only authorized Mercedes Benz dealership in Las Vegas. . . . Theyre experts in finance, they can figure out a new way, a different way to get you out of that old car and into a brand new car with a monthly payment thats easy on your wallet. Did you hear what I, did anybody listen to this commercial? I just said, theyll take your old car and theyll figure out a way to get you some good payments with a brand new car. Use your *F(Beeping)* head (emphasis supplied). . . . Fletcher Jones Imports, the only authorized Mercedes Benz dealer in Las Vegas can be found at 3100 South Rancho in the Freeway Auto Center, just south of the Palace Station.

MV: Now you can own a Mercedes for under \$31,000.

GP: Singing we will.

67. Letter from Norman Goldstein, Chief, Complaints and Investigations Branch, Enforcement Division, MM, to Mr. Al Wescott (Mar. 13, 1993) (on file with author).

68. FCC v. Pacifica Found., 438 U.S. 726 (1978).

69. Letter from Edythe Wise, Chief, Complaints and Investigations Branch, Enforcement Division, MM, to C.L. Holliday (Oct. 26, 1989) (on file with author).

70. Transcript of WAAV-AM, Wilmington, N.C. (Jul. 19, 1988, 11:40 a.m.) (on file with author).

71. Letter from Donna R. Searcy, Sec., to The Rusk Corp., 8 FCC Rcd. 3228 (1993).

72. *Id.*

73. *See In re King Brdcast. Co., Memorandum Opinion and Order*, 5 FCC Rcd. 2971, 67 Rad. Reg. 2d (P & F) 1124 (1990). The FCC said that the program "Teen Sex: What About the Kids?" was not indecent, even though it discussed sexual issues in a frank manner. Such serious discussion, said the Commission, was not patently offensive.

74. Letter from Edythe Wise, Chief, Complaints and Investigations Branch, Enforcement Division, MM, to Mr. and Mrs. Roger D. Evoy (Oct. 26, 1989) (on file with author).

75. Transcript of WYSP-FM, Philadelphia, Pa. (Mar. 6-7, 1989, 6:00 a.m.) (on file with author). The following is a partial transcript of the program (HS: Howard Stern):

HS: [Imitating caller to the CNN Larry King Show] Uh, yes, Id like to ask Jamie Lee Curtis her breast size.

[Imitating Larry King] Uh, Jamie, what about it?

Larry doesnt have the balls to ask any good questions.

....

HS: [Talking about disc jockeys] Yeah, they all have disc jockey voices. Theyre all a bunch of dickheads.

Stupid jerk-off. Butt-plug jerk-off [farting noise]. Im sorry, Im mad.

....

HS: Robin, if I had a wife like that [Kitty], Id strangle myself. Heres what I would do. I would get totally naked, Id walk into a closet, I would tie my feet up and my neck in such a way that, uh, uh, when I, uh, I would do that asphyxiation thing. I would masturbate and asphyxiate myself.

76. Transcript of WYSP-FM, Philadelphia, Pa. (Mar. 6-7, 1989, 6:00 a.m.) (on file with author). The following is a partial transcript of the program.

Take the first train to Brownsville,

Dont hang around the station.

Subway rapist would rather leap on you

Than resort to masturbation.

Yeah, yeah, yes, yes.

Hell make a mess,

All over your dress.

Ladies, take my warning, especially if you are a

dish,

You can probably recognize him if his fingers smell

like fish,

That tuna stench thats on a wench.

Hell try to french.

And we dont know if hes white or if hes black. . . .

[Train sound; a woman screaming]

You gotta be real careful, he dont use no

protection.

And when he goes through a turnstyle, it gives him

an erection.

He gets a chubby, pretends hes your hubby, but hes

real grubby. . .

77. *See, e.g.*, Letter from Roy J. Stewart, Chief, MM, to Mr. Mel Karmazin, Pres., Infinity Brdcast. Corp., 8 FCC Rcd. 6740, 73 Rad. Reg. 2d (P & F) 982 (1993).

78. *Id.*

79. Letter from Roy J. Stewart, Chief, MM, to Mr. Mel Karmazin, President, Infinity Brdcast. Corp., 9 FCC Rcd. 1746, 1751, 74 Rad. Reg. 2d (P & F) 750 (1994).

80. Transcript of WUFX-FM, Buffalo, N.Y. (Apr. 23, 1991, 8:30 a.m.) (on file with author).

81. *Id.* A partial transcript of the song follows (TV: Two male voices singing):

TV: Shes a real no-mans girl, like those things that spin and twirl. Madonna sleeps with only girls with big long (Unintelligible). Madonna has no real blonde hair, so say the girls whove been down there. Id hate to be her underwear in summertime. (Unintelligible) No-man girl, youre teasing us. Bound and twirl you pointy bust. Sleep with girls who hate all men and want you for lunch. (Unintelligible) Madonna is a no-man girl, she likes gay men and likes gay girls, whats next you queers, sex with a steer.

You make us sick. (Unintelligible) OK. Whats next you queers, sex with a steer. We hate your guts. (Unintelligible) Whats next you queers, sex with a steer. Say, can we watch?

There was no letter of dismissal included with the transcript; however, the file included the complaint filed by Ms.

Ruth M. Coleman of the New York Gay and Lesbian Community Network. Letter from Ms. Ruth M. Coleman to FCC (Apr. 25, 1991) (on file with author).

82. Letter from Edythe Wise, Chief, Complaints and Investigations Branch, Enforcement Division, MM, to Mr. Dale Cotter (Feb. 28, 1992) (on file with author). The stations file showed that there were two separate complaints filed and the Commission only dismissed the first. There was no record as to whether the second complaint was still under review--there was no indication that the FCC sent out a letter of inquiry to the licensee--or had been dismissed.

The second complaint against WBCN involved excerpts from afternoon and evening broadcasts and aired on February 26, 1991 (MV: Male Voice; M2: 2nd Male Voice; FV: Female Voice):

MV: You cant say hooters on the radio. (Unintelligible) OK. OK. And its time for my favorite and your favorite, Otis (?), the Clown.

M2: (Coughs) Phlegm. Hi, you boys and girls. Otis, the Clown here with an after school, fun, fun, tip number six. Are you ready kids? Do you know, your dads closet isnt just for clothes you know. (Cough) Excuse me. (Coughs) Thats right, dads closet is also dads secret library. (Bell rings) Believe me, just open the door. Thats right. Push aside the plaid flannel bathrobe and viola, broads, broads, broads. Now pick a good one. A real steamer. (Coughs) And if youre not a good reader who cares. Get one with a lot of pictures you know and youre going to be touching yourself. Please stay away from your mothers curtains you stupid little jerk. . . .

FV: Were going to have an orgasm that you cant even comprehend.

Transcript of WBCN-FM, Boston, Mass. (Feb. 26, 1991, 4:45 p.m.) (on file with author).

83. Transcript of WBCN-FM, Boston, Mass. (Mar. 8, 1991, 8:30 a.m.) (on file with author). The following is a partial transcript of Laquidaras conversation with his "daughter" (CL: Charles Laquidara):

CL: Why did you hang up on me?

Child: I dont want to be on the radio.

CL: Youre not on the radio!

Child: I dont want to talk now.

CL: Whats the matter with you, P.M.S.?

Child: (laughing) No.

CL: Dont you trust me? Who is your favorite Daddy?

Child: Nobody!

CL: Dont be like that. . . . Say: Hey Mark, lick me.

Child: I dont want to say it.

CL: Go ahead now, nice and loud.

Child: I cant.

CL: Go on.

Child: Hey Mark, lick me.

CL: Thats a good girl.

84. Letter from Edythe Wise, Chief, Complaints and Investigations Branch, Enforcement Division, MM (July 2, 1992) (on file with author).

85. Transcript of WCHV-FM, Coachella, Cal. (June 14, 1991, 6:00-9:00 a.m.) (on file with author). A partial transcript of the program follows (MV: Male Voice; FV: Female Voice):

MV: So we have to do the sperm ovulation count for the day. Because, hey, its a service, you know, of The Rock, for you people who are into family planning. . . . Now, its been wicked (?) high these last few days so, (Chimes) sounds like its tumbling.

FV: Oh, oh. It must have been a good night, last night.

MV: Its still high but not as high as its been. It was wicked high the other day but now its, its moderately high, so play it accordingly. Somebody wanted to know if theyve had a vasectomy, does that count. Only if you went to Vics discount vasectomy I would say. If you had a vasectomy I think you, you know, not included in this sperm count thing. . .

86. *Id.*

87. Letter from Roger Holdberg, Acting Chief, Complaints and Investigations Branch, Enforcement Division, MM, to Mr. Al Wescott (Sept. 13, 1993) (on file with author).

88. Transcript of KFBI-FM, Las Vegas, Nev. (June 4, 1993, 6:35 a.m.) (on file with author). A partial transcript follows (HS: Howard Stern; RQ: Robin Quivers; FV: Female Voice):

HS: Alright, Im ready to meet Gina, Gina is a woman who sent us a letter, sent to us several nude pictures of herself and her friends and said she wanted to come down her[e] and be naked for us and massage me. . . .

HS: . . . Heres one [picture] where shes naked with her three girl friends, the ones she had lesbian love with. And now ladies and gentlemen, with.

RQ: Real in the flesh.

HS: The real Gina, oh wow, whew, hubba hubba, hey get out of town. Youre stuck away in Cleveland? Wait, let me soak this in. Turn up the light a little Gary, just a touch. And then you can put it back down. What? A little bit up. . . . Wow, youre a piece of ass. . . . Im already aroused. . . . When were you at the nude beach? In Florida?

FV: About a few months ago.

HS: And what do you do, do you just go down to the beach and like what do you wear to the beach? A bathing suit?

FV: Usually a Tee shirt with nothing on under it.

HS: Is that because you love guys to stare at you and stuff?

FV: I like it.

HS: Are you perpetually hot? . . .

FV: Yeah. . . .

HS: Man, are you totally shaved for todays nude appearance?

FV: Im not totally shaved, Im trimmed. . . .

....

HS: Yeah, what is your favorite scene, what is your favorite sexual scene?

FV: With guys?

HS: Yeah . . . Like what, just surprise us, what is it?

FV: Uh, my favorite is one guy on each side sucking your.

HS: Okay, alright, I got it, okay, thats good, I got the microphone. She doesnt understand the FCC rules.

89. Letter from Norman Goldstein, Chief, Complaints and Investigations Branch, Enforcement Division, MM, to Mr. Gene Reynolds (Dec. 19, 1993) (on file with author).

90. Transcript of WYSP-FM, Philadelphia, Pa. (Apr. 3, 1992, 10:00-11:00 a.m.) (on file with author). A partial transcript of the program follows (HS: Howard Stern; RQ: Robin Quivers; MV: Male Voice):

MV: I thought you were healthy man.

HS: I am.

HS: What? A rat crawl up your ass and die

RQ: (Laughs).

HS: And this Sunday from one to three P M, its Zips (?) Toys. Wait. (Pause) (Apparently HS is flatulent).

....

HS: What are you smelling? Farted five minutes ago.

MV: I know. Its like stale air. . . .

91. Letter from Norman Goldstein, Chief, Complaints and Investigations Branch, Enforcement Division, MM, to Complainant (Feb. 3, 1995) (on file with author) (complainant requested anonymity).

92. Transcript of WRNO-FM, New Orleans, La. (Sept. 21-22, 1994) (on file with author). A partial transcript follows (HS: Howard Stern; SJ: Stuttering John; HH: Hugh Hefner; FC: Female Caller):

HS: How old were you when you first started doing some lesbianism?

FC: 21. . .

HS: She started rubbing your legs.

FC: Yeah. Telling me how beautiful my color was and, you know, stuff like that, the usual.

HS: And then what happened? She leaned in and started kissing you?

FC: No, she just sort of sliding her legs, her hands up my legs.

HS: Oh, and she was working your right out in front of the.

FC: She did everything, I dont know what youre talking about, she did everything.

....

HS: Our second nominee, you might remember this guy, also saw him on the E-Television show, this guy has to inject his penis every time he needs an erection. He had a stroke like at 28 years old, he contacted me about getting a date, he wanted to come on here and win a date with a girl. And let me tell you something, it was no easy going. . . .

....

SJ: Will you ever photograph women with their Tampon strings hanging out?

HH: No, I dont think so, no.

SJ: Does your stroke affect your erection?

HH: Would I what?

SJ: Does your stroke affect your erection?

HH: No, it didnt, no. . . .

Letter to Complainant (Complainant Requested Confidentiality), February 3, 1995.

93. Letter from Norman Goldstein, Chief, Complaints and Investigations Branch, Enforcement Division, MM, to Mr. Jeffrey M. Bablitz (Feb. 18, 1994) (on file with author).

94. Letter from Jeffrey M. Bablitz to FCC, September 28, 1993.

95. For example, in a case involving KSLX-FM, East Brunswick, NJ, Letter from Donna R. Searcy, Sec., to Mr. Mel Karmazin, Pres., Sagittarius Brdcast. Corp., 8 FCC Rcd. 2688, 2707, 71 Rad. Reg. 2d (P & F) 989 (1992), the FCC found the following segment, which aired on the *Howard Stern Show*, indecent (HS: Howard Stern; RQ: Robin Quivers):

RQ: This doctor has found a way to lengthen the penis. . . .

HS: I would lengthen my penis in two seconds flat. You know why. . . . Now my penis is an inch long.

96. For example, in 1993, the FCC found that jokes aired on WLUP-AM, Chicago involving the yearly circumcision of a man were indecent. The FCC said that some of the examples of the offensive material dwelled on lewd and vulgar discussions about penis size and mutilation. Letter from Roy J. Stewart, Chief, MM, to Evergreen Media Corp. of Chicago AM, 8 FCC Rcd. 1266, 72 Rad. Reg. 2d (P & F) 135 (1993).

97. Letter from Roger Holdberg, Acting Chief, Complaints and Investigations Branch, Enforcement Division, MM, to Mr. Billy Kutulas (Oct. 29, 1993) (on file with author).

98. Transcript of WWMM-FM, Greenville, South Carolina (Mar. 4, 1993, 9:20 a.m.) (on file with author).

99. Transcript of WLAV-FM, Grand Rapids, Mich. (Nov. 11-12, 1993) (on file with author). The following is a transcript of the conversation (MV: Male Voice; M2: 2nd Male Voice; FC: Female Caller):

MV: Describe yourself.

FC: I have full hips, thin waist.

MV: Yeah. . . . Do you have like, rock-hard thighs?

FC: Well, kinda.

M2: Do you have an hour glass shape?

FC: Yeah. . . .

MV: Do you have those little baby hairs on your stomach? Do you know what Im talking about?

FC: Yeah . . . the little blonde ones.

MV: Mm mm. What else?

FC: Well I got two very. . . .

MV: Hold on.

M2: (Unintelligible) Damn the FCC.

MV: (Laughs) Oh man, you got me aroused.

100. Letter from Norman Goldstein, Chief, Complaints and Investigations Branch, Enforcement Division, MM, to Great American TV and Radio Co., Inc. (June 29, 1994) (on file with author).

101. Transcript of WRIF-FM, Detroit, Mich. (Sept. 26, 1990, 9:00 a.m.-1:00 p.m.) (on file with author). Some of the excerpts included the following (N: Ted Nugent, guest announcer/DJ; ODJ: Other DJ):

N: Indeed, thats where I do a swan dive into an already hard piece of concrete? . . . thats where I was taking a dump on somebodys back porch. That was the testes when I wore that loin cloth with the escape hatch in the back.

ODJ: Any theatrics or things planned for New Years Eve this year?

N: Im thinking of coming out of the ceiling without a robe this year. I was also going to bring a live buffalo and have him squirt me right out of his ass right there on the stage and the rest of the band will have to snort the remains.

. . . .

ODJ: Put your John Hancock in there, will ya?

N: Put your cock in there.

. . . .

N: He was talking about royal dog shit.

. . . .

N: [Discussing an encounter with a Hari Krishna follower in an airport] I opened it [a book] to the middle so that these two guys had laundry on their head an a goat, and I think theyre whackin 'em in the butt, then I go . . . (makes regurgitating sound) and I laid in a gob like it came out of the butt of a rhino and I closed the book and said, "Hey, you mindless drugged out hippie piece of shit, take this book and stick it up your ass," and then I deck him.

. . . .

ODJ: Why is the Two Live Crew being arrested? Because they said Black men had big dicks, and no one wanted to hear that.

. . . .

N: . . . But before we get reverent for the out of doors, lets just go rock . . . wango tango wang dang sweet puntang . . . the forest, yank me, crank me but dont wake me up to thank me--of course one of my favorites, the harder they come, the harder I get. Inspiration does exist.

102. Letter from Norman Goldstein, Chief, Complaints and Investigations Branch, Enforcement Division, MM, to Great American TV and Radio Co., Inc. (June 29, 1994) (on file with author).

103. Letter from Norman Goldstein, Chief, Complaints and Investigations Branch, Enforcement Division, MM, to Mr. John DeMatteo (Jul. 20, 1994) (on file with author).

104. Transcript of WABC, New York, N.Y. (on file with author).

105. Letter from Donna R. Searcy, Sec., to Mr. Mel Karmazin, Pres., Sagittarius Brdcast. Corp., 8 FCC Rcd. 2688, 2695, 71 Rad. Reg. 2d (P & F) 989 (1992), 7 FCC Rcd. 7321; *see also* Letter to Mr. Mel Karmazin, Pres., Infinity Brdcast. Corp., 8 FCC Rcd. 6740, 73 Rad. Reg. 2d (P & F) 982 (1993).

106. Letter from Alex D. Felker, Chief, MM, to Mr. Richard A. Moore (Apr. 7, 1988) (on file with author).

107. Transcript of WTRG-FM, Rocky Mountain, N.C. (June 3, 1987, 10:55 a.m.) (on file with author). The following is a partial transcript of the song "I Want to Kiss Her, But":

. . . .

I want to whisper sweet nothings in her ear.

I want to hold her behind,

Closed doors and more.

I want to kiss her, but she wont let me. . . .

Well, Ill never forget that train ride down to Austin.

We shared a seat, and we shared our tales.

But as my heart tries to leave her behind,

Regrets are all I find,

'cause Id hoped Id get that girl in the end. . . .

108. Letter from Alex D. Felker, Chief, MM, to Mr. Richard A. Moore (Apr. 7, 1988) (on file with author).

109. Letter from Roy J. Stewart, Chief, MM, to Mr. Carl J. Wagner, Exec. V.P. Brdcast., Great American TV and Radio Co., Inc., 6 FCC Rcd. 3692, 3693, 68 Rad. Reg. 2d (P & F) 686, 687 (1990).

110. *Id.*

111. Letter from Edythe Wise, Chief, Complaints and Investigations Branch, Enforcement Division, MM, to Ms. Julie Magnell (Oct. 26, 1989) (on file with author).

112. Transcript of WSPN-FM, Saratoga Springs, N.Y. (Sept. 21, 1987, 6:50 a.m.) (on file with author). Partial transcript of "Slip it in!"

(Throughout the song a females voice moaned "slip it in!")

You--slipped--it--in

You--slipped--it--in

You slipped it innnnnnnnnnn!

Say it couldnt fit

Say you had too much to drink

Is it a chemical?

. . .You can tell how it felt

You felt it

You tried to fit all loose

Guess what you should just say you dont want

You dont want

Say you dont want it

Than you slipped it on innnnnnnnn!

. . . Say you got a boyfriend

But your head(?) down my friend

And everybody else friend

Yeah you

Youre wide open

. . . In okay. Yep okay. (moaning)

Now up now down. Thats good. Oh holy.

NOW!!

(girl and guy making orgasmic sounds)

Oh yeah. Okay.

113. *In re* Liability of Sagittarius Brdcast. Corp., 7 FCC Rcd. 6873, 71 Rad. Reg. 2d (P & F) 630 (1992).

114. Letter from Edythe Wise, Chief, Complaints and Investigations Branch, Enforcement Division, MM, to Mr. Christopher Trey (Apr. 30, 1993) (on file with author).

115. Transcript of WDTR-FM, Detroit, Mich. (Feb. 9, 1990 at 5:00 p.m.) (on file with author). The following is a partial transcript of the song:

Girl said you was going to give me some,

Now you want to start acting dumb.

You want to play cat and mouse,

But I know the real reason why you came to my house.

So just stop the teasing and start the pleasing.

You know what I want not just (might sound like: excuses)

Step on it baby, you need to quit it.

Come on baby 'cause we can do this.

Step to me and fall on your knees.

(Might sound like: Put your left breast) baby put me at ease

Do something special, you know what I like,

(Might sound like: silicone lips) and please dont bite.

Slow and easy; Ill put the seat back.

Pumpin down as I climax.

(Might sound like: sit) in motion I (might sound like: quietly) say

We can do this so come on babe.

116. Letter from Edythe Wise, Chief, Complaints and Investigations Branch, Enforcement Division, MM, to Mr. Christopher Trey (Apr. 30, 1993) (on file with author).

117. *Id.*

118. Letter from Norman Goldstein, Chief, Complaints and Investigations Branch, Enforcement Division, MM, to Ms. Katrina Carr (Feb. 23, 1994) (on file with author).

119. Transcript of WAPI-FM, Birmingham, Alabama (June 21, 1992, 6:30 a.m.) (on file with author). An excerpt of the song "Baby Got Back" follows (MV: Male Voice; M2: 2nd Male Voice; FV: Female Voice):

M2: I like big butts and I cannot lie. You other brothers cant deny that when a girl walks in with a itty-bitty waist and a round thing in your face, you get sprung. Wanna pull up, (Unintelligible) 'cause you notice that butt was stuck. These are the jeans shes wearing, Im hooked and I cant stop staring. Oh baby, I wanna get wit ya and take your picture. My home boys (?) tried to warn me, but that butt you got makes.

FV: Make me so horny.

MV: Oh rub a smooth skin, you say you want to get in my bins? Well use me, use me, 'cause you aint that average groupie. Ive seen 'em dancing, to hell with romancing, shes wet, wet, got it going like a turbo 'vette. Im tired of magazines, saying flat butts are the thing. But the average black man and ask him back, you gotta pack much back. So fellas, 'yeah, fellas, 'yeah you girl friend got some butt. Hell, yeah. Shake it, shake it, shake that healthy butt. Baby got back. . . . I want to get you home and uh, double up, uh, uh. I aint talking about Playboy, those silicone parts are made for toys. I want 'em real thick and juicy, so find that juicy double, Mix-A-Lots in trouble. Beggin' for a piece of that bubble. . . . So Cosmo says youre fat, well, I aint down with that. 'Cause your waist is small and your curves are

kicking and Im thinking about sticking

120. Letter from Roy J. Stewart, Chief, MM, to Guy Gannett Publ. Co., 6 FCC Rcd. 3702 (1989).

121. *Id.*

122. Another station that received a NAL for \$23,750 for the broadcast of a sexually explicit song was WSUC-FM, a noncommercial station licensed to the State University of New York. The Commission found that lyrics like "[n]ow that she sucked my dick and (unintelligible) Tony fuck you in the ass" were patently offensive and, therefore, indecent. Letter from Donna R. Searcy, Sec., to State University of New York, 8 FCC Rcd. 456 (1993).

123. Letter from Edythe Wise, Chief, Complaints and Investigations Branch, Enforcement Division, MM, to Capt. Theodore J. Schoch (Oct. 26, 1989) (on file with author).

124. Transcript of WEBN-FM, Cincinnati, Ohio (on file with author). The following is another joke included in the dismissed complaint:

There was this struggling dairy farmer who saved enough money to buy an automatic milking machine. As he stood in amusement watching his machine operate, he got to thinking of all the possibilities here, kind of a personal milking machine if you know what I mean. So knowing he would be rejected by his wife Ethel as he was almost 365 days a year, he decided to try this machine on himself, if you know what I mean. So after gingerly hooking himself up to this automatic milking machine, he found it better than he ever imagined. . . . This thing was great, you see these things in the back of Hustler magazine. After a couple of cigarettes and a glass of milk he was completely satisfied. However, the problem here, this machine refused to relinquish its grip upon his private parts here. His blood-curdling screams had finally reached Ethel who promptly contacted the dealer that sold him the machine. The dealer of course rushed right over, arrived at the scene. Ethel frantically asked him what could be done. The dealer looked at the situation, turned to Ethel [and said], the only thing you could do lady, is to feed him and fan him--its set for a quart.

125. Transcript of WEBN-FM, Cincinnati, Ohio (on file with author).

126. Letter from Edythe Wise, Chief, Complaints and Investigations Branch, Enforcement Division, MM, to Ms. Barbara Selph (Oct. 26, 1989) (on file with author).

127. Transcript of KWTO-FM, Springfield, Missouri (Oct. 26, 1989) (on file with author). Other jokes were:

Whats twelve inches long and white? Nothing.

If you dont have a rubber, use a glad bag, lover.

. . . .

Weekly Barroom Sexual Competency Test:

2 ovaries, Did you order some new furniture? Of course not, Why do you ask? B/c there are 2 nuts outside trying to push an organ in here.

. . . .

Why cant witches have babies? B/c their husbands have Hollow weenies.

128. Letter from Edythe Wise, Chief, Complaints and Investigations Branch, Enforcement Division, MM, to Mr. Michael K. Melton (Apr. 19, 1991) (on file with author).

129. Transcript of KLPX-FM, Tucson, Arizona (June 22, 1990, 7:45 a.m.) (on file with author).

130. Letter from Donna R. Searcy, Sec., to Mr. Gregory P. Barber, Pres., Narrangansett Brdcst. Co. of Cal., Inc. 5 FCC

Rcd. 3821, 3822, 67 Rad. Reg. 2d (P & F) 1506 (1990).

131. Letter from Edythe Wise, Chief, Complaints and Enforcement Branch, Enforcement Division, MM, to Mr. Robert Gire (Feb. 23, 1990) (on file with author).

132. Transcript of commercial sent by complainant:

A lady is talking with her girlfriends about a recent date. They ask her to tell them what happened on the date. The lady says that they (she and her boyfriend) began to get "romantic" only to realize they were not "protected." Then, what appears to be a commercial begins and says, "Hi, Im Princess Di and Im here to tell you about the new Princess Di diaphragm. If you want to be royally screwed, get the new Princess Di diaphragm." Then the talk goes back to the lady and her boyfriend on a date and she says "you make me f-e-e-e-l so good, just like a princess." [The complainant then said that some sexual sighs accompanied some of the previous statements.]

Letter from Mr. Robert Gire to FCC (Nov. 20, 1989) (on file with author).

133. *See, e.g.*, Letter from Donna R. Searcy, Sec., to the Rusk Corp., 8 FCC Rcd. 3228 (1993).

134. Letter from Edythe Wise, Chief, Complaints and Investigations Branch, Enforcement Division, MM, to Ms. Susan Moyers (Aug. 5, 1991) (on file with author).

135. Transcript of WZLZ-FM, Quincy, Illinois (Mar. 1, 1991, 6:00 p.m.) (on file with author). The following is a partial transcript of the live exchange (MV: Ron Crook; M2: 2nd Male Voice):

M2: Remember (unintelligible) hes back.

MV: Well, wait a minute. That junior high teacher aint talking, hes watching, watching, watching, watching child pornography on.

M2: What, hes watching you do anyway. What is it youre doing?

MV: We have a live interview. I understand youre a child porn star. Just what is it you do? What do they pay you? How much do they pay you? Do they pay you? Do they pay you though? Are they giving you drugs or that kind of stuff? Huh? Thats illegal What else is going on?

M2: I dont know, the Ron McBarf (?) school of broadcasting.

MV: (Unintelligible) Sweetheart, come over here a minute. Did you go to Mac Martin pre-school in Los Angeles? Huh? You did?

M2: The postal service sent us a big fax on this guy.

MV: Im not going to get down on him. Oh, youre badly hurt. Are you going to go down on this guy? Do you think what he did is wrong? Huh? You dont? I dont think that she thinks that was wrong. What else? Here comes. What else is going on? (Unintelligible)

136. Letter from Donna R. Searcy, Sec., to Mr. Mel Karmazin, Pres., Sagittarius Brdcast., Corp., 8 FCC Rcd. 2688, 2707, 71 Rad. Reg. 2d (P & F) 989 (1992).

137. Letter from Edythe Wise, Chief, Complaints and Investigations Branch, Enforcement Division, MM, to Mrs. Janet D. Wall (Jul. 2, 1992) (on file with author).

138. Transcript of WQBZ-FM, Macon, Georgia (May 17, 1991) (on file with author). The following is a partial transcript of the telephone conversation (MV: Male Voice; FC: Female Caller):

MV: Its eight eleven at one-oh-six point-three WQBZ. Q one-oh-six. This is your buddy, the burly Bear OBrian

sitting here punching buttons, buck naked. Dont punch the wrong button. Hey.

....

MV: Q one-oh-six, Howdy.

FC: Hi, Bear.

MV: Hi, honey, are we having fun this morning?

FC: Yeah, youre entertaining the hell out of us and we got something for you.

MV: You got something for me?

FC: Yeah. (Unintelligible) how juicy it is.

MV: Well let me ask you this.

FC: OK, what?

MV: If I was to chew on it would I enjoy it?

FC: Damn right.

MV: (Laughs)

FC: 'Cause if you werent (?) I wouldnt let you chew on it.

MV: (Laughs) Oh, mama. . . .

....

Song: "Kennedy Clan in Trouble Again" (MV: Male Voice; CH: Chorus):

MV: Hormones, hormones, Kennedy clan is in trouble once more

Hormones, Kennedy, Kennedy, Kennedy, Kennedy-Oh

CH: Kennedy clan is in trouble once more

MV: Hey Mister Kennedy put back your banana

CH: Kennedy clan is in trouble once more

MV: Uncle Ted is naked out on the veranda

CH: Kennedy clan is in trouble once more

MV: Late one night down in Palm Beach town

CH: Kennedy clan is in trouble once more

MV: Brought young girl back to the big compound

CH: Kennedy clan is in trouble once more

MV: Hormones, hormones

CH: Kennedy clan is in trouble once more

MV: William want to sky dive right into her panties

CH: Kennedy clan is in trouble once more

MV: Couldnt get a thought of another night of handies

CH: Kennedy clan is in trouble once more

MV: He got six inch, seven inch, eight inch, whoa

CH: Kennedy clan is in trouble once more

MV: He said that shes just a two bit whore

CH: Kennedy clan is in trouble once more. . .

139. Letter from Roger Holdberg, Acting Chief, Complaints and Investigations Branch, Enforcement Division, MM, to Mr. Tom Brandeberry (Aug. 13, 1993) (on file with author).

140. Transcript of KRZR-FM, Hanford, Cal. (Aug. 18, 1992 6:00-10:00 a.m.) (on file with author).

141. FCC v. Pacifica Found., 438 U.S. 726 (1978).

142. While many complainants send copies of their letters to the local station, that is not always the case, thus it is possible that several complaints be filed against a station and the management of the station never becomes aware of such complaints.

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