

# Recent Developments in Program Content Regulation

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Beginning in the 1970s and continuing until this past year, there has been a strong and consistent tendency at the FCC to move away from program content regulation—and to place primary reliance on marketplace forces and on editorial decision-making within the private sector. In 2004, however, the Commission has moved on a number of fronts to consider the possible implementation of new and more rigorous policies governing content. In this brief Essay, the Authors will discuss: (1) the deregulatory trend that began in the 1970s, (2) beefed-up regulatory actions taken in the past year (specifically, in the fields of indecency and children's TV) and (3) other regulatory initiatives that are slated for consideration in the areas of violence and localism.

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## I. THE DEREGULATORY TREND THAT BEGAN IN THE 1970S

From the early days of broadcasting, the FCC—in carrying out its perceived public interest responsibilities—involved itself in the oversight and regulation of program content. And over the years, it adopted a broad array of rules and policies governing various aspects of broadcast programming. Then, beginning in the mid-1970s, the Commission began to chip away at this established regulatory regime. Some notable deregulatory landmarks in the past thirty years are set forth below:

1976: Abandonment of radio format regulation;

1976: Permitting on-the-spot coverage of political debates;

1981 and 1984: Liberalization of ascertainment requirements;

1987: Repeal of the Fairness Doctrine;

1995: Repeal of the Prime Time Access Rule; and

2000: Repeal of the Personal Attack and Political Editorializing Rules.

## II. 2004: STRENGTHENING OF RULES GOVERNING INDECENCY AND CHILDREN'S TV

### A. *Indecency*

One major exception to the FCC's content—deregulatory program over the last thirty years has been the effort to restrict “indecent” programming via the airwaves (defined generally as the description or depiction, in patently offensive terms, of sexual or excretory activities or organs). The Commission's regulatory initiatives in this area were based on two primary rationales: the unique pervasiveness of broadcasting into the American home and the presence of young children in the viewing and listening audience. In its seminal 1978 ruling in *Pacifica*, the Supreme Court upheld the Commission's authority to regulate indecent programming on precisely the same bases.

In the ensuing years, broadcasters (with a few notable exceptions) have exhibited appropriate discretion by avoiding the airing of problematic material. In turn, the Commission's policies have demonstrated both restraint and good judgment. In particular, the Commission has established so-called safe harbor hours (10 p.m. to 6 a.m.) during which more adult programming can be aired. Its enforcement policies generally have reflected sensitivity to First Amendment values.

Since the 1970s, most of the FCC's indecency sanctions have involved infractions by so-called radio shock jocks. Thus, it is somewhat ironic that, in 2004, four TV incidents have generated renewed attention to

indecent programming and much more vigorous FCC enforcement (as well as bipartisan calls in Congress for greatly increased fines and, perhaps, even broadcast license renewal challenges).

In March, the FCC unanimously reversed its enforcement staff in a case involving a live NBC telecast. In receiving a Golden Globes Award, U2 lead singer Bono uttered the phrase “f\*\*\*ing brilliant.” Following established precedent, noting the comment’s fleeting nature and also its nonsexual context, the staff dismissed the complaints received. However, the Commission’s members found the Bono expletive to be indecent (and also profane, in violation of federal law). In sanctioning (but not fining) NBC, the FCC announced new guidelines for indecency enforcement: succinctly, the “F” word is simply out in any context. NBC, joined by various other media organizations and performers, has asked the agency to reconsider its decision.

Then, in September, the FCC issued a \$550,000 fine against twenty stations owned and operated by Viacom/CBS for airing the 2004 Super Bowl halftime show—one in which Janet Jackson experienced what has been euphemistically called a “wardrobe malfunction” (revealing part of her anatomy for nine-sixteenths of a second). Once again, a full Commission rejected assertions that the exposure’s ephemeral nature constituted a defense. While finding no evidence that Viacom or CBS had advance knowledge of the incident, the agency ruled that the licensees did not exercise adequate precautions to protect their audience. Like NBC, CBS has filed a petition for reconsideration with the FCC.

Then, in October, the Commission members found a six-minute episode of the Fox TV program *Married by America* (involving strippers and a variety of sexual-oriented skits) to be indecent. But here, unlike the Super Bowl incident, the agency decided to fine not only the network’s own stations, but also local, independently owned outlets affiliated with the network (a total of 169 stations in all). The Commission explained that, in the Janet Jackson episode, CBS affiliates could not reasonably have anticipated the indecent exposure. By contrast, the offensive *Married by America* segment was in a taped episode that could have been preempted by local stations (as indeed, one North Carolina affiliate did).

And then, in November, ABC aired a rerun of Steven Spielberg’s classic film *Saving Private Ryan* which includes numerous war-time expletives (including the never-never “F” word). Although the film was introduced by Senator John McCain who proclaimed it “nowhere near indecent,” some thirty network affiliates chose not to run it, presumably out of concern over possible FCC sanctions.

The Commission's heightened vigor in enforcement also extended in 2004 to the traditional environment for indecency cases, radio, and to a performer quite familiar with this kind of regulatory oversight. Specifically, on the heels of the Bono decision, the FCC issued a near half million dollar fine against six stations for alleged indecent broadcasts by Howard Stern, and further enforcement actions seem likely against other broadcasters which carry the syndicated Stern program. As a result of all this Commission attention, and perhaps a pretty sweet financial deal as well, Mr. Stern has announced that he soon will leave over-the-air broadcasting and take his program to Sirius, a satellite digital audio provider (to which, like other subscription services such as cable and satellite TV, the FCC's indecency regime is legally much more problematic).

In all, it will be interesting to see how these cases ultimately play out at the FCC and the courts (where challenges to *Pacifica* and the Commission's entire indecency program seem inevitable). The Authors' view is that the FCC would be wise to reestablish the importance of the *context* in which offensive words are used—as, for example, in the *Saving Private Ryan* case noted above—and, once again, to exercise appropriate restraint in enforcement. At the same time, the industry needs to engage in self-regulatory actions designed to reasonably protect the sensitivities of its diverse audience.

#### B. *Children's Television on Digital Television*

Another deviation from the general trend toward nonregulation of content occurred when the Clinton FCC mandated that every TV station carry three hours per week of core educational and informational programs for children. In 2004, in a decision that could be considered highly premature, the Commission decided to impose additional children's programming time requirements on digital broadcasters who multicast—up to three hours for every full-time digital television (“DTV”) multicast stream that a station chooses to provide (on a nonsubscription basis).

The problem, of course, is that digital television is in its very inception. To date, broadcasters have focused on upgrading their single-channel analog offerings to a one program digital service (emphasizing network HDTV content in prime time). However, the highly flexible U.S. DTV standard also allows the industry to offer four or five multicast programs with a transmission quality equivalent to today's conventional service (so-called Standard Definition Television or “SDTV”). At this point, no one knows how many stations will choose to multicast. But if that number is large, the hours of mandated core kid's fare might far exceed any reasonable marketplace need.

Moreover, the FCC's new policy determination could seriously undermine the ability of broadcasters to compete with cable and other established Multichannel Video Programming Distributors ("MVPDs"). The most common and successful business model for cable and satellite networks involves the carriage of a single specialized programming genre on a dedicated 24/7 channel. This approach allows the viewer to know, with a high degree of confidence, that a given channel will deliver a particular type of programming (e.g., news, sports, history, cooking) at virtually any time of the day or night. By mandating the placement of children's programs on a station's multiplex channels, expansion of the three-hour requirement will substantially compromise the ability of broadcasters to mount an effective competitive response with specialized all-the-time channels of their own. If left free to make these decisions on their own, it is likely that many would experiment with multiplexed channels focusing on local news, sports, or weather. In the Authors' opinion, such experimentation should be encouraged.

Instead, the DTV children's programming requirement may create incentives that are less likely to promote positive public interest outcomes. For example, it must be assumed that a rational business organization will respond to expensive new government mandates by looking for ways to minimize the cost. The most obvious alternatives are to: (1) avoid multiplexing altogether, (2) provide multiplexed services solely on a subscription basis, or (3) reduce children's TV program production budgets (and thus, effect a corresponding decrease in production values). As the Authors see it, none of these responses would serve the viewing public.

### III. ADDITIONAL CONTENT-BASED REGULATIONS SLATED FOR AGENCY CONSIDERATION IN 2005

Two especially important content-related regulatory actions are scheduled for Commission consideration in 2005. The first of these involves the proposed regulation of "violent" TV programming, and the second relates to the possible reestablishment of tougher standards in "ascertainment" and "localism."

#### *A. Violence*

Last year, in response to a request from prominent members of Congress, the FCC issued a comprehensive Notice of Inquiry looking toward the possible enactment of legislation regulating "violent" television programming. The Notice is open-ended in that it invites comment on a broad array of purported violence-related problems and solutions. As

explained herein, virtually any regulatory action in this area is likely to run afoul of the First Amendment.

One proposal suggests violence could be banned throughout most of the broadcast day in a manner modeled on the current treatment of indecent programming (i.e., a general ban coupled with a late-evening safe harbor). But that concept likely could not be sustained. As the Supreme Court explained in *Pacifica*, indecent words are subject to regulation because they are not “essential to any exposition of ideas” and their minimal social value is outweighed by the “social interest in order and morality.”

The proponents of regulation could not reasonably hope to succeed in trivializing communications dealing with violence. As the Commission itself has acknowledged, violence has long “been an important element of storytelling, and violent themes have been found in the Bible, The Iliad and The Odyssey, fairy tales, theatre, literature, film and, of course, television.” The suggestion to restrict violent material is very much at odds with this rich and ancient storytelling tradition, and it is also curiously out of step with the tenor of our own times. This is, after all, an age in which TV cameras and reporters have become embedded in front-line military units to facilitate live, close-up coverage of deadly combat operations.

The definitional complexities of what constitutes acceptable and nonacceptable violence also would be extremely challenging. This would be especially true given the wide variety of program categories that would have to be examined—e.g., news, public affairs, documentaries, other varieties of informational and educational shows, sports and, indeed, drama and comedy as well.

But even if the Commission were to assume some regulatory power concerning violence, it generally would be expected to shun any form of censorship in favor of less restrictive alternatives. In this regard, it is highly significant that Congress has already put in place technological remedies that are designed to help parents screen out unwanted TV programming. In particular, Section 624(d)(2) of the Communications Act requires cable operators to provide subscribers with devices that will preclude viewing of any particular service a subscriber specifies. Similarly, Section 303(x) provides that TV sets sold in the U.S. generally be equipped with a feature (a so-called V-Chip) that will enable viewers to block display of all programs with a common rating. Accordingly, proponents of regulatory proposals would have the added burden of demonstrating that these measures are inadequate to deal with a substantial identified governmental objective.

*B. Proposed New Regulations to Promote Localism*

In July of last year, the FCC issued another broad-ranging Notice of Inquiry—this one seeking comment on a variety of regulatory proposals designed to shape broadcaster efforts in ascertaining the problems, needs, and interests of their local communities and in airing programming responsive to such issues.

During the heyday of this form of regulation, the ascertainment portion alone was a tremendous burden. The Commission required surveys of both the general public and community leaders. Licensees in cities with a population of 500,000 or more were generally required to conduct 220 leader interviews over the course of their three-year license terms. As a result, the eight commercial TV stations and 27 commercial radio stations then licensed to Chicago were expected to hold a total of 8,400 interviews, or an average of 2,800 per year. Moreover, to foreclose a challenge to their procedures, these leadership interviews were to be distributed across the following nineteen categories, including such fields as government, business, labor, charity, culture, etc. At least 50 percent of the leader surveys had to be conducted by management-level employees.

The Commission has not indicated that it intends to reinstitute such extensive and highly formalized ascertainment requirements, and it can only be hoped no such plan exists. The fact is that there never really was a need for interviews or surveys in order to elicit information on the major issues facing a given community. In fact, such information would have been apparent from the outset to virtually anyone who lived in the community (and particularly, to well-informed station news and public affairs directors).

Moreover, if such government requirements ever were necessary, they certainly are not so in today's incredibly rich and diverse electronic media marketplace. Television stations, in particular, have been driven by competitive forces to emphasize news far more than ever. Indeed, local news provides broadcasters with a distinctive premium brand that provides a critically important way to distinguish their operations from those of national broadcast, cable, and satellite networks. As a result, TV outlets air twice as much local news per day as they did twenty years ago. Radio stations, of course, tend to feature formats that are much more highly specialized. But even here, through the emergence of "talk radio," this medium now plays an exceptionally vibrant role in the discussion and debate of public issues.

In sum, the Localism NOI would appear to be an anachronism—a throwback to marketplace conditions that ceased to exist long ago. Hopefully, the Commission ultimately will decide not to adopt any new

regulations in this area. Overall, it also must be hoped that the agency will proceed with great caution in program content regulation—and that it will consider new and expanded regulatory initiatives only where there is a clearly demonstrated need for such action.