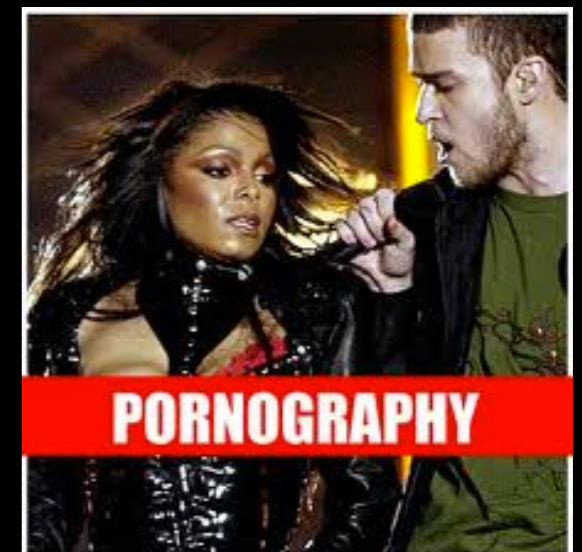


Federal Regulation Of Broadcast Indecency

University Of Colorado
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Maureen O'Connell, Sr. VP, News Corporation



Tim Winter, President, Parents Television Council



Timely Discussion

- On June 21, 2012 the Supreme Court (8-0) held that the FCC's broadcast "indecentcy" regime is unconstitutional because it violates the Due Process clause of the Fifth Amendment.
- The Court (that in Jacobellis, in 4 separate majority opinions could not define "obscenity" leaving Justice Stewart to famously say, " I know it when I see it"), lectured the FCC that "laws which regulate persons or entities must give fair notice of conduct that is forbidden or required."



Radio Act of 1927

- Two contradictory provisions in the same section!
- "Nothing in this Act shall be understood or construed to give the licensing authority the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the licensing authority which shall interfere with the right of free speech by means of radio communications. No person within the jurisdiction of the United States shall utter any obscene, indecent, or profane language by means of radio communication."

U.S. Criminal Code

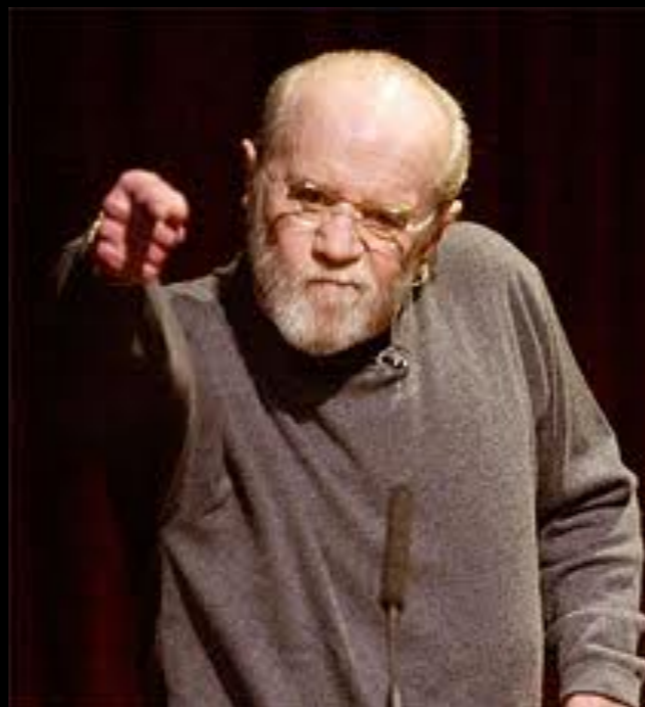
- 18 U.S.C. § 1464 : US Code - Section 1464:
Broadcasting obscene language
- "Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both."

FCC Regulation

- 73.3999 Enforcement of 18 U.S.C. 1464 (restrictions on the transmission of obscene and indecent material).
- (a) No licensee of a radio or television broadcast station shall broadcast any material which is obscene.
- (b) No licensee of a radio or television broadcast station shall broadcast on any day between 6 a.m. and 10 p.m. any material which is indecent

George Carlin's "Filthy Words"

- October 30, 1973 at 2:00 pm WBAI-FM in New York, NY broadcast the George Carlin monolog "Filthy Words" which included the "7 Words You Can Never Say On Television"



FCC Pacifica Decision

- On February 21, 1975 the FCC upheld a listener complaint about the broadcast. The FCC defined “Indecent” language as follows:
 - “language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience.”



FCC v. Pacifica Foundation

- 1978 - The Supreme Court Held:
 - That the anti-censorship provision of the Communications Act (Section 326) is not a bar to the FCC imposing sanctions for the broadcast of obscene, indecent or profane content
 - That content can be indecent without being obscene - statute uses the disjunctive “or”
 - That because broadcasting is “uniquely pervasive” and “uniquely accessible to children” it is entitled to only limited First Amendment protection

FCC Enforcement After Pacifica

- The FCC was restrained
- In 1992 Court Of Appeals for the D.C. Circuit struck down a 24 hour ban on indecent broadcasts - setting 10:00 pm to 6:00 am as a “safe harbor” (Note - programs aired at 10:00 Eastern and Pacific time are broadcast at 9:00 Central and Mountain time)
- In 2000 the FCC declined to fine stations for airing the film “Schindler’s List” with full frontal nudity before 10:00 pm



A Different Standard For Cable

- In 2000 the Supreme Court in United States v. Playboy ruled that non-obscene cable programming could **not** be censored by the government
- The Court held, “[t]here is, moreover, a key difference between cable television and the broadcasting media, which is the point on which this case turns: Cable systems have the capacity to block unwanted channels on a household-by-household basis.”



2001 FCC Industry Guidance

- In 2001 the FCC issued guidance to the broadcast industry explaining that it would base decisions on:
- (1) whether the material “describe[s] or depict[s] sexual or excretory organs or activities” and
- (2) whether the broadcast is “patently offensive as measured by contemporary community standards for the broadcast medium.”
- (1) “the explicitness or graphic nature of the description or depiction”;
- (2) “whether the material dwells on or repeats at length” the description or depiction; and
- (3) “whether the material appears to pander or is used to titillate, or whether the materials appears to have been presented for its shock value.”
- The FCC also clarified that “fleeting and isolated” expletives would not be considered actionably indecent.

Janet Jackson's “Wardrobe Malfunction”

- Super Bowl 2004 sparked a sharp escalation in the FCC's indecency enforcement.
- Janet Jackson and Justin Timberlake's dance routine gave indecency advocates the ammunition to press for larger fines



The FCC Changes Course

- In 2003, consistent with prior precedent, the FCC Staff ruled that live utterance of the words “fucking brilliant” by pop singer Bono was not actionable as indecent because it was fleeting and not uttered “in a sexual context”
- In 2004 the full FCC changed course holding:
 - That a single fleeting utterance is actionable
 - That the word “fuck” always is indecent
 - And that each broadcast by each individual station in a Network will be considered a separate violation significantly increasing potential fines



Largest TV Indecency Fine Ever

- In September 2004, the FCC fined CBS \$550,000 for the Janet Jackson Super Bowl incident
- Chairman Michael Powell reacted to political and public outrage



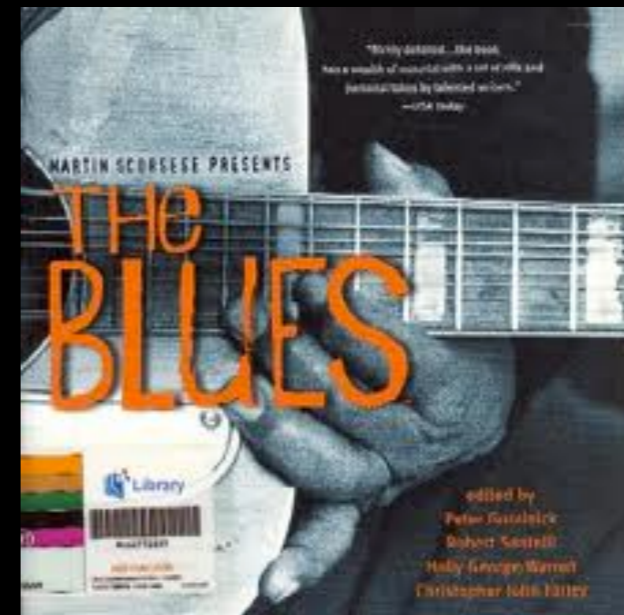
“Saving Private Ryan”

- 64 local ABC affiliate stations declined to broadcast the film for fear of FCC sanctions
- In 2005 despite the numerous “F-bombs” (and seemingly inconsistent with its decision in the Bono case) the FCC declined to fine the ABC stations for indecency citing:
 - The extensive parental warnings
 - And, the context of the utterances



The FCC Gets More Aggressive

- In 2006, under new Chairman Kevin Martin, the FCC issued its “Omnibus Order” resolving a number of long-standing complaints. The Order:
- Fined a California station for airing the PBS program, “The Blues” which contained expletives similar to “Saving Private Ryan”



The FCC's 2006 “Omnibus Order”

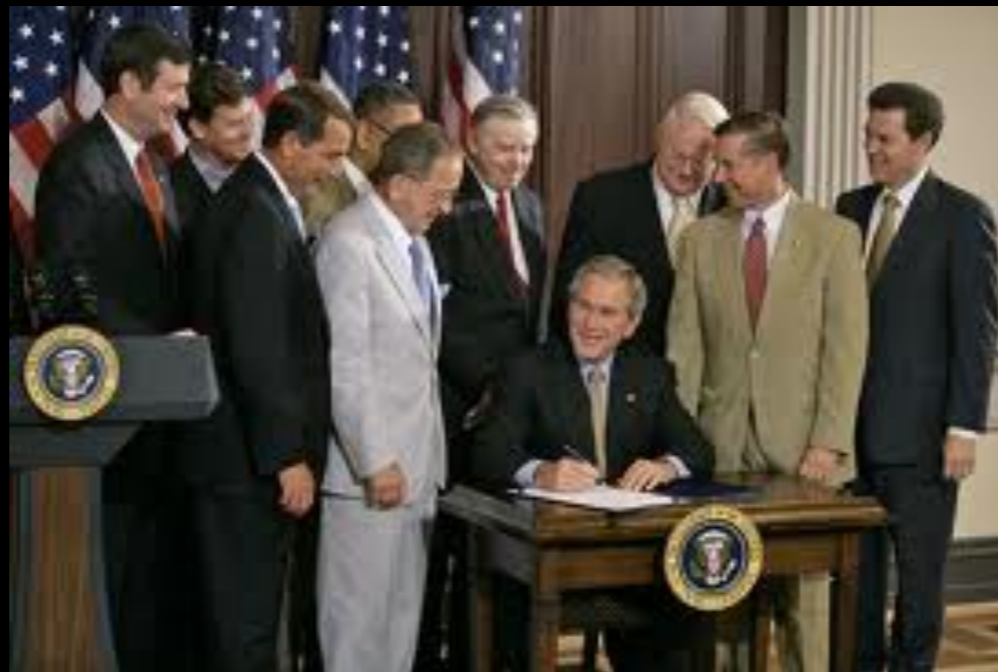
- Found Cher's fleeting “Golden Globes” “F-bomb” to be indecent



- Found Nicole Ritchie's fleeting “Billboard Awards” “F and S-bombs” to be indecent
- Found “NYPD Blue” utterances of “bullshit” to be indecent but “dick” and “dickhead” to not be indecent
- Found CBS Morning Show utterance of “bullshitter” to be indecent
- Ruled that “F and S-bombs” will almost always be deemed indecent

Broadcast Decency Enforcement Act

- Also in 2006 Congress increased the maximum fine for each indecent broadcast 10 fold from \$32,500 to \$325,000



NYPD Blue Shower Scene

- In 2008 the FCC ruled that brief rear nudity in “NYPD Blue” was indecent notwithstanding extensive parental warnings and its earlier decision that full frontal nudity in “Schindler’s List” was not indecent (Note broadcast time was 10:00 pm Eastern and Pacific and 9:00 pm Central and Mountain)



Fox Television Stations v. FCC

- A complicated series of Court appeals followed the FCC's more aggressive enforcement policy culminating in decisions by the 2nd Circuit and the Supreme Court in Fox Television Stations, Inc v. FCC

2nd Circuit

- “We now hold that the FCC’s policy violates the First Amendment because it is unconstitutionally vague, creating a chilling effect that goes far beyond the fleeting expletives at issue here.”

2nd Circuit

- The Court noted a change in the “unique pervasiveness” of broadcasting that had been the cornerstone of the Supreme Court’s Pacifica decision:
- “The past thirty years has seen an explosion of media sources, and broadcast television has become only one voice in the chorus. Cable television is almost as pervasive as broadcast – almost 87 percent of households subscribe to a cable or satellite service – and most viewers can alternate between broadcast and non-broadcast channels with a click of their remote control.....The internet, too, has become omnipresent, offering access to everything from viral videos to feature films and, yes, even broadcast television programs.”

2nd Circuit

- The Court also noted that the availability of the channel blocking technology that had been the cornerstone of the Supreme Court's decision in the Playboy case now also applied to broadcasting:
- “Every television, 13 inches or larger, sold in the United States since January 2000 contains a V-chip, which allows parents to block programs based on a standardized rating system..... Moreover, since June 11, 2009, when the United States made the transition to digital television, anyone using a digital converter box also has access to a V-chip.....In short, there now exists a way to block programs that contain indecent speech in a way that was not possible in 1978.”

Fox Television Stations Supreme Court 2012

- By 8-0, the Court held that the Commission “failed to give Fox or ABC fair notice prior to the broadcasts in question that fleeting expletives and momentary nudity could be found actionably indecent.”
- “Therefore, the Commission's standards as applied to these broadcasts were vague, and the Commission's orders must be set aside”