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Ever since the Radio Act of 1927, the nation's airwaves have been regulated.¹ Over the past several decades, the regulatory commission, now known as the Federal Communications Commission, has had an ever-expanding territory to keep watch over. Their representatives cannot sit in on every radio show or every television show filming, but they do hold the power to allow what can and cannot be broadcasts the American public. These broadcasters certainly know they are being watched, or at least listened to, by a powerful hand.

According to the FCC's web page, "it is a violation of federal law to air obscene programming at anytime²." Initially put against the English-based Hicklin Test³, potentially obscene material must now face the Miller test enacted from *Miller v. California* in 1973. The test is three-pronged and includes: that "the average person, applying contemporary community standards would find that the work...appeals to the prurient interest," must be "patently offensive" and lack serious literary, artistic, political, or social value.⁴

¹ U.S. Policy: The Communications Act of 1934--The Museum of Broadcast Communications. < www.museum.tv/eotvsection.php?entrycode=uspolicyc>

² Obscenity, Indecency and Profanity. Federal Communications Commission <www.fcc.gov/guides/obscenity-indecency-and-profanity> 2011

³ An Overview of How Courts Have Defined Obscenity. The University of North Carolina <www.cas.okstate.edu/jb/faculty/senat/jb3163/obscenity.html>

⁴ *Miller v. California* 413 U.S. 15 (1973)

However, broadcasters almost never air obscene material in regards to the Miller Test.⁵ They are often more concerned with being caught with indecent content, which unlike obscenity, can, in fact be protected by the First Amendment. Indecent material is still sexually oriented, but faces different tests than obscene material does. Because of a broadcast of comedian George Carlin's "Filthy Words" act, The FCC was given a precedent to measure what type of content can be aired and when it can be aired without consequence, if at all. Much like obscenity, Indecency depicts or describes sexual or excretory activities or organs in a patently offensive manner, which fit the meanings of the seven words that Carlin repeated throughout his act.⁵

Naturally, the Pacifica Foundation, which owned the station that broadcast the act, had someone complain about the words that Carlin described as "the words you couldn't say on the public, ah, airwaves, um the ones you definitely wouldn't say, ever⁶." Since the airing the words, which "limited humans to their bodily functions," was at a time that children could easily access the broadcast, the Supreme Court ruled that the FCC could regulate such indecent material⁷

Fast-forward about thirty years and the FCC is facing another set of filthy words from the public airwaves. In the on-going case between the Fox Television stations and the Commission, more potentially indecent words are being fought over. Since the FCC has already been granted the ability to regulate broadcasts, it is trying to levy punishment on Fox, ABC and CBS for

⁵ Middleton, K. *The Law of Public Communication:2012 Update*. Pearson-2011. Boston at 426

⁶ *FCC v. Pacifica Foundation* 438 U.S. 726 (1978) at 726

⁷ *Id.* At 727

indecent material. Despite the holding in *Red Lion Broadcasting Co. v. FCC* that “no free speech right exists in possessing a broadcasting license⁸” these broadcast companies are trying hard to uphold their free speech, though.

An independent federal agency, the FCC was established through the Communications Act of 1934. They cannot censor programming themselves, but they can levy fines and send people to jail after complaints from consumers⁹. This is exactly what the agency is trying to do to Fox, ABC and CBS. The case derives from the newly implemented (at the time) “fleeting expletive” policy. Fox representatives believed that this policy is “arbitrary and capricious under the Administrative Procedure Act for failing to articulate a reasoned basis for its change in policy.”¹⁰

So what’s all the fuss about? The FCC found several instances on music award programs where indecent and profane words were broadcast live, a violation of 18 U.S.C.S. statute 1464. The FCC had previously taken the view that isolated, non-literal, fleeting expletives did not violate its indecency regime. However, the Commission rejected the petitioners’ argument that these fleeting expletives were not actionable¹¹. The Second Court did hold that the FCC made a “180 degree turn regarding its treatment of fleeting expletives without providing

⁸ *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969)

⁹ What We Do. Federal Communications Commission < www.fcc.gov/what-we-do>2011

¹⁰ *Fox Television Stations, Inc. v. FCC*, 489 F.3rd 444 (2007) at 1

¹¹ *Id.* At 1

a reasoned explanation” for the change. The court also held that there was “no evidence that fleeting expletives were harmful.”¹²

Upon reaching the U.S. Court of Appeals for the Second Court, it was noted that the FCC is permitted to sanction speech without showing that is satisfied the elements of obscenity¹³. After all, these fleeting expletives had already been determined indecent through the *Pacifica* case since they were part of Carlin’s repeated “filthy words.”¹⁴ In the radio program “Shocktime America,” phrases like “eat shit” and mother-fucker” were used without any pressure from the FCC. These words, which are now always considered indecent and profane, were allowed since the FCC could not retrieve a transcript or tape of the program to determine “whether the use of patently offensive speech was isolated.”¹⁵

The award programs discussed are the 2002 Billboard Music Awards, the 2003 Billboard Music Awards, and the 2003 Golden Globe Awards. In the 2002 Billboards, Cher, in her acceptance speech, said: “People have been telling me I’m on the way out every year, right? So fuck’em.” In the 2003 version of the same award show, presenter Nicole Ritchie stated: “Have you ever tried to get cow shit out of a Prada purse? It’s not so fucking simple.”¹⁶ For winning the Golden Globe for best original song said: “This is really, really, fucking brilliant.”¹⁷

At one time, broadcasters would not have been afraid of any type of punishment from words such as these, creating the upsetting response from the

¹² Id. At 1

¹³ Id. At 449

¹⁴ Id. At 447

¹⁵ FCC, 489 U.S. at 16

¹⁶ Id At 452

¹⁷ Id At 451

broadcasters at hand. In 2001, the FCC agreed to clarify its indecency standards in order to “provide guidance to the broadcast industry regarding our case law interpreting the indecency statute and out government policies.”¹⁸

The commission then explained that indecency included two determinations: “whether the material falls within the ‘subject matter scope of [the] indecency definition—that is, the material must describe or depict sexual or excretory organs or activities;’ and whether the broadcast is ‘patently offensive as measured by contemporary community standards for the broadcast medium.’”¹⁹ In order to determine the “patently offensive” section, the FCC cited examples distinguishing between material that ‘dwells’ on the offensive content (indecent) and material that was ‘fleeting and isolated’ (not indecent).²⁰

In the initial court of appeals opinion, the judges determined that the FCC showed a reasoned explanation for its change and that it was trying to promote good manners by penalizing “shit” and not what was supposed to be said by Ritchie (crap.) They also held that since “fuck” inherently contains a sexual reference, there is no question of scrutiny²¹. The court then granted permission for the Supreme Court to review the case.²²

Upon reaching the Supreme Court, the case *became FCC et al., Petitioners v. Fox Television Stations, Inc., et al, 129 S. Ct. 1800 (2009)*. It concerns the adequacy of the Federal Communications Commission’s

¹⁸ Id At. 16

¹⁹ Id At. 451

²⁰ 18 U.S.C. § 1464 at 17-18

²¹ Id At. 474

²² Id At. 1

explanation of its decision that the indecency statute sometimes forbids the broadcasting of indecent expletives even when said words are not repeated.²³ Justice Scalia, who delivered the opinion, brought up the “proscription against ‘uttering any obscene, indecent, or profane language’” between the hours of 6 a.m. and 10 p.m.²⁴ This time frame, known as the broadcast “safe harbor,” is when indecent material is fully regulated since it is when children are most likely to be part of an audience.²⁵

The opinion goes further into the *Pacifica* decision, especially in regards to the time it was broadcast and whether or the words were sexual. Scalia stated that “we rejected the broadcasters argument that the statutory proscription applied only to speech appealing to the prurient interest, noting that “the normal definition of ‘indecent’ merely refers to nonconformance with accepted standards of morality.””²⁶ Unlike books or they not-yet-popularized Internet, a radio broadcast could be banned since the broadcast of Carlin’s monologue (or any other indecent speech) is “uniquely accessible to children.”²⁷

Nevertheless, the *Pacifica* ruling was found to rely too much on the repetitive occurrence, and became too narrow according the FCC. When the Commission considered this notion, its members determined that in 1987 such a

²³ FCC v. Fox Television Stations, Inc, 129 S. Ct. 1803 (2009)

²⁴ Fox, 129 S. Ct. 1806

²⁵ Obscenity, Indecency and Profanity. Federal Communications Commission < www.fcc.gov/guides/obscenity-indecency-and-profanity> 2011

²⁶ Id At. 1806

²⁷ Id At. 1806

“highly restricted enforcement standard...was unduly narrow as a matter of law and inconsistent with [the Commission’s] enforcement responsibilities...”²⁸

Expanding its control over a decade later, the FCC emphasized that “full context is...critically important” and the “explicitness or graphic nature” were principal factors to guide the inquiry of indecency. Then, in 2004, the commission declared that a non-literal (fleeting) use of the “F- and S- Words” could be indecent.²⁹

Although Bono’s use of “fuck” was as an intensifier and not a literal descriptor, the commission determined that any use of that word has a sexual connotation, making it always indecent.³⁰ Furthermore, the “F-word” was declared as “one of the most vulgar, graphic and explicit descriptions of sexual activity in the English Language” as well as “shocking and gratuitous.”³¹

After the two Billboard Music Awards incidents, the FCC issued an order that explained that both broadcasts fell comfortably within the subject-matter scope of the Commission’s indecency test because the 2003 broadcast (Ritchie) involved a literal description of excrement and both broadcasts invoked the “F-Word.”³² Next, the order determined that both broadcasts were patently offensive under community standards and that the 2002 statement (Cher) metaphorically suggested a sexual act as a means of expressing hostility to her critics.³³

²⁸ Id At. 1806

²⁹ Id At. 1806

³⁰ Id At. 1808

³¹ Id At. 1808

³² Id At. 1809

³³ Id At. 1809

The Administrative Procedure Act is then explained through *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut.*, 463 U.S. 29 (1983) and Scalia notes that by overturning the FCC's judgment, the Court of Appeals relied in part on Circuit precedent requiring a more substantial explanation for agency action.³⁴ Scalia also stated that the Court found no basis in the Administrative Procedure Act or in their opinions for a requirement that all agency change be subjected to more searching review.

The Court eventually held that the FCC made it clear that it based the "fleeting expletive" policy upon the need to avoid getting too close to the constitutional line set by the *Pacifica* ruling.³⁵ Although the Court points out technology advances have brought "bleeping out or delay systems" the FCC has not accounted for local broadcast coverage of such events.³⁶ The dissenting justices held that the decision to change policy was "arbitrary, capricious, an abuse of discretion" and required remand for the case.

With its decision, the Supreme Court volleyed the case back to the Court of Appeals in 2010. Attempting to figure out if the changing of the policy is constitutional or not, this court notes how "broadcast radio and television...have always occupied a unique position when it comes to First Amendment protection."³⁷ The networks will argue that the world has changed since *Pacifica* and the reasons underlying the decision [to change] are no longer valid." At that

³⁴ Fox, 129 S. Ct. 1809

³⁵ Fox, 129 S. Ct. 1834

³⁶ Id. At. 1841

³⁷ Fox Television Stations, Inc. v. FCC, 613 F.3d 317 at 325 (2010)

time (1978) cable was still in its infancy and there was no Internet to search for podcasts or streaming videos.³⁸

Even the FCC acknowledges “children today live in a media environment that is dramatically different from the one in which their parents and grandparents grew up decades ago.”³⁹ Current technology like the government-created V-chip gives parents to control what their children watch on TV.⁴⁰ The court can think of no reason why the rationale for applying strict scrutiny for cable television would not apply equally to broadcast television with the V-chip.⁴¹ The court also rejects several notions brought upon by the FCC, including its argument that the Networks’ (Fox, et al) vagueness challenge is foreclosed by *Pacifica* itself.⁴²

Regarding the two main indecent words, the court labels the FCC’s rules for when “shit” and “fuck” are allowed vague, still. First, is if the word is “bona-fide news” and second is “demonstrably essential to the nature of an artistic or educational work...”⁴³ The court holds that the guidance of the FCC’s policies are not reliable, leading to unnecessary self censorship from broadcast programs like House and That 70s Show.⁴⁴ The Supreme Court will review the case once again.

Who knew that anything described as “fleeting” would create such uproar? It has become clear that these courts are treating the battle between Fox and its

³⁸ Id At. 325

³⁹ Id At. 326

⁴⁰ Id At. 326

⁴¹ Id At. 327

⁴² Id At. 329

⁴³ Id At. 331

⁴⁴ FCC, 613 F.3d 317 at 335

other broadcast members, the FCC and the Constitution very carefully. This is not to be fully unexpected, however. Even the case much of this debate is originally based on—*FCC v. Pacifica*—discussed the narrowness of the holding, stating, “we have not decided that an occasional expletive...would justify any sanction...or criminal prosecution.”⁴⁵ Additionally, the ruling was a 5-4 decision, showing that even the Justices who allowed the FCC to regulate indecent programming, were not entirely sold on their ideas.

Considering the decision of *Pacifica* and the previous FCC/Fox cases, the Supreme Court will rule in favor of the FCC. First of all, in *FCC v. Fox*, the Justices tail off to discussing administrative law. According to the opinion, the Administrative Procedure Act permits the setting aside of agency action that is “arbitrary” or “capricious.” The Justices also request that the agency “examine the relevant data and articulate a satisfactory explanation for its action.”⁴⁶ In fact, the First Amendment should have cast a “shadow” over the administrative law grounds upon which the challenge the FCC rested.⁴⁷

Even dealing with First Amendment issues, whenever some form of regulation is proposed, it is often held up. Throughout the twentieth century there was some form of measuring stick, or test to determine whether or not content was suitable to some audience.

⁴⁵ *Pacifica*, 438 U.S. 726 at 750

⁴⁶ *Fox*, 129 S. Ct. 1809

⁴⁷ Dorf, Michael. *The Supreme Court Upholds the FCC's Policy on "Fleeting Expletives"* FindLaw < <http://writ.news.findlaw.com/dorf/20090504.html>> (2009)

Another reason the Court will favor the Commission is the lack of prior restraint. *New York Times v. United States* showed that the press could not be denied to print.⁴⁸ Since the printed media is safe from governmental control, this leaves broadcast to succumb to regulation. From the Comstock Act of 1873 suppressing obscene literature⁴⁹ to the Roth Test to the Miller Test, the law has attempted to shield the public from offensive words and images. The FCC is trying to tighten its grip on broadcast through the “fleeting expletives” doctrine since it cannot touch most other media.

Nevertheless, there is a push to extend regulation to cable and satellite companies. According to John C. Quale, the vast majority of viewers receives video programming from multi-channel video programming providers—mostly cable or satellite television.⁵⁰ This certainly makes sense, considering there are exponentially more channels from non-broadcast content providers than regulated stations. Senator Jay Rockefeller introduced regulation that would have extended indecency regulation. He noted that “broadcast, cable and satellite indiscriminately barrage our children and families with indecent and violent images.”⁵¹

Even with the rise in popularity of cable television and the Internet through the last couple decades, the amount of proposed fines from the FCC generally

⁴⁸ *New York Times Co. v. United States* 403 U.S. 713 at 714

⁴⁹ 17 Statute § 598 (1873)

⁵⁰ Quale, J. C., & Tuesley, M. J. (2007). Space, the Final Frontier--Expanding FCC Regulation of Indecent Content onto Direct Broadcast Satellite. *Federal Communications Law Journal*, 60(1), 37-66.

⁵¹ O'Neil, Robert. *Indecency, The First Amendment, and the FCC*. 60 Fed. Comm (2008) <http://www.law.indiana.edu/fclj/pubs/v60/no1/O'Neil_Forum_Final.pdf>

increased from 1995 to 2006, peaking in 2004 with \$7.9 million in proposed fines.⁵² \$3.5 million of that has come out of Viacom's pockets. The media conglomerate owns CBS, MTV, VH1 and others. This settlement does not include the Janet Jackson "wardrobe malfunction," however. The proposed \$550,000 fine is being challenged separately.⁵³ After all, the process to file a complaint is a relatively simple one using the Commission's website.

Not all complaints are processed, not even the ones with "cussing" before 10 p.m. A Jacksonville father was surprised to find profanity on cartoons like *King of the Hill* and *The Simpsons*, which his children watch on the local Fox affiliate. He emailed a complaint in September 2003 saying that the FCC "do [ts] job and put a...halt to the cussing in any cartoon form."⁵⁴ In the end, FCC dished out to the father what the courts have been describing to the Commission. Ironically enough, his complaint did not have "sufficient context to make a determination of indecency." That's right: he was too vague.

Despite the Fox/FCC case still in limbo going back to the Supreme Court, the television broadcasters have certainly reacted the way that the FCC would have liked. Immediately following the "wardrobe malfunction" CBS disclosed that it would air the Grammy Award Show on up to a five-minute delay "to safeguard

⁵² Indecency Complaints and NALs:1993-2006 (Chart) <
<http://transition.fcc.gov/eb/oip/ComplStatChart.pdf>>

⁵³ Davidson, Paul. *Viacom will pay \$3.5 to settle complaints*. USA Today 11/24/2004. Accessed from *Academic Search Premier*

⁵⁴ Belmas, G. I., Love, G. D., & Foy, B. C. (2007). In the Dark: A Consumer Perspective on FCC Broadcast Indecency Denials. *Federal Communications Law Journal*, 60(1), 67-109.

against any unexpected and inappropriate content.”⁵⁵ During the 2011 Grammy’s, CBS basically edited out half the lyrics from Eminem’s performance, just to be safe in avoiding any of the song’s expletives.

These topics even have the Supreme Court skittish in its vernacular. The opinion for *FCC v. Fox*, the words “fuck” and “shit”, which appear in *Pacifica*, are substituted with the “S-Word” and “F-Word.” Either the justices are tipping their hand at which way they will lean for the upcoming holding or the fact that Chief Justice Roberts never used those words in an opinion before.⁵⁶

When getting to the core issues for the FCC, they actually can regulate indecency constitutionally. All they have to do is maintain rigid list of words that cannot be broadcasted outside the safe harbor time. This way, parents are happy that their children will not expose themselves to indecent and adults can still see unedited language on their favorite programming. The *In re Pacifica* ruling articulated that the FCC emphasized that broadcasters must precede indecent material with a warning even if children could not reasonably be expected to be in the audience.”⁵⁷ Of course, when such words are said outside the safe harbor time, the broadcaster will often self-impose their punishment by firing the guilty employee.

The Commission appears desperate to stay relevant among the media. With the vast array of alternatives, they may just dig even deeper to catch indecency over the air. Even with the over-arching restrictions, basic cable

⁵⁵Gary, L. (n.d). CBS to air Grammys with up to 5-minute delay. USA Today.

⁵⁶ Dorf, Michael

⁵⁷ *In Re Pacifica Foundation, Inc.*, 2 FCCR 2698 (1987)

subscribers should not have to wait until 1 a.m. to get programming the way it was supposed to be shown. It should not matter whether or not the content is “integral” to the film or show.⁵⁸ Indecent words are all over Saving Private Ryan and are often unedited when shown on television. On the other hand, the same language portrayed by police officers responding to the events of September 11, 2001 is deemed unacceptable.⁵⁹

⁵⁸ Middleton, K, pg 431

⁵⁹ O’Neil, R, pg 14