Regulation of Broadcast Indecency: Background and Legal Analysis

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April 16, 2013

Congressional Research Service
7-5700
www.crs.gov
RL32222

CRS Report for Congress
Prepared for Members and Committees of Congress

Summary

During the 2012 Super Bowl Halftime Show, the rapper M.I.A. (stage name for the artist Mathangi "Maya" Arulpragasm) made an indecent gesture during her live performance, reigniting the debate over whether the FCC could punish broadcasters for fleeting indecency. M.I.A.'s performance echoed two other prominent television events that have been the subject of ongoing litigation. The airing of an expletive by Bono (stage name for the artist Paul David Hewson) during the 2003 Golden Globe Awards, as well as the "wardrobe malfunction" that occurred during the 2004 Super Bowl halftime show, gave broadcast indecency prominence at the Federal Communications Commission (FCC) and in the 109th and 110th Congresses. These incidents resulted in the enactment of P.L. 109-235 (2006), which increased the penalties for broadcast indecency by tenfold. They also resulted in protracted litigation that was the subject of two recent Supreme Court decisions that eventually reversed the fines the FCC had issued in these cases.

Federal law makes it a crime to utter "any obscene, indecent, or profane language by means of radio communication" (18 U.S.C. §1464). Violators of this statute are subject to fines and imprisonment of up to two years; the FCC may enforce this provision by forfeiture or revocation of a broadcaster's license. The FCC has found that for material to be "indecent," it "must describe or depict sexual or excretory organs or activities," and "must be patently offensive as measured by contemporary community standards for the broadcast medium." The federal government's authority to regulate material that is "indecent" but not obscene was upheld by the Supreme Court in *Federal Communications Commission v. Pacifica Foundation*, which found that prohibiting such material during certain times of the day does not violate the First Amendment.

In 1992, Congress enacted P.L. 102-356 (47 U.S.C. §303 note), Section 16(a) of which, as interpreted by the courts, requires the FCC to prohibit "indecent" material on broadcast radio and broadcast television from 6 a.m. to 10 p.m. Under P.L. 109-235, "indecent" broadcasts are now subject to a fine of up to "$325,000 for each violation or each day of continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of $3,000,000 for any single act or failure to act." Fines may be levied against broadcast stations, but not against broadcast networks. The FCC appears to have the statutory authority to fine performers as well (up to $32,500 per incident), but has taken the position that "[c]ompliance with federal broadcast decency restrictions is the responsibility of the station that chooses to air the programming, not the performers."

The federal restriction on "indecent" material applies only to broadcast media. This stems from the fact that there are a limited number of broadcast frequencies available. The Supreme Court, therefore, interprets the First Amendment in a manner that allows the government to regulate speech via broadcast media to a greater extent than via other media. This report discusses the legal evolution of the FCC's indecency regulations, and provides an overview of how the current regulations have been applied. Two recent cases have considered to what extent broadcast indecency can be regulated before First Amendment rights are impermissibly infringed. Fleeting expletives and images like those in the Golden Globes and Super Bowl halftime show cases have been subject to government enforcement action, and those enforcement actions have been challenged as violations of the First Amendment. The Supreme Court in *Pacifica* left open the question whether broadcasting an occasional expletive, as in the Bono case, would justify a sanction. As noted above, the Supreme Court has recently agreed to hear a case that may decide this question.

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Introduction

During the 2012 Super Bowl Halftime Show, the rapper M.I.A. made an indecent gesture during her live performance, reigniting the debate over whether the FCC could punish broadcasters for fleeting indecency.[1] M.I.A.'s performance echoed two other prominent television events that have been the subject of ongoing litigation. The airing of an expletive by Bono during the 2003 Golden Globe Awards, as well as the "wardrobe malfunction" that occurred during the 2004 Super Bowl halftime show, gave broadcast indecency prominence at the Federal Communications Commission (FCC) and in the 109th and 110th Congresses. These incidents resulted in the enactment of P.L. 109-235 (2006), which increased the penalties for broadcast indecency by tenfold. The litigation between the broadcasters and FCC regarding the legality of the fines issued in these cases has been the subject of two Supreme Court decisions. In 2012, the Supreme Court reversed the fines the FCC had issued in these controversial cases.

Federal law makes it a crime to utter "any obscene, indecent, or profane language by means of radio communication" (18 U.S.C. §1464). Violators of this statute are subject to fines and imprisonment of up to two years, and the FCC may enforce this provision by forfeiture or revocation of a broadcaster's license. The FCC has found that, for material to be "indecent," it "must describe or depict sexual or excretory organs or activities," and "must be patently offensive as measured by contemporary community standards for the broadcast medium." The federal government's authority to regulate material that is "indecent" but not obscene was upheld by the Supreme Court in *Federal Communications Commission v. Pacifica Foundation*, which found that prohibiting such material during certain times of the day does not violate the First Amendment.

In 1992, Congress enacted P.L. 102-356 (47 U.S.C. §303 note), Section 16(a) of which, as interpreted by the courts, requires the FCC to prohibit "indecent" material on broadcast radio and broadcast television from 6 a.m. to 10 p.m. Under P.L. 109-235, "indecent" broadcasts are now subject to a fine of up to "$325,000 for each violation or each day of continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of $3,000,000 for any single act or failure to act." Fines may be levied against broadcast stations, but not against broadcast networks. The FCC appears to have the statutory authority to fine performers as well (up to $32,500 per incident), but has taken the position that "[c]ompliance with federal broadcast decency restrictions is the responsibility of the station that chooses to air the programming, not the performers."

It is important to note that the federal restriction on "indecent" material applies only to broadcast media, and this stems from the fact that there are a limited number of broadcast frequencies available and that the Supreme Court, therefore, allows the government to regulate broadcast media more than other media. This report discusses the evolution of the FCC's indecency regulations, provides an overview of how the current regulations have been applied, and examines recent cases analyzing the FCC's authority to regulate broadcast indecency.

[1] David Bauder, "M.I.A. Flashes Middle Finger During Super Bowl Halftime Show," Associated Press via Huffington Post (February 5, 2012), http://www.huffingtonpost.com/2012/02/05/mia-flips-bird-super-bowl-middle-finger_n_1256338.html.

Evolution of the FCC's Indecency Regulations

Title 18 of the United States Code makes it unlawful to utter "any obscene, indecent, or profane language by means of radio communication."[2] Violators of this provision are subject to fines or imprisonment of up to two years. The Federal Communications Commission has the authority to enforce this provision by forfeiture or revocation of license.[3] The Commission's authority to regulate material that is indecent, but not obscene, was upheld by the Supreme Court in *Federal Communications Commission v. Pacifica Foundation*.[4] In *Pacifica*, the Supreme Court affirmed the commission's order regarding the airing of comedian George Carlin's "Filthy Words" monologue.[5] In that order, the commission determined that the airing of the monologue, which contained certain words that "depicted sexual and excretory activities in a patently offensive manner," at a time "when children were undoubtedly in the audience" was indecent and prohibited by 18 U.S.C. Section 1464.[6] Pursuant to the Court's decision, whether any such material is "patently offensive" is determined by "contemporary community standards for the broadcast medium."[7] The Court noted that indecency is "largely a function of context—it cannot be judged in the abstract."[8]

The Commission's order in the *Pacifica* case relied partially on a spectrum scarcity argument. That argument posits that there is a scarcity of spectrum space, which requires the government to license the use of such space in the public interest, and partially on "principles analogous to those found in the law of nuisance."[9] The Commission noted that public nuisance law generally aims to channel the offensive behavior rather than to prohibit it outright. For example, in the context of broadcast material, channeling would involve airing potentially offensive material at times when children are less likely to be in the audience. In 1987, the Commission rejected the spectrum scarcity argument as a sufficient basis for its regulation of broadcast indecency, but noted that it would continue to rely upon the validity of the public nuisance rationale, including channeling of potentially objectionable material.[10] However, in its 1987 order, the Commission also stated that channeling based on a specific time of day was no longer a sufficient means to ensure that children were not in the audience when indecent material aired and warned licensees that indecent material aired after 10 p.m. would be actionable.[11] The Commission further clarified its earlier

[2] 18 U.S.C. §1464. "Radio communication" includes broadcast television, as the term is defined as "the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds." 47 U.S.C. §153(33).

[3] 47 U.S.C. §503(b).

[4] 438 U.S. 726 (1978).

[5] The United States Court of Appeals for the District of Columbia Circuit had reversed the commission's order. *See* 556 F.2d 9 (D.C. Cir. 1977). The commission appealed that decision to the Supreme Court, which reversed the lower court's decision.

[6] 438 U.S. at 732.

[7] *Id*.

[8] *Id.* at 742.

[9] *Id.* at 731; *see*, *In the Matter of a Citizen's Complaint Against Pacifica Foundation Station WBAI (FM), New York, New York*, 56 F.C.C.2d 94 (1975).

[10] *In the Matter of Pacifica Foundation, Inc. d/b/a Pacifica Radio Los Angeles, California*, 2 F.C.C. Rcd. 2698 (1987). Two other orders handed down the same day articulate the commission's clarified indecency standard. *See also In the Matter of the Regents of the University of California*, 2 F.C.C. Rcd. 2703 (1987); *In the Matter of Infinity Broadcasting Corporation of Pennsylvania*, 2 F.C.C. Rcd. 2705 (1987).

[11] The commission noted Arbitron ratings indicating that a number of children remain in the local audience well after 10 p.m. *See* 2 F.C.C. Rcd. 1698, ¶ 16.

Pacifica order, noting that indecent language was not strictly limited to the seven words at issue in the original broadcast in question, and that repeated use of those words was not necessary to find that material in question was indecent.[12]

The Commission's 1987 orders were challenged by parties alleging that the Commission had changed its indecency standard and that the new standard was unconstitutional. In *Action for Children's Television v. Federal Communications Commission (ACT I)*, the United States Court of Appeals for the District of Columbia Circuit upheld the standard used by the Commission to determine whether broadcast material was indecent, but it vacated the Commission's order with respect to the channeling of indecent material for redetermination "after a full and fair hearing of the times at which indecent material may be broadcast."[13]

Following the court's decision in *Action for Children's Television (ACT I)*, a rider to the Commerce, Justice, State FY89 Appropriations Act required the FCC to promulgate regulations to ban indecent broadcasts 24 hours a day.[14] The commission followed the congressional mandate and promulgated regulations prohibiting all broadcasts of indecent material.[15] The new regulations were challenged, and the United States Court of Appeals for the District of Columbia Circuit vacated the Commission's order.[16] In so doing, the court noted that in *ACT I* it held that the Commission "must identify some reasonable period of time during which indecent material may be broadcast," thus precluding a ban on such broadcasts at all times.[17]

In 1992, Congress enacted the Public Telecommunications Act of 1992, which required the FCC to promulgate regulations to prohibit the broadcasting of indecent material from 6 a.m. to midnight, except for broadcasts by public radio and television stations that go off the air at or before midnight, in which case such stations may broadcast indecent material beginning at 10 p.m.[18] The Commission promulgated regulations as mandated in the act.[19] The new regulations were challenged, and a three-judge panel of the United States Court of Appeals for the District of Columbia Circuit subsequently vacated the Commission's order implementing the act and held the underlying statute unconstitutional.[20] In its order implementing the act, the FCC set forth three goals to justify the regulations: (1) ensuring that parents have an opportunity to supervise their children's listening and viewing of over-the-air broadcasts; (2) ensuring the well-being of minors regardless of supervision; and (3) protecting the right of all members of the public to be free of indecent material in the privacy of their homes.[21] The court rejected the third justification as "insufficient to support a restriction on the broadcasting of constitutionally protected indecent material," but accepted the first two as compelling interests.[22] Despite the finding of compelling

[12] 2 F.C.C. Rcd. 2698, ¶¶ 12 and 15.

[13] 852 F.2d 1332, 1344 (1988).

[14] P.L. 100-459, §608.

[15] *Enforcement of Prohibitions Against Broadcast Obscenity and Indecency*, 4 F.C.C. Rcd. 457 (1988).

[16] *Action for Children's Television v. Federal Communications Commission (ACT II)*, 932 F.2d 1504 (1991), *cert. denied*, 503 U.S. 913 (1992).

[17] *Id.* at 1509.

[18] P.L. 102-356, §16, 47 U.S.C. §303 note.

[19] *In the Matter of Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. 1464*, 8 F.C.C. Rcd. 704 (1993).

[20] *Action for Children's Television v. Federal Communications Commission*, 11 F.3d 170 (D.C. Cir. 1993).

[21] 8 F.C.C. Rcd. at 705-706.

[22] 11 F.3d at 171.

interests in the first two, the court found that both Congress and the FCC had failed "to tailor their efforts to advance these interests in a sufficiently narrow way to meet constitutional standards."[23]

Following the decision of the three-judge panel, the Commission requested a rehearing *en banc*.[24] The case was reheard on October 19, 1994, and, on June 30, 1995, the full court of appeals held the statute unconstitutional insofar as it prohibited the broadcast of indecent material between the hours of 10 p.m. and midnight on broadcast stations that were not eligible for the public broadcast station exception.[25] In so doing, the court held that while the channeling of indecent broadcasts between midnight and 6 a.m. "would not unduly burden the First Amendment," the distinction drawn by Congress between public and non-public broadcasters "bears no apparent relationship to the compelling government interests that [the restrictions] are intended to serve."[26] The court remanded the regulations to the FCC with instructions to modify the regulations to permit the broadcast of indecent material on all stations between 10 p.m. and 6 a.m.

Indecency Regulations

Following the decision in *ACT III*, the Commission modified its indecency regulations to prohibit indecent broadcasts from 6 a.m. to 10 p.m.[27] The modified regulations became effective August 28, 1995.[28] These regulations have been enforced primarily with respect to radio broadcasts and thus have been applied more often to indecent language rather than to images.[29] Under these regulations, broadcasts deemed indecent were subject to a forfeiture of up to $32,500 per violation,[30] with the FCC's considering each utterance of an indecent word as a separate violation, rather than viewing the entire program as a single violation.[31]

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[23] *Id*.

[24] *Action for Children's Television v. Federal Communications Commission*, 15 F.3d 186 (D.C. Cir. 1994).

[25] *Action for Children's Television v. Federal Communications Commission (ACT III)*, 58 F.3d 654 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1043 (1996). Public broadcast stations that went off the air after 10 p.m. were eligible for an exception to the rule requiring indecent programming to be aired only between the hours of midnight and 6 a.m. P.L. 102-356, § 16(a).

[26] 58 F.3d at 656.

[27] *Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. §1464*, 10 F.C.C. Rcd. 10558 (1995); 47 C.F.R. 73.3999(b). Subsection (b) prohibits the broadcast of material which is obscene without any reference to time of day. Broadcast obscenity will not be discussed in this report. For more information on obscenity, see CRS Report 95-804, *Obscenity and Indecency: Constitutional Principles and Federal Statutes*, by Henry Cohen, and CRS Report 98-670, *Obscenity, Child Pornography, and Indecency: Brief Background and Recent Developments*, by Kathleen Ann Ruane.

[28] 60 FR 44439 (August 28, 1995).

[29] Enforcement actions based on televised broadcast indecency are rare. However, the commission recently issued a *Notice of Apparent Liability* for the broadcast of indecent material during a televised morning news program. During the program, the show's hosts interviewed performers with a production entitled "Puppetry of the Penis," who appeared wearing capes but were otherwise nude. A performer's penis was exposed during the broadcast. *See In the Matter of Young Broadcasting of San Francisco, Inc.*, File No. EB-02-IH-0786 (January 27, 2004). *See also In the Matter of Complaints Against Various Licensees Regarding Their Broadcast of the Fox Television Network Program "Married by America" on April 7, 2003*, File No. EB-03-IH-0162 (October 12, 2004).

[30] Under 47 U.S.C. §503(b)(2)(A), the maximum fine per violation is $25,000. However, the maximum forfeiture amount was increased to $32,500 pursuant to the Debt Collection Improvement Act of 1996, P.L. 104-134, which amended the Federal Civil Monetary Penalty Inflation Adjustment Act of 1990, P.L. 101-410. *See* 47 C.F.R. §1.80.

[31] Regulations set a maximum forfeiture of $325,000 for any single act or failure to act, which arguably limits the forfeiture for a single broadcast. *See* 47 C.F.R. §1.80.

Fines may be levied against broadcast stations, but not against broadcast networks. The FCC appears also to have the statutory authority to fine performers for uttering indecent words,[32] but it has taken the position that "[c]ompliance with federal broadcast decency restrictions is the responsibility of the station that chooses to air the programming, not the performers."[33]

On June 15, 2006, the President signed S. 193, 109th Congress, into law, and it became P.L. 109-235, the Broadcast Decency Enforcement Act of 2005. This law increased the penalty for indecent broadcasts tenfold, to $325,000 for each violation, with a maximum of $3 million "for any single act or failure to act." This increased penalty may be levied against "a broadcast station licensee or permittee; or ... an applicant for any broadcast license, permit, certificate, or other instrument or authorization issued by the Commission." If the FCC were to change its policy and impose fines on performers, it could apparently do so only under the provision (which remains in effect) that authorizes forfeitures of up to $32,500 per violation.[34]

To determine whether broadcast material is in fact indecent, the Commission must make two fundamental determinations: (1) that the material alleged to be indecent falls within the subject matter scope of the definition of indecency—the material in question must describe or depict sexual or excretory organs or activities; and (2) that the broadcast is patently offensive as measured by contemporary community standards for the broadcast medium.[35] If the material in question does not fall within the subject matter scope of the indecency definition, or if the broadcast occurred during the "safe harbor" hours (between 10 p.m. and 6 a.m.), the complaint is usually dismissed. However, if the Commission determines that the complaint meets the subject matter requirements and was aired outside the "safe harbor" hours, the broadcast in question is evaluated for patent offensiveness. The Commission notes that in determining whether material is patently offensive, the full context is very important, and that such determinations are highly fact-specific.

The Commission has identified three factors that have been significant in recent decisions in determining whether broadcast material is patently offensive:

> (1) the explicitness or graphic nature of the description or depiction of sexual or excretory organs or activities; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; (3) whether the material appears to pander or is used to titillate, or whether the material appears to have been presented for its shock value.[36]

A discussion of cases that address each of these factors follows.

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[32] 47 U.S.C. §503(b)(1)(D) provides that the FCC may impose a forfeiture penalty upon any "person" who violates 18 U.S.C. §1464, which makes it a crime to "utter" indecent language. In addition, 47 U.S.C. §503(b)(6)(B) provides that the FCC may not impose a forfeiture penalty on a person who does not hold a broadcast station license if the violation occurred more than one year prior to the date of issuance of the required notice or notice of apparent liability. This suggests that the FCC may fine a performer if the violation occurred within one year of such date.

[33] *Complaints Against Various Television Licensees Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show*, File No. EB-04-IH-0011 (September 22, 2004) http://www.fcc.gov/eb/Orders/2004/FCC-04-209A1.html.

[34] *See* note 42, *supra*.

[35] *See In the Matter of Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. §1464 and Enforcement Policies Regarding Broadcast Indecency*, File No. EB-00-IH-0089 (April 6, 2001) http://www.fcc.gov/eb/Orders/2001/fcc01090.html.

[36] *Id.*

Explicitness or Graphic Nature of Material

Generally, the more explicit or graphic the description or depiction, the greater the likelihood that the material will be deemed patently offensive and therefore indecent. For example, the Commission imposed a forfeiture on a university radio station for airing a rap song that included a line depicting anal intercourse.[37] In that case, the commission determined that the song described sexual activities in graphic terms that were patently offensive and therefore indecent. Since the song was broadcast in the mid-afternoon, there was a reasonable risk that children were in the audience, thus giving rise to the commission's action.[38]

Broadcasts need not be as graphic as the song in the above case to give rise to the imposition of an FCC forfeiture. Broadcasts consisting of double entendres or innuendos may also be deemed indecent if the "sexual or excretory import is unmistakable." The FCC issued a notice of apparent liability and imposed forfeiture on several stations for airing a song that included the following lines: "I whipped out my Whopper and whispered, Hey, Sweettart, how'd you like to Crunch on my Big Hunk for a Million Dollar Bar? Well, she immediately went down on my Tootsie Roll and you know, it was like pure Almond Joy."[39] The Commission determined that the material was indecent even though it used candy bar names to substitute for sexual activities. In one notice concerning the broadcast of the song, the Commission stated that "[w]hile the passages arguably consist of double entendre and indirect references, the language used in each passage was understandable and clearly capable of specific sexual meaning and, because of the context, the sexual import was inescapable."[40] The nature of the lyrics, coupled with the fact that the song aired between 6 a.m. and 10 p.m., gave rise to the imposition of a forfeiture.

Dwelling or Repetition of Potentially Offensive Material

Repetition of and persistent focus on a sexual or excretory activity could "exacerbate the potential offensiveness of broadcasts." For example, the FCC issued a notice of apparent liability and imposed forfeiture on a radio station that broadcast an extensive discussion of flatulence and defecation by radio personality "Bubba, the Love Sponge."[41] Though the broadcast did not contain any expletives, the Commission found that the material dwelt on excretory activities and therefore was patently offensive.

While repetition can increase the likelihood that references to sexual or excretory activities are deemed indecent, where such references have been made in passing or are fleeting in nature, the commission has found that the reference was not indecent even when profanity has been used.[42] For example, the Commission determined that the following phrase—"The hell I did, I drove

[37] *Notice of Apparent Liability, State University of New York*, 8 F.C.C. Rcd. 456 (1993).

[38] *Id*.

[39] *Notice of Apparent Liability, KGB Incorporated*, 7 F.C.C. Rcd. 3207 (1992). *See also Great American Television and Radio Company, Inc.*, 6 F.C.C. Rcd. 3692 (1990); *WIOD, Inc.*, 6 F.C.C. Rcd. 3704 (1989).

[40] 6 F.C.C. Rcd. 3692.

[41] *Notice of Apparent Liability, Citicasters Co.*, 13 F.C.C. Rcd. 22004 (1998).

[42] The commission has recently indicated that "the mere fact that specific words or phrases are not sustained or repeated does not mandate a finding that material that is otherwise patently offensive to the broadcast medium is not indecent." *In the Matter of Complaints Against Various Broadcast Licensees Regarding the Airing of the "Golden Globe Awards" Program*, File No. EB-03-IH-0110 (March 18, 2004). *See* section entitled "Golden Globe Awards Decision," below.

mother-f[***]er, oh."—uttered by an announcer during a radio morning show, was not indecent.[43] The Commission declined to take action regarding the broadcast because it contained only a "fleeting and isolated utterance ... within the context of live and spontaneous programming."[44] Certain fleeting references may, however, be found indecent where other factors contribute to the broadcast's patent offensiveness. For example, the Commission has imposed forfeitures on stations for airing jokes that refer to sexual activities with children.[45]

Pandering or Titillating Nature of Material

In determining whether broadcast material is indecent, the commission also looks to the purpose for which the material is being presented. Indecency findings generally involve material that is presented in a pandering or titillating manner, or material that is presented for the shock value of its language. For example, the Commission deemed a radio call-in survey about oral sex to be indecent based in part on the fact that the material was presented in a pandering and titillating manner.[46]

Whether a broadcast is presented in a pandering or titillating manner depends on the context in which the potentially indecent material is presented. Explicit images or graphic language does not necessarily mean that the broadcast is being presented in a pandering or titillating manner. For example, the commission declined to impose forfeiture on a television station for airing portions of a high school sex education class that included the use of "sex organ models to demonstrate the use of various birth control devices."[47] In dismissing the complaint, the commission held that, "[a]lthough the program dealt with sexual issues, the material presented was clinical or instructional in nature and not presented in a pandering, titillating, or vulgar manner."[48]

Golden Globe Awards Decision

On January 19, 2003, broadcast television stations in various parts of the country aired the Golden Globe Awards. During the awards, the singer Bono,[49] in response to winning an award, said, "this is really, really f[***]ing brilliant."[50] Following this event, the FCC received over 230 complaints alleging that the program was obscene or indecent, and requesting that the commission impose sanctions on the licensees for the broadcast of the material in question.[51]

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[43] *L.M. Communications of South Carolina, Inc.*, 7 F.C.C. Rcd. 1595 (1992).

[44] *Id*.

[45] *See Notice of Apparent Liability, Temple Radio, Inc.*, 12 F.C.C. Rcd. 21828 (1997); *Notice of Apparent Liability, EZ New Orleans, Inc.*, 12 F.C.C. Rcd. 4147 (1997).

[46] *Notice of Apparent Liability, Rusk Corporation, Radio Station KLOL*, 5 F.C.C. Rcd. 6332 (1990).

[47] *In the Matter of Application for Review of the Dismissal of an Indecency Complaint Against King Broadcasting Co.*, 5 F.C.C. Rcd. 2971 (1990).

[48] *Id*.

[49] Bono's real name is Paul Hewson.

[50] See *In the Matter of Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 18 F.C.C. Rcd. 19859 (2003).

[51] *Id.* at 2.

The Enforcement Bureau of the FCC issued a *Memorandum Opinion and Order* on October 3, 2003, denying the complaints and finding that the broadcast of the Golden Globe Awards including Bono's utterance did not violate federal restrictions regarding the broadcast of obscene and indecent material.[52] The bureau dismissed the complaints primarily because the language in question did not describe or depict sexual or excretory activities or organs. The bureau noted that while "the word 'f[***]ing' may be crude and offensive," it "did not describe sexual or excretory organs or activities. Rather, the performer used the word 'f[***]ing' as an adjective or expletive to emphasize an exclamation."[53] The bureau added that in similar circumstances it "found that offensive language used as an insult rather than as a description of sexual or excretory activity or organs is not within the scope of the commission's prohibition on indecent program content."[54]

The decision of the Enforcement Bureau was met with opposition from a number of organizations and Members of Congress, and an appeal was filed for review by the full commission. FCC Chairman Michael Powell asked the full commission to overturn the Enforcement Bureau's ruling.[55] On March 18, 2004, the full commission issued a *Memorandum Opinion and Order* granting the application for review and reversing the Enforcement Bureau's earlier opinion.[56] The Commission found that the broadcasts of the Golden Globe Awards violated 18 U.S.C. 1464, but declined to impose a forfeiture on the broadcast licensees because the order reversed Commission precedent regarding the broadcast of the "F-word."

The Commission concluded that the broadcast of the Golden Globe Awards did include material that violated prohibitions on the broadcast of indecent and profane material.[57] In reversing the bureau, the Commission determined that the "phrase at issue is within the scope of our indecency definition because it does depict or describe sexual activities."[58] Although the commission "recognize[d] NBC's argument that the 'F-Word' here was used 'as an intensifier,'" it nevertheless concluded that, "given the core meaning of the 'F-Word,' any use of that word or a variation, in any context, inherently has a sexual connotation, and therefore falls within the first prong of our indecency definition."[59]

Upon finding that the phrase in question fell within the first prong of the definition of "indecency," the Commission turned to the question of whether the broadcast was patently offensive under contemporary community standards for the broadcast medium. The commission determined that the broadcast was patently offensive, noting that "[t]he 'F-Word' is one of the most vulgar, graphic and explicit descriptions of sexual activity in the English language," and that

[52] *Id*.

[53] *Id.* at 3.

[54] *Id*.

[55] "FCC Chairman Seeks Reversal on Profanity," *Washington Post*, January 14, 2004, at E01.

[56] *In the Matter of Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, File No. EB-03-IH-0110 (March 18, 2004).

[57] The commission declined to impose a forfeiture on the broadcast licensees named in the complaint because they were not "on notice" regarding the new interpretations of the commission's regulations regarding broadcast indecency and the newly adopted definition of profanity. The commission also indicated that it will not use its decision in this case adversely against the licensees during the license renewal process.

[58] *In the Matter of Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, File No. EB-03-IH-0110 at 4 (March 18, 2004).

[59] *Id*. Similarly, in March, 2006, the FCC decided that "s[***]" has an "inherently excretory connotation" and therefore could not be used from 6 a.m. to 10 p.m. See, *@$#&*% Ken Burns! PBS Scrubbing G.I. Mouths With Soap*, New York Observer, October 2, 2006, p. 1.

"[t]he use of the 'F-Word' here, on a nationally telecast awards ceremony, was shocking and gratuitous."[60] The Commission also rejected "prior Commission and staff action [that] have indicated that isolated or fleeting broadcasts of the 'F-Word' such as that here are not indecent or would not be acted upon," concluding "that any such interpretation is no longer good law."[61] The commission further clarified its position, stating "that the mere fact that specific words or phrases are not sustained or repeated does not mandate a finding that material that is otherwise patently offensive to the broadcast medium is not indecent."[62]

In addition to the determination that the utterance of the word "f[***]ing" during the Golden Globe Awards was indecent, the Commission also found, as an independent ground for its decision, that use of the word was "profane" in violation of 18 U.S.C. 1464.[63] In making this determination, the Commission cited dictionary definitions of "profanity" as "'vulgar, irreverent, or coarse language,'"[64] and a Seventh Circuit opinion stating that "profanity" is "'construable as denoting certain of those personally reviling epithets naturally tending to provoke violent resentment or denoting language so grossly offensive to members of the public who actually hear it as to amount to a nuisance.'"[65] The Commission acknowledged that its limited case law regarding profane speech has focused on profanity in the context of blasphemy, but stated that it would no longer limit its definition of profane speech in such manner. Pursuant to its adoption of this new definition of "profane," the Commission stated that, depending on the context, the "'F-Word' and those words (or variants thereof) that are as highly offensive as the 'F-Word'" would be considered "profane" if broadcast between 6 a.m. and 10 p.m.[66] The Commission noted that other words would be considered on a case-by-case basis. This new policy became the subject of an appeal before the Second Circuit Court of Appeals and the Supreme Court.

Super Bowl Halftime Show Decision

On February 1, 2004, CBS aired Super Bowl XXXVIII, with a halftime show produced by the MTV network. The show included performers singing and dancing provocatively, and ended with the exposure of the breast of one female performer, Janet Jackson. The network received numerous complaints regarding the halftime performance, and FCC Chairman Michael Powell initiated a formal investigation into the incident.[67]

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[60] *Id*. at 5.

[61] *Id*. at 6. *See* section entitled "Dwelling or Repetition of Potentially Indecent Material," above.

[62] *Id*.

[63] *Id*. at 7. Although in this case the commission found that the broadcast in question was both indecent and profane, there are certain to be words that could be deemed "profane," but do not fit the commission's definition of "indecent." Under the newly adopted definition of "profanity," many words could arguably be found "profane" because they provoke "violent resentment" or are otherwise "grossly offensive," but not be found "indecent" because they do not refer to any sexual or excretory activity or organ or even "inherently" have a sexual connotation, as the commission found the phrase that Bono uttered to have. Presumably, it is these words that the commission will consider on a case-by-case basis.

[64] *Id*. at 7, citing Black's Law Dictionary 1210 (6th ed. 1990) and American Heritage College Dictionary 1112 (4th ed. 2002).

[65] *Id*., citing *Tallman v. United States*, 465 F.2d 282, 286 (7th Cir. 1972).

[66] *Id*.

[67] http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-243435A1.pdf.

On September 22, 2004, the FCC released a *Notice of Apparent Liability for Forfeiture* finding that the airing of the Super Bowl halftime show "apparently violate[d] the federal restrictions regarding the broadcast of indecent material."[68] The *NAL* imposed a forfeiture in the aggregate amount of $550,000 on Viacom Inc., the licensee or ultimate parent of the licensees with regard to whom the complaint was filed.[69] On March 15, 2006, the FCC issued a *Forfeiture Order* imposing a mandatory forfeiture in the amount of $550,000 on CBS for the airing of the 2004 Super Bowl halftime show. CBS appealed to the U.S. Court of Appeals for the Third Circuit, which, in 2008, invalidated the fine, but, in 2009, the Third Circuit's decision was vacated by the Supreme Court.[70] This case is discussed in greater detail below.

As noted above, on September 22, 2004, the FCC released a *Notice of Apparent Liability for Forfeiture* imposing a $550,000 forfeiture on several Viacom-owned CBS affiliates for the broadcast of the Super Bowl XXXVIII halftime show on February 1, 2004, in which a performer's breast was exposed.[71] The commission determined that the show, which was aired at approximately 8:30 p.m. Eastern Standard Time, violated its restrictions on the broadcast of indecent material.

In its analysis, the Commission determined that since the broadcast included a performance that culminated in "on-camera partial nudity," and thus satisfied the first part of the indecency analysis, further scrutiny was warranted to determine whether the broadcast was "patently offensive as measured by contemporary community standards for the broadcast medium."[72] The Commission found that the performance in question was "both explicit and graphic," and rejected the licensees' contention that since the exposure was fleeting, lasting only 19/32 of a second, it should not be deemed indecent.[73] In determining whether the material in question was intended to "pander to, titillate and shock the viewing audience," the commission noted that the performer's breast was exposed after another performer sang, "gonna have you naked by the end of this song."[74] The Commission found that the song lyrics, coupled with simulated sexual activities during the performance and the exposure of the breast, indicated that the purpose of the performance was to pander to, titillate and shock the audience, and the fact that the actual exposure of the breast was brief, as noted above, was not dispositive.[75]

The Commission ordered each Viacom-owned CBS affiliate to pay the statutory maximum forfeiture of $27,500 for the broadcast, for a total forfeiture of $550,000. The forfeiture was

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[68] *Complaints Against Various Television Licensees Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show*, File No. EB-04-IH-0011 (September 22, 2004) http://www.fcc.gov/eb/Orders/2004/FCC-04-209A1.html.

[69] *Id*.

[70] CBS Corp. v. Federal Communications Commission, 535 F.3d 167 (3d Cir. 2008), *vacated and remanded*, No. 08-653 (U.S. May 4, 2009).

[71] *Complaints Against Various Television Licensees Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show*, File No. EB-04-IH-0011 (September 22, 2004) http://www.fcc.gov/eb/Orders/2004/FCC-04-209A1.html.

[72] *Id.* at ¶ 11.

[73] *Id*. at ¶ 13.

[74] *Id.* at ¶ 14.

[75] *Id.*

imposed on the Viacom-owned affiliates because of Viacom's participation in and planning of the Super Bowl halftime show with MTV networks, another Viacom subsidiary.[76]

Following the issuance of the *Notice of Apparent Liability for Forfeiture*, the affiliates are "afforded a reasonable period of time (usually 30 days from the date of the notice) to show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture."[77] CBS filed an opposition to the Notice of Apparent Liability on November 5, 2004. The opposition challenged the forfeiture on various grounds, including that the test for indecency was not met and that the forfeiture violates the First Amendment.

On March 15, 2006, the FCC issued a *Forfeiture Order* imposing a mandatory forfeiture in the amount of $550,000 on CBS for the airing of the 2004 Super Bowl halftime show.[78] CBS appealed to the U.S. Court of Appeals for the Third Circuit, which, on July 21, 2008, invalidated the fine, but, on May 4, 2009, the Supreme Court vacated the Third Circuit's decision.[79] The court's decision is discussed in greater detail below.

Supreme Court and Appeals Court Decisions in the Fleeting Expletive and Fleeting Image Cases

Two major cases were decided by federal courts of appeals in 2007 and 2008. Both cases invalidated forfeiture orders the FCC had issued against broadcasters for transmitting fleeting indecent material over the airwaves. The first decision, in a case known as *Fox Television v. FCC*, was decided by the Second Circuit and invalidated the FCC's policy on fleeting expletives as a violation of the Administrative Procedure Act. The facts of the case surrounded three broadcasts that the FCC determined to be indecent under the standard it had announced in its *Golden Globes* decision, discussed above. In April of 2009, the Supreme Court overturned the Second Circuit's first decision and remanded the case to the Second Circuit for proceedings consistent with the Supreme Court's opinion. Upon reconsideration, the Second Circuit struck down the FCC's indecency policy for violating the First Amendment. The Supreme Court agreed that the fines at issue in the case were unconstitutional in the particular cases before the Court, but did not decide whether the FCC's policy towards fleeting expletives violated the Constitution in general.

In the second appeals court decision, *CBS v. FCC*, the Third Circuit invalidated the FCC's policy relating to fleeting indecent images as a violation of the Administrative Procedure Act. The facts of the case surrounded the Superbowl Halftime Show discussed above. That case was appealed to the Supreme Court, but prior to hearing the case, the Court rendered its decision in *Fox Television*. The Supreme Court, therefore, ordered the Third Circuit to reconsider the Superbowl Halftime Show case in light of *Fox Television*. The Third Circuit has affirmed its decision, finding that the Supreme Court decision in *Fox Television* did not change the outcome of its previous

[76] *Id*. at ¶¶ 17 - 24.

[77] 47 C.F.R. §1.80(f)(3).

[78] *In the Matter of Complaints Against Various Television Licensees Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show*, File No. EB-04-IH-0011, FCC 06-19 (March 15, 2006).

[79] CBS Corp. v. Federal Communications Commission, 535 F.3d 167 (3d Cir. 2008), *vacated and remanded*, No. 08-653 (U.S. May 4, 2009).

determination. This section will discuss these cases, beginning with the Supreme Court decision in *Fox Television*.

FCC v. Fox Television, Inc. (First Supreme Court Decision, 2009)

The FCC had taken action against, among other broadcasts, two award show incidents, described in an Associated Press article as, "a December 9, 2002, broadcast of the Billboard Music Awards in which singer Cher used the phrase, 'F—'em,' and a December 10, 2003, Billboard awards show in which reality show star Nicole Richie said: 'Have you ever tried to get cow s—out of a Prada purse? It's not so f——simple.'"[80] These incidents raised two main questions: whether a fleeting, isolated, and non-literal expletive is "indecent" under federal law, and, if so, whether the First Amendment permits the FCC to enforce the law by punishing broadcasters for such utterances. It is important to note that these incidents were broadcast prior to the FCC issuing its decision to bring enforcement actions against fleeting indecent occurrences in *Golden Globes*.

On June 4, 2007, the U.S. Court of Appeals for the Second Circuit, in a 2-1 decision, found "that the FCC's new policy regarding 'fleeting expletives' represent[ed] a significant departure from positions previously taken by the agency and relied on by the broadcast industry."[81] The court further found "that the FCC ha[d] failed to articulate a reasoned basis for this change in policy. Accordingly, [the court held] that the FCC's new policy regarding 'fleeting expletives' [was] arbitrary and capricious under the Administrative Procedure Act."[82] Having overturned the FCC policy on statutory grounds, the court had no occasion to decide whether it also violated the First Amendment. It explained, however, why it was "skeptical that the Commission can provide a reasonable explanation for its 'fleeting expletive' regime that would pass constitutional muster."[83] The final section of this report examines this aspect of the court's opinion.

On April 28, 2009, the Supreme Court, in a 5-4 ruling, overturned the decision of the Second Circuit.[84] The Court found that the policy shift of the FCC was "entirely rational."[85] The Court found that the Second Circuit had relied on an erroneous interpretation of Supreme Court precedent when measuring the adequacy of the FCC's reasoning for its policy shift. According to the Court, the Second Circuit had applied a heightened standard of review to agency decisions that effect changes in prior policy. The Second Circuit interpreted that Supreme Court precedent to require the agency to articulate "why the new rule effectuates the statute as well or better than the old rule."[86]

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[80] Larry Neumeister, *Appeals court panel grills government lawyer in indecency case*, Associated Press State & Local Wire (December 20, 2006).

[81] Fox Television Stations, Inc. v. Federal Communications Commission, 489 F.3d 444, 447 (2d Cir. 2007), *reversed and remanded*, 129 S. Ct. 1800 (2009).

[82] *Id*.

[83] *Id*. at 462.

[84] Federal Communications Commission v. Fox Television Stations, Inc., 129 S. Ct. 1800 (2009).

[85] *Id*. at 1812.

[86] *Id*. at 1810 (discussing *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Autmobile Ins. Co.*, 463 U.S. 29, 43 (1983)). Justice Breyer, in dissent, disagreed with this interpretation of *State Farm*. He argued that, when an agency changes its rules, it must focus on the fact of the change and explaining the change and its basis, which is more than explaining why the new policy is a good one and in keeping with the statute. It includes answering why the change has occurred. In Justice Breyer's opinion, such a requirement does not create a heightened standard, but applies the same standard to different circumstances. According to Justice Breyer, the FCC's failure to adequately explain why (continued...)

The Supreme Court found no basis in its precedent or in the Administrative Procedure Act for such a requirement. The Court explained that the opinion upon which the Second Circuit had relied did not require agencies to articulate reasons for policy changes that were more substantial than those required to adopt a policy in the first instance. The precedent held, rather, that new actions required "a reasoned analysis for the change beyond that which may be required when an agency *does not act* in the first instance."[87] The FCC need not have demonstrated that the reasons for its new policies were better than the reasons for the old one. It was sufficient for the agency to show that the new policy is permissible under the statute; there are good reasons for it; and the agency believes it to be better, "which the conscious change of course adequately indicates."[88]

Applying this standard to the FCC's rule change, the Court found that the FCC's actions were not arbitrary or capricious. The FCC acknowledged that its actions represented a shift from prior policy. The Court also found the agency's reasons for its policy change were "entirely rational," because it was not unreasonable to treat literal and nonliteral uses of expletives in the same way. It was also reasonable, in the Court's estimation, to find even isolated utterances to fit within the definition of indecency. As a result, the Court upheld the FCC's new policy on enforcement of "fleeting expletives." The Court, however, declined to rule on the constitutionality of the policy.[89]

Regarding the issue of constitutionality, the Court noted the dicta of the Second Circuit. The Second Circuit, having overturned the FCC policy on statutory grounds, had no occasion to decide whether it also violated the First Amendment. In dicta, however, it explained why it was "skeptical that the Commission can provide a reasonable explanation for its 'fleeting expletive' regime that would pass constitutional muster."[90]

The court wrote that it was:

> sympathetic to the Networks' contention that the FCC's indecency test is undefined, indiscernible, inconsistent, and consequently, unconstitutionally vague.... We also note that the FCC's indecency test raises the separate constitutional question of whether it permits the FCC to sanction speech based on its subjective view of the merit of that speech. It appears that under the FCC's current indecency regime, any and all uses of an expletive is presumptively indecent and profane with the broadcaster then having to demonstrate to the satisfaction of the Commission, under an unidentified burden of proof, that the expletives were "integral" to the work. In the licensing context, the Supreme Court has cautioned against speech regulations that give too much discretion to government officials.... Finally, we recognize that there is some tension in the law regarding the appropriate level of First Amendment scrutiny. In general, restrictions on First Amendment liberties prompt courts to apply strict scrutiny.... At the same time, however, the Supreme Court has also considered broadcast media exceptional.... Nevertheless, we would be remiss not to observe that it is increasingly difficult to describe the broadcast media as uniquely pervasive and uniquely

(...continued)

it changed policy directions rendered the policy arbitrary and capricious. Id. at 1829.

[87] *Id*. at 1810 (emphasis in original).

[88] *Id*. at 1811.

[89] *Id*. at 1819. In a concurring opinion, Justice Thomas suggested that the viability of the precedents supporting the constitutionality of the FCC's indecency policy may be in doubt. Id. at 1819-22. Justice Thomas therefore appears open to the reconsideration of these precedents.

[90] *Id*. at 462.

> accessible to children, and at some point in the future, strict scrutiny may properly apply in the context of regulating broadcast television.[91]

With respect to the Second Circuit's dicta regarding the First Amendment question, the Supreme Court wrote,

> It is conceivable that the Commission's orders may cause some broadcasters to avoid certain language that is beyond the Commission's reach under the Constitution. Whether that is so, and, if so, whether it is unconstitutional, will be determined soon enough, perhaps in this very case. Meanwhile, any chilled references to excretory and sexual material "surely lie at the periphery of First Amendment concern," *Pacifica*, 438 U.S., at 743 (plurality opinion of Stevens, J.). We see no reason to abandon our usual procedures in a rush to judgment without a lower court opinion. We decline to address the constitutional questions at this time.[92]

On July 13, 2010, the Second Circuit, as discussed below, invalidated the FCC's policy because the court determined it to be unconstitutionally vague.[93]

Fox Television, Inc. v. FCC (Second Circuit Decision, Following Remand from Supreme Court, 2010)

As a result of the Supreme Court's decision in *FCC v. Fox Television*, described above, the case was remanded to the Second Circuit Court of Appeals for consideration of whether the FCC's indecency policy violated the First Amendment.[94] On July 13, 2010, a three-judge panel struck down the FCC's indecency policy because the court determined it to be unconstitutionally vague. The panel noted that a law is impermissibly vague "if it does not 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited.'"[95] While the vagueness doctrine does not require perfect clarity, it requires the law to give persons notice of what is prohibited and what is not. The panel found that the FCC's policy lacked such notice because it was impossible to determine what the FCC would find to be "patently offensive" prior to broadcast, and the application of the exceptions to the FCC's presumptive prohibitions on two particular expletives were equally difficult to predict.

The court reached this conclusion by surveying the FCC's enforcement of its indecency policy, since its amendments of the policy in 2001. The court lists a number of instances, occasionally within the same program, where some words that referred to sexual organs or excretion were patently offensive (bull***t), and other words that referred to sexual organs or excretion were not (d**k and d***head).[96] In surveying the orders determining which expletives were permissible, the court could find no explanation offered by the FCC for why certain words were impermissibly indecent, while others were not.

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[91] *Id*. at 463-465.

[92] Federal Communications Commission v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1819 (2009).

[93] Fox Television Stations, Inc. v. Federal Communications Commission, 613 F. 3d 317 (2d Cir. 2010).

[94] Fox Television Stations, Inc. v. Federal Communications Commission, 613 F. 3d 317 (2d Cir. 2010).

[95] *Id*. at 327 quoting Farrell v. Burke, 449 F. 3d 470, 485 (2d Cir. 2006)(quoting Grayned v. City of Rockford, 408 U.S. 104, 108 (1972)).

[96] *Id*. at 330.

The FCC argued that because it could not anticipate what broadcasters would say prior to broadcast, flexibility was necessary to determine what was indecent after the fact.[97] The court, however, seemed to find this argument to contribute to its finding that the policy was impermissibly vague. "If the FCC cannot anticipate what is indecent under its policy, it can hardly expect broadcasters to do so," the court found.[98]

Even where the policy stated a presumptive violation of the indecency policy, the court found the policy to be vague.[99] The FCC has a presumptive prohibition on the use of the words "f***" and "sh**" outside of the safe harbor; however, there are two exceptions: the bona fide news exception and the artistic necessity exception. The court found it difficult to discern when either exception applied. For example, the use of these words in a broadcast of the fictional movie, *Saving Private Ryan*, did not violate the FCC's indecency policy because they fell under the artistic necessity exception. However, the use of these same words in the documentary "The Blues" did violate the policy and did not qualify for the exception. The court asked "how fleeting expletives could be more essential to the 'realism' of a fictional movie than to the 'realism' of interviews with real people about real life events."[100] The court continued, stating "it is hard not to speculate that the FCC simply was more comfortable with the themes in" *Saving Private Ryan*, raising the specter of censorship concerns.[101] The court avoided accusing the FCC of suppressing particular viewpoints, but noted that "nothing would prevent the FCC from applying its indecency policy in a discriminatory manner in the future."[102] The court also pointed out inconsistent applications of the bona fide news exception. The court cited an instance wherein the FCC found the use of one of the presumptively prohibited words to be indecent because it was uttered during a morning news program, only for the FCC to reverse its decision and find that the use of the word was not indecent *because it was used during a morning news program*.[103]

The panel noted that the FCC's policy had a significant chilling effect on the speech of broadcasters and noted a number of programs that broadcasters had refused to air for fear of violating the policy. "By prohibiting all 'patently offensive' references to sex, sexual organs, and excretion without giving adequate guidance as to what 'patently offensive' means, the FCC effectively chills speech, because broadcasters have no way of knowing what the FCC will find offensive."[104] Thus, the court struck down the policy.

Notably, the court did not decide whether it was unconstitutional to punish "fleeting expletives" or single uses of an indecent word or image. Instead, the court invalidated the FCC's entire indecency policy as impermissibly vague, a broader decision than might have been expected under the facts of the case. The decision was appealed to the Supreme Court, and the Court's decision is discussed below.

[97] *Id*. 331.
[98] *Id*.
[99] *Id*.
[100] *Id*. at 332.
[101] *Id*.
[102] *Id*.
[103] *Id*. at 331.
[104] *Id*. at 334.

CBS Corp. v. FCC (First Third Circuit Decision, Prior to Supreme Court Remand, 2009)

On July 21, 2008, a year after the Second Circuit had rendered its initial decision invalidating the FCC's policy toward "fleeting expletives," the U.S. Court of Appeals for the Third Circuit issued a unanimous decision to invalidate the FCC's fine against CBS broadcasting station affiliates for the broadcast of the Super Bowl Halftime Show that included a brief instance of partial nudity.[105] The court decided to invalidate the fine because the FCC had acted arbitrarily and capriciously when finding that the brief nudity was actionably indecent.

In its review of the FCC's previous actions in this area, the court noted that the FCC has the power to regulate indecency over the broadcast airwaves, but for much of the FCC's history the agency maintained an exception for fleeting instances of indecency.[106] The commission argued that its policy exempting fleeting instances of indecency over broadcast from enforcement applied only to fleeting indecent language and not to images.[107] The FCC claimed that fleeting indecent images had always been subject to enforcement; therefore, there was no departure from the FCC's previous approach to sanctions regarding such images. As a result, the FCC argued that the agency did not have to articulate a reasoned basis for its shift in policy, and it provided none.

The court examined the FCC's claim that the agency had previously made the distinction between images and language and that indecent fleeting images had always been subject to FCC enforcement.[108] The court found those claims to be unfounded. In its review of the FCC's previous decisions, the court could find no distinction between the way the agency treated fleeting indecent language as opposed to indecent images.[109] The court cited instances in which the FCC declined to issue fines for fleeting indecent images. In declining to institute enforcement actions, the agency had stated that the images were fleeting and covered by its policy of non-enforcement.[110] The court decided, on that basis, that the FCC's decision to consider the fleeting indecent image broadcast during the Halftime Show to be actionable was a shift in the FCC's policy towards the enforcement against such images.

Because the agency had decided to implement a policy shift, the agency was required to articulate a reasoned basis for doing so in order for the departure to be valid under the Administrative Procedure Act.[111] As noted above, the FCC argued that its policy toward fleeting indecent images had not changed. Consequently, the FCC articulated no reason for the shift in policy identified by the court of appeals. Because the FCC provided no basis for its departure from previous enforcement practices, the court held that the deviation from the prior policy of restraining from enforcement against fleeting images was arbitrary and capricious to the extent that it violated the APA.[112] The fine, therefore, could not be imposed on CBS for two reasons. First, the underlying

[105] CBS Corp. v. Federal Communications Commission, 535 F.3d 167 (3d Cir. 2008), *vacated and remanded*, No. 08-653 (U.S. May 4, 2009). For a discussion of the incidents giving rise to the FCC's forfeiture order, see the section entitled "Super Bowl Halftime Show Decision," *supra*.

[106] *Id*. at 174.

[107] *Id*.

[108] *Id.* at 176-184.

[109] *Id*. at 184.

[110] *Id*. at 184-185.

[111] *Id*. at 188-189.

[112] *Id*. at 189.

policy shift was invalid, having no reasoned basis. Second, even if the policy had a reasoned basis, the enforcement action against CBS represented the first time that the FCC had articulated its intention to take action against fleeting indecent images (assuming, as the commission argued, that it had not done so in its *Golden Globes* decision). The new policy could not be applied retroactively to fine CBS in this case.[113] The court did not consider whether a policy punishing fleeting indecent images over broadcast television would violate the First Amendment.

The FCC petitioned the Supreme Court for certiorari.[114] On May 4, 2009, the Court granted the petition, vacated the judgment, and remanded the case to the Third Circuit for further consideration in light of the Supreme Court's decision in *FCC v. Fox Television Stations, Inc.*[115]

CBS Corp. v. FCC (Second Third Circuit Decision, Following Supreme Court Remand, 2011)

Following the remand of the Supreme Court for reconsideration of its decision in light of *Fox Television*, the Third Circuit reconsidered the case. In a 2-1 decision, the panel held that *Fox* confirmed the court's previous decision to invalidate the FCC's policy, and found again that the FCC did not adequately justify its policy change toward fleeting images before imposing a penalty on CBS.[116] The court therefore invalidated the FCC's policy toward fleeting images of indecency.

The majority of the panel began its opinion by explaining why the Supreme Court's decision in *Fox Television* supported the court's decision to reverse the fine imposed on CBS for broadcasting the Halftime Show.[117] In *Fox Television*, the FCC had acknowledged that its enforcement action against the fleeting words at issue was a new policy, and had articulated reasons for its policy change that the Supreme Court upheld as rational and not a violation of the APA.[118] In the first case before the Third Circuit, the FCC was not arguing that there had ever been a shift in the FCC's policy of bringing enforcement actions against fleeting indecent images. As a result, the FCC articulated no basis for a policy change.[119] The agency did not believe that it was required to do so because it believed the action it was taking was consistent with its prior policy toward images such as those broadcast during the Halftime Show. The FCC argued on remand to the Third Circuit that the Court's decision in *Fox Television* supported the FCC's argument that the agency's previous policy regarding fleeting indecency applied only to non-literal expletives and

[113] *Id*. Upon deciding that the FCC's new policy regarding fleeting images was invalid under the APA, the court was not obligated to reach the second question raised by the case, which was whether CBS had properly been held vicariously liable for the actions of the performers. The court chose, however, to address this question in dicta, and determined that, under two of the FCC's theories of vicarious liability, the fine would have been improperly imposed upon the broadcasters. As to a third FCC theory of vicarious liability, which was that the broadcasters had willfully violated the FCC's regulations by failing to take adequate precautionary measures, the court determined that the definition of "willful" was unclear and remanded the question to the FCC for a decision on that issue. *See* CBS Corp. v. FCC, 535 F.3d 167, 189-209 (3d Cir. 2008).

[114] Petition for Writ of Certiorari, *CBS v. FCC*, No. 08-653.

[115] FCC v. CBS Corp., 129 S. Ct. 2176 (2009).

[116] CBS Corp. v. FCC, 2011 U.S. App. LEXIS 22501 (3d Cir. 2011).

[117] *Id*. at *4.

[118] *Id*. at *10.

[119] *Id*. at 11.

not to literal indecency.[120] The FCC also argued that indecent images were, by their nature, literal indecency.

The Third Circuit did not agree, and reiterated its finding that the FCC's historical fleeting indecency policy did not apply only to non-literal expletives.[121] To support its argument, the panel noted an FCC decision to issue a forfeiture order against broadcast stations that had aired a brief image of a man's penis.[122] The FCC began its analysis by acknowledging that the image was fleeting, and conducted its general analysis for whether the enforcement exception should apply. The FCC did not hold that the exception should not apply because the indecency took the form of an image. Instead, the FCC found the broadcast did not fall under the exception because the exposure was meant to pander to the viewers, the station knew in advance that such exposure was part of the act the program would cover, and the station failed to take the proper precautions. Thus, in the panel's opinion, this decision gave evidence to the FCC's belief that the enforcement exception applied to images.[123] Accordingly, the panel found that the Supreme Court's decision in *Fox Television* again struck down the FCC's forfeiture order against the CBS broadcasting affiliates.

Judge Scirica, the author of the previous unanimous Third Circuit decision, dissented on remand. Judge Scirica believed the Supreme Court's decision in *Fox Television* undermined the previous holding in this case because the Supreme Court case "compels the conclusion that the fleeting exemption was limited to a particular type of words."[124] Therefore, the action taken against CBS for the broadcast of an indecent image did not represent a change in policy, and passed muster under the APA.

The case was appealed to the Supreme Court, but the Court denied certiorari.[125]

FCC v. Fox Television (Second Supreme Court Decision, 2012)

Though the Supreme Court denied certiorari to the Third Circuit case, the Court had agreed to review the decision of the Second Circuit, striking down the FCC's policy as a violation of the First Amendment.[126] In June of 2012, the Court issued its decision striking down the rules as applied to the facts before the Court as unconstitutionally vague.[127]

It was widely believed that the Supreme Court would tackle the question of whether the Federal Communications Commission's (FCC's) policy of holding broadcasters liable for even fleeting instances of indecency violated the First Amendment. Whether the policy violated the First Amendment was the first question presented to the Court in the parties' briefs and was debated at length during oral argument before the Justices. However, in the decision the Court handed down

[120] *Id*. at *17.

[121] *Id*. at *27.

[122] *Id*. at *28.

[123] *Id*. at *31.

[124] *Id*. at *92.

[125] FCC v. CBS, Corp., 132 S. Ct. 2677 (2012).

[126] FCC v. Fox Television, Inc., 2011 U.S. LEXIS 4926 (June 27, 2011).

[127] FCC v. Fox Television, Inc. 132 S.Ct. 2307 (2012).

on June 21, 2012, in *FCC v. Fox*, the Court declined to decide whether the FCC's indecency policy violated the First Amendment.

Instead, in a very narrow decision, the Court held that the FCC had violated the Fifth Amendment due process rights of Fox Television and ABC, Inc., because the FCC had not given the broadcasters fair notice that broadcasting the material at issue in those particular cases was forbidden. The FCC's policy towards indecency at the time of the broadcasts was, therefore, unconstitutionally vague. The case turned primarily on the fact that at the time the broadcasts at issue aired, the FCC had not yet made it clear that fleeting instances of indecency could be punishable.

The Court began its analysis by tracing the procedural history of the FCC's indecency policy. The Court recalled that the FCC had a long-stated policy that it would not consider fleeting instances of indecency to be actionable. Furthermore, in 2001, the FCC had issued an industry guidance regarding what material the agency would consider to be indecent. In the guidance, the FCC wrote that whether material referring to sexual or excretory activities was repeated or dwelled upon at length would be one of the main criteria for determining if a broadcast was indecent in violation of the law. This criterion seemed to reinforce the agency's policy that fleeting occurrences of indecent content on broadcast airwaves would not be subject to enforcement actions.

The Court went on to point out that the broadcasts at issue in this case occurred in 2002 and 2003. However, the FCC did not announce its new policy that broadcasters could be held liable for fleeting instances of indecency until 2004. The Commission policy in place at the time of the broadcasts, therefore, gave the broadcasters no notice that a fleeting instance of indecency could be actionably indecent. Due process requires that the government "provide a person of ordinary intelligence fair notice of what is prohibited."[128] With respect to the case at hand, the Court wrote, "this would be true with respect to a regulatory change this abrupt on any subject, but it is surely the case when applied to the regulations in question, regulations that touch upon 'sensitive areas of basic First Amendment freedoms.'"[129] Therefore, the Court found that the broadcasters did not have sufficient notice that the material could be found to be actionably indecent. The Court found the Commission's standard as applied only to the broadcasts at issue in this case to be unconstitutionally vague and set aside the FCC's orders finding that the broadcasts were indecent.

The Court did not decide the question of whether the FCC's indecency policy violates the First Amendment. Because the Court reached its decision on other grounds, the Second Circuit's decision holding the policy to be in violation of the First Amendment was vacated. The Supreme Court noted that its decision would leave the FCC free to modify its indecency policy if it determined such action was in the public interest.

Justice Ginsburg filed a concurring opinion that was joined by Justice Thomas.[130] In her concurrence, Justice Ginsburg made clear that she believes that *FCC v. Pacifica*,[131] the Supreme Court case that found that the FCC could constitutionally regulate indecent speech on broadcast airwaves, was wrongly decided, and that she believes the case should be reconsidered. This

[128] *Id*. at 2317.

[129] *Id*. at 2318 (quoting Baggett v. Bullitt, 377 U.S. 360 (1964)).

[130] *Id*. at 2321 (Ginsburg, J., concurring).

[131] 428 U.S. 726 (1978).

concurrence may prove significant in a future case, should the Supreme Court have the occasion to consider the constitutionality of broadcast indecency regulations while Justice Ginsburg remains on the Court.

Justice Sotomayor took no part in this decision.

Current Status of the FCC's Indecency Policy

Following the Supreme Court decision in 2012, the Chairman of the FCC, Julius Genachowski, instructed the Commission to review its indecency policies, and, in the interim, to focus its enforcement efforts only upon egregious cases.[132] On April 1, 2013, the FCC released a public notice announcing a greatly reduced backlog of broadcast indecency complaints and seeking comment on updating its broadcast indecency enforcement policies.[133]

In the notice, the FCC asks three questions. The first is whether the agency should return to a policy of forbearance from enforcement against isolated expletives. The second is whether the Commission should, instead, maintain the policy that it had announced in the *Golden Globes* decision, which stated that the FCC would, under some circumstances, issue fines for isolated expletives. The last question the FCC poses relates to how the FCC should treat isolated and non-sexual nudity, specifically whether such images should be treated the same, or differently from isolated expletives.

While the Commission is considering these questions, the agency will continue to pursue enforcement actions against egregious cases of broadcast indecency. The comment period will close on May 1, 2013, with reply comments due within the month following that date.

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Acknowledgments

This report was originally written by Henry Cohen, Legislative Attorney.

[132] FCC, Public Notice: FCC Reduces Backlog of Broadcast Indecency Complaints by 70% (More than One Million Complaints); Seeks Comment on Adopting Egregious Cases Policy, Pleading Cycle Established, GN Docket No. 13-86, DA 13-581 (April 1, 2013), available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2013/db0401/DA-13-581A1.pdf.

[133] *Id*.