

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)
)
COMPLAINTS REGARDING VARIOUS)
TELEVISION BROADCASTS BETWEEN)
FEBRUARY 2, 2002 AND MARCH 8, 2005)

COMMENTS OF THE MEDIA INSTITUTE

The Media Institute appreciates the opportunity to comment in the above-captioned proceeding regarding the Commission’s application of its indecency policy to episodes of four television programs that aired between 2002 and 2004, which were the subject, in part, of the Commission’s Omnibus Order released March 15, 2006.¹ The Institute is a nonprofit research foundation that advocates a strong First Amendment and sound communications policy. Thus, our primary concern here will be the constitutional implications surrounding the Commission’s approach to indecency enforcement.

The Commission’s rulings in these four cases show the effect of the greatly expanded indecency and profanity standards announced in its *Golden Globe Awards Order*.² That Order tightened the indecency standard significantly by declaring that any use of the “F-word” has an inherent sexual connotation and thus falls within the Commission’s definition of indecency. The

¹ *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, Notices of Apparent Liability and Memorandum Opinion and Order, FCC 06-17 (March 15, 2006) (“Omnibus Order” or “Order”). The programs at issue are “The 2002 Billboard Music Awards” (Dec. 9, 2002); “The 2003 Billboard Music Awards” (Dec. 10, 2003); “NYPD Blue” (various dates between Jan. 14 and May 6, 2003); and “The Early Show” (Dec. 13, 2004).

² *In the Matter of Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards” Program*, Memorandum Opinion and Order, FCC 04-43 (March 18, 2004) (“*Golden Globe Awards*”).

Order further tightened the indecency standard by declaring that any use of the “S-word” has an inherent excretory connotation that likewise falls within its indecency definition.

In addition, the *Golden Globe* decision announced a vastly broader policy regarding profanity. The Commission found the “F-word” and “S-word” so vulgar and coarse as to be “among the most offensive words in the English language, the broadcast of which is likely to shock the viewer and disturb the peace and quiet of the home.”³ Thus, the Commission declared each word presumptively profane.

Problems With a Fixed Definition. The rulings in these four cases show the difficulty of applying a standard that employs fixed and absolute definitions of terms. Episodes of “NYPD Blue,” for example, were found indecent and profane for using the term “bulls--t.”⁴ While some may find the term offensive, we find it hard to believe that the term necessarily conjures up an excretory image. Likewise, we question whether Bono’s fleeting expletive “f---ing brilliant,” the subject of the seminal *Golden Globe Awards Order*, necessarily invokes sexual imagery.⁵ Our sense is that sometimes an expletive is just an expletive. From a common-sense standpoint, then, applying an indecency standard that relies on fixed definitions of the “F-word” and “S-word” and their derivatives, regardless of how they are used, makes little sense and can yield rather bizarre results.

Problems With a Subjective Approach. The Commission has taken great pains at various times to state that context plays an important role in determining whether it considers language indecent or not. In fact, the Commission has established a three-part test for analyzing the context of material that falls within the scope of its indecency definition: “(1) the explicitness or graphic nature of the description; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; and (3) whether the material panders to,

³ Omnibus Order at paras. 107, 121, 133, 143.

⁴ *Id.* at paras. 126, 133.

⁵ The Enforcement Bureau initially found that Bono’s utterance of “f---ing brilliant” during a live telecast of the Golden Globe Awards Ceremony was not indecent. 18 FCC Rcd. 19859 (2003) (Enforcement Bureau, 2003).

titillates, or shocks the audience.”⁶ The Commission then weighs and balances these factors on a case-by-case basis.⁷

However, this inherently subjective approach carries its own set of problems. The Commission found, for instance, that the otherwise-indecent language in the movie “Saving Private Ryan” was not indecent because of its artistic and dramatic context.⁸ Conversely, the word “bullshit” in the televised dramatic series “NYPD Blue” was found to be indecent, even though it was used as a dramatic tool to add gritty realism to the production.⁹ And interestingly enough, while the Commission found “bullshit” so coarse as to be indecent despite the context, it found that two other expletives used in the show, “dick” and “dickhead,” were “not sufficiently vulgar, explicit, or graphic” to be considered indecent.¹⁰ These obviously inconsistent results point up the difficulty of achieving predictable and consistent findings of indecency when relying on a highly subjective contextual analysis.

Thus, the stricter standards for indecency and profanity announced in *Golden Globe Awards* only exacerbate what has been the Commission’s long-standing and insoluble problem: the practical difficulties of trying to differentiate a category of content unique to the broadcast medium (“indecent” content), and trying to regulate that content by applying standards that inevitably prove too objective or too subjective.

First Amendment Concerns. There is a strong likelihood that this proceeding may devolve into yet another attempt to “tweak” or “fine-tune” the Commission’s indecency policy, by focusing on the minutiae of definitions, multi-part tests, and the like, to yield a “workable” policy that offends the fewest number of interested parties on all sides of the issue. Even if there were a practical mechanism for equitably enforcing broadcast “indecency” (which there is not), we would still have to step back and ask the larger question: “Why is the Commission in the business of policing ‘indecent’ content (a category of its own making) delivered over one particular distribution system (broadcasting)?”

⁶ Omnibus Order at para. 13.

⁷ *Id.*

⁸ *Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004 of the ABC Television Network’s Presentation of the Film “Saving Private Ryan,”* Memorandum Opinion and Order, 20 FCC Rcd 4507, 4512-14, paras. 13-18 (2005).

⁹ *Id.* at para. 131.

¹⁰ *Id.* at para. 127.

From a First Amendment standpoint, the question is “Why indeed?” The Commission’s indecency standard has long been constitutionally suspect as ambiguous and paradoxical, because indecent speech is otherwise protected by the First Amendment. “Indecent” material in magazines, the Internet, and even on cable TV and satellite radio, while undoubtedly offensive to some, still receives the guarantee of constitutional protection.

In its 1978 decision in *Pacifica*, however, the U.S. Supreme Court carved out a constitutional exception for the regulation of broadcast “indecency.” The Court hearkened back to the early days of radio when it called broadcasting “a uniquely pervasive presence in the lives of all Americans”¹¹ – the radio-era notion that broadcast signals could penetrate the ether and invade the privacy of citizens in their own homes. Moreover, the Court said broadcasting was “uniquely accessible to children, even those too young to read.”¹² The Commission contends that both factors “are equally, if not more, applicable today.”¹³

However, we would argue that the Commission misinterprets this idea of pervasiveness and uniqueness. With the explosion of other types of media – cable, satellite, VHS, video-on-demand, DVDs, CDs, personal digital devices, and the Internet – broadcasting is a far less pervasive and unique medium than it once was. There is no longer any reason that broadcasting deserves to be excluded from the full First Amendment protections long afforded other media.

Conclusion. The Commission’s approach to indecency enforcement is based on the now-outdated view of the *Pacifica* Court that broadcasting is uniquely pervasive and thus subject to restrictions on indecent content that would otherwise be constitutionally unacceptable. As a practical matter, the Commission has not been able to define and enforce standards without being arbitrary, ambiguous, inconsistent, and unpredictable. Its latest attempt, in *Golden Globe Awards*, is one of its more onerous efforts.

“Indecent” speech, even if tasteless, crude, or offensive to some, is still speech protected by the First Amendment. Therefore, content-based restrictions on such speech, including the Commission’s indecency policy, must be subject to strict scrutiny.¹⁴ Under this standard, the

¹¹ *FCC v. Pacifica Foundation*, 438 U.S. 726, 748 (1978).

¹² *Id.* at 749.

¹³ Omnibus Order at para. 10.

¹⁴ *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 826 (2000).

regulation must be narrowly tailored to promote a compelling government interest and the government must prove that this is the least restrictive means of achieving its goal.¹⁵

Clearly this is a matter that must ultimately be resolved by the courts. It will be up to the judiciary to: (1) define the scope of the Commission's authority to regulate content; (2) determine if the Commission should clarify its standards for television so that broadcasters can predict how the standards will be applied; (3) consider the impact of new technologies that permit parents to determine what their children can watch; and, most importantly, (4) evaluate the applicability of First Amendment protections, including strict scrutiny.

Until the courts issue clear and timely direction, we urge the Commission to tread lightly in the area of indecency enforcement. Although not likely, a self-imposed stay on all indecency actions would be one alternative. At a minimum, we suggest that the Commission revert to its pre-*Golden Globe* standard of indecency enforcement for which there is substantial precedent (*e.g.*, allowing the use of fleeting expletives). Until the matter is resolved by the courts, it is incumbent upon the Commission to do no further harm to the First Amendment.

Respectfully submitted,

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¹⁵ *Id.*