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## TELECOMMUNICATIONS LAW UPDATES

### FCC Releases Policy Statement on Broadcast Indecency

On April 6, 2001, the Federal Communications Commission released its long-promised Policy Statement on indecency guidelines for the broadcasting industry. While this statement provides some insight into the FCC's substantive and procedural approach to indecency cases, it largely confirms the regulatory landscape that has been in place for the past six years, leaving little doubt that new cases in this area will continue to test the new Commission's enforcement priorities.

#### *The History of Broadcast Indecency Regulation*

Title 18, section 1464 of the United States Code prohibits "any obscene, indecent, or profane language by means of radio communication." "Indecent" speech has been defined as speech that, in context, describes sexual or excretory organs or activities in patently offensive terms as measured by contemporary community standards. The Supreme Court has held that such speech is entitled to some protection under the First Amendment and thus may not be completely banned. On the other hand, "obscene" speech — speech that appeals to a prurient interest in sex, is patently offensive, and does not have any serious cultural value — is not protected by the First Amendment and may not be broadcast at any time.

Congress, the courts, and the FCC have traditionally applied different indecency standards to different media. In the view of the Supreme Court, the invasive and omnipresent nature of television and radio broadcasting has justified a greater level of regulation in that medium as compared with the internet, cable, and telephone services. How these different standards

will work in an age of streaming video, internet radio, and other examples of the "convergence" of different media is not a question the FCC has yet addressed.

The FCC's implementation of section 1464 has been a source of controversy for some 25 years. In *FCC v. Pacifica Foundation*, a 1978 case that involved the radio broadcast of a now famous George Carlin monologue about the "seven dirty words," the Supreme Court held that the FCC's restrictions on "indecent" speech did not violate the First Amendment. For several years after that decision, the FCC did not find any other broadcasts indecent, emphasizing that *Pacifica* was limited to its facts and that it would not expand the indecency rules. However, in 1987, the FCC changed course and decided to "channel" indecent material to after midnight and before 6 a.m. The FCC's rulings were eventually appealed in *Action for Children's Television v. FCC (ACT I)*. In that 1988 decision, the Court of Appeals upheld the FCC's definition of indecent material, but ruled that the FCC's channeling approach was inadequately supported by Commission analysis or data indicating the significant presence of children in the broadcast audience late at night but before midnight.

Soon after *ACT I*, Congress instructed the FCC to enforce the prohibition against indecent material on a 24 hour per day basis. This rule was quickly overturned by the Court of Appeals for the same reason. In response, Congress ordered the FCC to reestablish the midnight to 6 a.m. safe harbor for *commercial* stations, but extend the period from 10 p.m. to 6 a.m. for *non-commercial* stations (many of which go off the air at midnight). The D.C. Circuit upheld the new channeling approach in a 1995 decision, but it found that the

preferential treatment granted to noncommercial stations was unconstitutional. The court ordered the FCC to adopt the 10 p.m. to 6 a.m. period for all broadcasters. This standard is still in place today.

### ***The FCC's Current Approach***

The recently released Policy Statement is the result of a settlement agreement the FCC entered into with Evergreen Media Corporation in 1994. Under the terms of that agreement, the FCC was obligated to publish a set of guidelines explaining the FCC's indecency policies. (Why the Commission took so long to produce the guidelines is an open question, and in a separate statement Commissioner Furchgott-Roth openly expressed his "amazement" that it had taken the FCC so long to fulfill its obligation.) In the statement, the FCC did not alter the indecency standards established by previous Commission decisions and the *ACT* cases, but rather summarized the regulatory history mentioned above and described the general analytical approach the FCC uses in such cases.

In its Policy Statement, the Commission repeatedly emphasizes the fact-specific nature of the indecency inquiry in the statement, noting that the "full context in which the material appeared is critically important." According to the FCC, the factors that have proven significant for a finding of indecency are (1) the explicitness of the material, (2) whether or not the material is repeated at length, and (3) whether the material is used to titillate or presented for its shock value. The simple fact that an expletive or "dirty" word was used is not necessarily the deciding factor — an expletive used in an inadvertent or non-titillating way may be acceptable, while a broadcast that merely consists of innuendo will not automatically be shielded from a finding of indecency. In a famous case, the

repeated use of one particular four-letter word in an NPR broadcast of a taped John Gotti conversation was found not to be indecent because the material was part of a news story and was not intended to titillate the viewer.

The Policy Statement also points out that the FCC does not independently monitor broadcasts; if a listener or viewer feels that indecent material has been broadcasted by a station, the listener must submit a complaint to the FCC with a tape or transcript of the offending show. The Policy Statement acknowledges that many complaints are quickly dismissed without the station ever becoming aware that a complaint was filed.

### ***Conclusion***

It is difficult to pull a guiding principle out of this Policy Statement other than "context is everything." While this approach has the advantage of forcing broadcasters to watch their language while allowing for some wiggle room, judging what is and is not indecent under these rules is not always easy, particularly in the context of the currently popular formats of extemporaneous and unpredictable radio talk shows. Under this approach there is simply no way to say with certainty how the FCC will decide a given case. In addition, this middle ground approach leaves critics on all sides of this debate unhappy: Free speech advocates will still argue that the government has no business regulating indecent speech; advocates for more restrictive regulation (including Commissioner Tristani) will argue that the FCC's approach is too lenient; and the broadcasting industry is left with regulations that are difficult to apply prospectively. Whether this statement is intended mainly as a discharge of a long overdue FCC obligation, or as a shot across the bow by a new FCC, remains to be seen.

**This letter is for general informational purposes only and does not represent our legal advice as to any particular set of facts, nor does this letter represent any undertaking to keep recipients advised as to all relevant legal developments. For further information on these or other telecommunications matters, please contact one of the lawyers listed below:**

**Lynn Charytan**

**202-663-6455**

**[LCharytan@wilmer.com](mailto:LCharytan@wilmer.com)**

**John Harwood**

**202-663-6333**

**[JHarwood@wilmer.com](mailto:JHarwood@wilmer.com)**

**William Lake**

**202-663-6725**

**[WLake@wilmer.com](mailto:WLake@wilmer.com)**

**Jonathan Nuechterlein**

**202-663-6850**

**[JNuechterlein@wilmer.com](mailto:JNuechterlein@wilmer.com)**

**Daniel Phythyon**

**202-663-6545**

**[DPhythyon@wilmer.com](mailto:DPhythyon@wilmer.com)**

**William Richardson**

**202-663-6038**

**[WRichardson@wilmer.com](mailto:WRichardson@wilmer.com)**