

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

In the Matter of)
)
COMPLAINTS AGAINST VARIOUS) File No. EB-03-IH-0110
BROADCAST LICENSEES REGARDING)
THEIR AIRING OF THE "GOLDEN)
GLOBE AWARDS" PROGRAM)

PETITION FOR RECONSIDERATION

**American Civil Liberties Union
American Federation of Television
and Radio Artists
Beasley Broadcast Group, Inc.
Citadel Broadcasting Corporation
The Creative Coalition
Directors Guild of America, Inc.
Entercom Communications Corp.
The First Amendment Project
Fox Entertainment Group, Inc.
Freedom to Read Foundation
Margaret Cho
Media Access Project**

**Minnesota Public Radio®
National Coalition Against Censorship
National Federation of Community Broadcasters
Penn & Teller
People For the American Way Foundation
Radio One, Inc.
Recording Artists' Coalition
Recording Industry Association of America, Inc.
Screen Actors Guild
Viacom Inc.
When in Doubt Productions, Inc.
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SUMMARY

On March 18, 2004, the Federal Communication Commission reversed an Enforcement Bureau order involving a live telecast of the Golden Globe Awards and in the process overruled well-established precedent to announce a broad new policy, applicable to all broadcasters, that significantly expands its regulation of programming content. *Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards” Program*, Mem. Op. and Order, FCC 04-43 (Mar. 18, 2004). The Commission’s decision that the isolated use of an unplanned and unscripted expletive is both “indecent” and “profane” represents an unconstitutional expansion of the government’s intrusion into broadcast content. It is not a narrow as-applied ruling in which the full Commission decided only that the Enforcement Bureau erred in failing to sanction a broadcaster for airing a given word in a particular context. Rather, the FCC’s decision is a rule of general applicability that already is exerting a substantial chilling effect on constitutionally-protected speech.

Petitioners urge the Commission to reconsider its aggressive new approach to regulating broadcast indecency, its newly-crafted profanity standard, and its revised enforcement procedures. The Petitioners are a diverse group of broadcast licensees, public interest organizations, professional associations, production entities, programmers, writers and performers that have a direct stake in the FCC’s enforcement of 18 U.S.C. § 1464.

The *Golden Globe Awards* decision asserts FCC power to regulate broadcasting far beyond anything the Supreme Court contemplated or approved in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). It puts broadcast licensees on notice that the Commission in the future will punish broadcasters for “isolated” or “fleeting” expletives even if they are accidental or unintentional, and adds the broad, vague and unbounded term “profanity” to the types of

speech the government will restrict. With this decision the Commission has abandoned the regulatory restraint mandated by well-established judicial precedent. The indecency policy has long been recognized as a very limited exception to the basic constitutional command that the government cannot reduce viewers or listeners to viewing or hearing only what is fit for a child. Reviewing courts accordingly have confined the enforcement of indecency restrictions exclusively to the broadcast medium during certain times of the day, and only so long as the government exercises considerable restraint.

The Commission also has changed its procedural approach to indecency regulation, thus announcing its intention to apply its increasingly muddled standard more harshly. The *Golden Globe Awards* decision confirms that the FCC no longer requires that complaints be substantiated, and that, in some cases, no complaint need be filed at all. And when the FCC concludes that the indecency rules have been violated – as it may do in any case where it deems words or images to be “offensive” – its stated intention is to impose greatly magnified fines and possible license revocation as sanctions.

The Commission’s aggressive crackdown on “coarse” speech has sent shock waves through the broadcast industry and the lack of clear guidelines, coupled with threats of draconian administrative action, has forced licensees to censor speech that unquestionably is protected by the First Amendment. By prescribing delayed broadcasts as an “element” of its indecency calculus and putting station licenses at risk even for unintentional slips of the tongue, the FCC is undermining the ability to engage in live broadcasting in America. Radio stations also are scouring their play lists and dropping or heavily editing songs, many of which have been played for years – some for decades – without ever having drawn a complaint. The *Golden Globe Awards* decision also has resulted in significant self-imposed restrictions on television

programming. It has led to changes in acclaimed network drama series and prompted some public television stations to edit, and in some cases drop, serious documentary programs.

The Golden Globe Awards decision amounts to a rulemaking through adjudication that imposes sweeping new content controls on the broadcast industry. Because the Commission adopted this new approach without notice or opportunity for public comment, Petitioners urge the Commission to reconsider this decision. Upon doing so, the Commission should: (1) reverse its finding that the isolated or fleeting broadcast of an expletive may constitute actionable indecency; (2) rescind its decision to add “profanity” as a separate category of proscribed speech under the law; (3) require complaints to be supported by credible evidence, such as a tape or transcript; (4) cease imposing disproportionate fines on a “per utterance” basis; and (5) seriously examine whether the system of government regulation of content announced in this Order, including its threats of potential license revocations, is fundamentally incompatible with the First Amendment of the Constitution.

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PETITION FOR RECONSIDERATION

Pursuant to 47 U.S.C. § 405 and 47 C.F.R. § 1.106, American Civil Liberties Union; American Federation of Television and Radio Artists; Beasley Broadcast Group, Inc.; Citadel Broadcasting Corporation; The Creative Coalition; Directors Guild of America, Inc.; Entercom Communications Corp.; The First Amendment Project; Fox Entertainment Group, Inc.; Freedom to Read Foundation; Margaret Cho; Media Access Project; Minnesota Public Radio®; National Coalition Against Censorship; National Federation of Community Broadcasters; Penn & Teller; People For the American Way Foundation; Radio One, Inc.; Recording Artists’ Coalition; Recording Industry Association of America, Inc.; Screen Actors Guild; Viacom Inc.; When in Doubt Productions, Inc.; and Writers Guild of America, west (together, “Petitioners”), by counsel, hereby submit this Petition requesting that the Commission reconsider its aggressive new approach to regulating broadcast indecency, its newly-crafted profanity standard, and its revised enforcement procedures as articulated in *Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards” Program*, Mem. Op. and Order, FCC 04-43 (Mar. 18, 2004) (“*Golden Globe Awards*”). The new indecency enforcement

policy exceeds the Commission's authority under the Communications Act and violates the First Amendment rights of broadcast licensees, performers, program producers, writers, and broadcast viewers and listeners.

I. INTRODUCTION

On March 18, 2004, the Commission adopted four orders fundamentally altering the standards of what the government deems acceptable broadcast fare.¹ Each of the decisions, most prominently the Commission's decision to reverse a staff ruling in *Golden Globe Awards*, applied new interpretations of the FCC's indecency policies that depart significantly from established precedent.² In *Golden Globe Awards* the Commission put all broadcast licensees, performers and audience members on notice that the Commission will apply new substantive and procedural standards that vastly expand the government's control over "indecent" or "profane" speech. In doing so, the FCC upset the delicate balance in what it inexplicably continues to characterize as its "very limited" role in regulating broadcast content, and it cast a significant pall over constitutionally-protected speech that already is having a substantial chilling effect.

Despite the obvious constitutional ramifications of the Commission's actions, it did not conduct a notice and comment rulemaking before adopting sweeping new rules of general application, despite recently being asked to do so by a broadly based consortium.³ Rather, it simply announced the new policies in the context of a Commission reversal of a staff ruling that was consistent with longstanding precedent. Thus, the FCC upended decades of

¹ *Golden Globe Awards*, FCC 04-43; *Infinity Radio License, Inc.*, Mem. Op. and Order, FCC 04-48 (rel. Mar. 18, 2004) ("*Infinity Radio License*"); *Infinity Broad. Operations, Inc.*, Notice of Apparent Liability for Forfeiture, FCC 04-49 (rel. Mar. 18, 2004) ("*Infinity Broadcasting*"); *Capstar TX Ltd. P'ship*, Notice of Apparent Liability for Forfeiture, FCC 04-36 (rel. Mar. 18, 2004) ("*Capstar*") (together, the "*March 18 Indecency Orders*").

² This Petition seeks reconsideration of the Commission's *Golden Globe Awards* decision. However, to the extent any of the issues raised in this Petition implicate one or more of the other *March 18 Indecency Orders*, the Petitioners also seek reconsideration of such orders.

³ See *Infinity Broad. Operations, Inc.*, 18 FCC Rcd. 26360, 26363 n.7 (2003).

established case law and extended its authority to regulate broadcast content well beyond judicially-approved narrow limits with virtually no participation by broadcasters and other parties most directly affected.⁴

On very similar facts the FCC has in the past recognized the propriety of review of constitutionally sensitive issues arising from its indecency rules. In *Infinity Broadcasting Corporation of Pennsylvania*, 3 FCC Rcd. 930 (1987), the Commission considered several petitions and comments addressing a public notice that summarized three indecency decisions and “put[] all broadcast . . . licensees on notice as to new standards” that the Commission said “will apply in enforcing the prohibition against obscene and indecent” content. *New Indecency Standards to be Applied to All Broadcast and Amateur Radio Licensees*, 2 FCC Rcd. 2726 (1987). Where adjudication of specific broadcasts resulted in the adoption of “new standards” that “could have an impact on all licensees,” the Commission deemed it appropriate “to address the uncertainty created by those rules” by “treat[ing] the filings . . . as requests for reconsideration of the three specific cases” and issuing a substantive reconsideration decision. *Infinity Broad.*, 3 FCC Rcd. at 936 n.18. Similarly, the court of appeals treated the FCC’s actions as more like “the result of a notice-and-comment rulemaking than . . . an ad hoc adjudicatory proceeding.” *ACT I*, 852 F.2d at 1337.

The Petitioners here seek similar substantive reconsideration of the new course in Section 1464 regulation that the Commission charted in *Golden Globe Awards*. The Petitioners

⁴ In view of the Commission’s election to proceed in this manner, Petitioners who were not parties to *Golden Globe Awards* satisfy the requirements in 47 C.F.R. § 1.106(b)(1) for seeking reconsideration. Each Petitioner will be adversely affected by the new standards and policies adopted or relied upon in *Golden Globe Awards*, as they apply prospectively to all broadcasters and thus directly control their programming, and individuals appearing in the programs, as well as their viewers. See *Action for Children’s Television v. FCC*, 852 F.2d 1332, 1334, 1336-37 (D.C. Cir. 1988) (“*ACT I*”) (citing, *inter alia*, *SEC v. Chenery Corp.*, 332 U.S. 194 (1947)). Petitioners did not participate in earlier stages of the proceeding as it was not foreseeable the Commission would adopt standards of general application in an indecency adjudication involving a single program aired by specific licensees, nor that it would reverse what the Commission acknowledges is long-standing precedent.

represent a coalition of broadcast licensees, programmers, producers, directors, public interest organizations, professional associations, writers, and performers that share concerns about the effect of FCC policies on freedom of expression for the broadcast medium. Petitioners are described, in a manner disclosing how their interests are adversely affected by the *Golden Globe Awards*, in the Appendix to this Petition.

II. BACKGROUND

This controversy arose from an initial October 2003 Enforcement Bureau decision declining to impose a penalty on NBC and its affiliates for a live telecast of the 2003 Golden Globe Awards during which U-2's lead singer Bono uttered a phrase to the effect "this is really, really, fucking brilliant" when accepting an award.⁵ Applying well-established Commission precedent, the Bureau ruled the licensees did not violate the law because, in the context of a live unscripted event, "fleeting and isolated remarks of this nature do not warrant Commission action."⁶ Additionally, while acknowledging that many people might find Bono's statement "crude and offensive," the Bureau staff reasoned that "the material aired . . . does not describe or depict sexual and excretory activities and organs" as required by the Commission's long-standing definition of indecency.⁷

⁵ *Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 18 FCC Rcd. 19859 (2003) (Enf. Bur., 2003) ("Bureau Order"). At the time of the staff ruling, 93 percent of the complaints on file with the Commission had been submitted by persons associated with one organization – the Parents Television Council. The exact phrasing at issue was variously stated on the face of the complaints, which did not include a tape or transcript of the broadcast. *Golden Globe Awards* ¶ 3 & n.4.

⁶ *Bureau Order*, 18 FCC Rcd. at 19861 (citing *Entercom Buffalo License LLC (WGR(AM))*, 17 FCC Rcd. 11997 (Enf. Bur. 2002); *L.M. Communications of S.C., Inc. (WYBB(FM))*, 7 FCC Rcd. 1595 (MMB 1992); *Peter Branton*, 6 FCC Rcd. 610 (1991); *Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Their Broadcast*, 16 FCC Rcd. 7999, 8008-09 (2001) ("Industry Guidance"). The Bureau also found the material was not obscene. *Id.* at 19862 (citing *Miller v. California*, 413 U.S. 15 (1973); *WGBH Educ. Found. (WGBH-TV)*, 69 F.C.C.2d 1250 (1978)).

⁷ *Id.* at 19861-62 (citing *Industry Guidance* and *FCC v. Pacifica Found.*, 438 U.S. 726 (1978)). The Bureau found the cited use of the word was as an "adjective or expletive to emphasize an exclamation," and thus not indecent under FCC precedent.

The full Commission, acting on an application for review filed by the Parents Television Council, reversed the Bureau's decision. Though the Commission purported to acknowledge that its "role in overseeing program content is very limited" under the Communications Act and First Amendment, the agency concluded it was compelled to act in part because, if it "were routinely not to take action against isolated and gratuitous uses of such language on broadcasts," it "would likely lead to more widespread use." *Golden Globe Awards* ¶¶ 4, 9. The Commission rejected the Bureau's analysis of the usage of the word "fucking," finding that "within the scope of our indecency definition . . . it does depict or describe sexual activities." *Id.* ¶ 8. It then held that prior agency decisions holding "that isolated or fleeting broadcasts of the 'F-Word' . . . are not indecent or would not be acted upon" are "no longer good law." *Id.* ¶ 12. The Commission also found as "an independent ground" that the material violated 18 U.S.C. § 1464 because it "constitutes 'profane' language" under that provision. *Id.* ¶ 13.

The Commission announced that "broadcasters are on clear notice that, in the future, they will be subject to potential enforcement action for any broadcast of the 'F-Word' or variations thereof," and it took the "opportunity to reiterate . . . that serious multiple violations of our indecency rule . . . may well lead to . . . license revocation proceedings, and that we may issue forfeitures for each indecent utterance in a particular broadcast."⁸ Notwithstanding these findings, the Commission by a 3-2 vote refrained from imposing a forfeiture on the licensees that aired the offending material. *Golden Globe Awards* ¶ 15. The majority declined to impose a forfeiture because precedent at the time of the broadcast would have permitted airing the material so that the licensees "lacked the requisite notice to justify a penalty." *Id.* But the full Commission acknowledged that it was taking "a new approach to profanity." *Id.* Moreover, as

⁸ *Id.* ¶ 17. The Commission first issued this warning about "serious violations" in *Infinity Broadcasting Operations, Inc.*, 18 FCC Rcd. 6915 (2003).

discussed more fully below, the Commission also changed its procedural approach to indecency regulation, thus announcing its intention to apply these nebulous rules more harshly in the future. The *Golden Globe Awards* thus represents a sea change in the Commission's approach to regulating broadcast indecency.

III. THE FCC'S NEW APPROACH TO SECTION 1464 ENFORCEMENT IS UNCONSTITUTIONAL AND SIGNIFICANTLY CHILLS PROTECTED SPEECH

Despite acknowledging that the First Amendment is a “critical constitutional limitation” that requires “restraint” in enforcing the indecency rules, the Commission devotes only a single paragraph of *Golden Globe Awards* to constitutional analysis, concluding that its aggressive new policy is “not inconsistent” with *FCC v. Pacifica Foundation*. But this cursory treatment of a “critical” limitation is predicated on the Commission's mistaken assumption that the Court in *Pacifica* “explicitly left open the issue of whether an occasional expletive could be considered indecent.” See *Golden Globe Awards* ¶ 16. This is wrong. Although Justice Powell, who supplied a crucial swing vote for *Pacifica*'s 5-4 majority, noted “[t]he Commission's holding, and certainly the Court's holding today, does not speak to cases involving the isolated use of a potentially offensive word,” he also stressed that the FCC does not have “unrestricted license to decide what speech, protected in other media, may be banned from the airwaves in order to protect unwilling adults from momentary exposure to it in their homes.”⁹ Justice Powell expressly distinguished “the isolated use of a potentially offensive word” from “the verbal shock treatment administered by respondent,” and explained that the order under review

⁹ *Pacifica*, 438 U.S. at 760-761 (Powell, J., joined by Blackmun, J., concurring). See also *id.* at 772 (Brennan J., dissenting) (“I believe that the FCC is estopped from using either this decision or its own orders in this case . . . as a basis for imposing sanctions on any public radio broadcast other than one aired during the daytime or early evening and containing the relentless repetition, for longer than a brief interval, of [offensive language].”).

“was limited to the facts of this case.”¹⁰ He noted the danger of chilling protected speech in what he described as a “relatively new and difficult area of law,” but allowed the FCC some latitude because “the Commission may be expected to proceed cautiously, as it has in the past.”¹¹ Here however, the Commission consciously decided to extend its power to restrict content far beyond what was approved by the Court in *Pacifica*. Consequently, the Commission has an obligation to reconsider carefully the constitutionality of its actions.

A. *Golden Globe Awards Expands the Scope of Actionable Indecency Beyond Permissible Constitutional Limits By Applying Arbitrary and Vague Standards to the Regulation of Protected Speech*

Even at its most expansive, the Commission’s authority to regulate indecent speech is narrow and has been considered constitutionally permissible only so long as the FCC exercised considerable restraint. Even within such limits, judicial tolerance for this anomalous legal doctrine has eroded since *Pacifica* was decided in 1978, as more recent cases have subjected the indecency rationale to far less forgiving constitutional review. The Court has confirmed that “indecent” speech is fully protected by the First Amendment and is not subject to diminished scrutiny as “low value” speech, as three Justices who joined the *Pacifica* plurality opinion had suggested.¹² Since *Pacifica*, the Supreme Court has invalidated government-imposed indecency restrictions on cable television access channels despite finding them “as ‘accessible to children’ as over-the-air broadcasting, if not more so.”¹³ Additionally, in *Reno v.*

¹⁰ *Id.* at 761 (Powell, J., concurring) (emphasis added).

¹¹ *Id.* at 756, 760, 761 (Powell, J., concurring). Justice Powell wrote that the Commission should take into account the chilling effect on speech “as it develops standards in this area.” *Id.* at 760.

¹² Rather, it stressed that the government cannot assume it has greater latitude to regulate because of its assumption that “the speech is not very important” or that the speech is “shabby, offensive, or even ugly.” *United States v. Playboy Entmt. Group, Inc.*, 529 U.S. 803, 826 (2000).

¹³ *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 717, 744 (1996). The Court upheld a provision that permitted cable operators to adopt editorial policies for leased access channels, but rejected government-imposed restrictions on indecent programs on leased and public access channels.

ACLU, the Court for the first time subjected the indecency definition (in the Internet context) to rigorous scrutiny and found it significantly overbroad. 521 U.S. 844, 871-881 (1997). These decisions addressed the underlying logic of the indecency standard, thus extending their significance beyond the broadcast-specific context. The factual underpinnings of *Pacifica* have been superseded by significant changes as well, including the rise of cable television and the Internet as equally pervasive electronic media.¹⁴

In these circumstances, the Commission should be more circumspect about regulating broadcast content, not less. But *Golden Globe Awards* eliminates many interpretive restraints the Commission previously used to ensure that its enforcement of 18 U.S.C. § 1464 does not cross the constitutional line. For example, by overruling its previous precedents which held that isolated or fleeting references to “indecent” words are not actionable, the Commission opened a broad new area of enforcement. But the Supreme Court stressed in *Pacifica* that it was not empowering the Commission to act in such isolated instances, and it emphasized that the context in which words are used is “all-important.” *Pacifica*, 438 U.S. at 750. *Golden Globe Awards* drains the FCC’s contextual approach of meaning because the agency’s focus is on whether a particular word will “enlarge a child’s vocabulary” regardless of the setting in which the word is used. *Golden Globe Awards* ¶ 9 (the fact that the broadcast of vulgar language is

¹⁴ As the Commission has found, “the modern media marketplace is far different than just a decade ago.” *2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 18 FCC Rcd. 13620, 13648 (2003). It noted that traditional media “have greatly evolved,” and “new modes of media have transformed the landscape, providing more choice, greater flexibility, and more control than at any other time in history.” *Id.* Of particular relevance here, the Commission noted that “[t]oday’s high school seniors are the first generation of Americans to have grown up with this extraordinary level of abundance in today’s media marketplace.” It found that most teens have access to cable television and high speed Internet access, many live in households that receive 100 to 200 channels of video programming and thus “have come to expect immediate and continuous access to news, information, and entertainment.” *Id.* at 13648-49. In this environment, imposing special speech restrictions on the broadcast medium because a teenager might hear something that could “enlarge[] a child’s vocabulary in an instant,” *Pacifica*, 438 U.S. at 749, is futile, and needlessly reduces broadcast content to only what is fit for children.

isolated and unintentional “is irrelevant; it still has the effect of exposing children to indecent language”).

The Commission’s insistence that the context of speech continues to be “critically important” in indecency determinations is belied by its reasoning in *Golden Globe Awards*. Although it suggests that the “merit” of a work may be considered as part of its indecency analysis, the FCC confines this review to whether “there was any political, scientific or other independent value of use of the word here.” *Golden Globe Awards* ¶ 17. Such a narrow, atomistic view of merit word-by-word is about as far as one can get from the “work as a whole” requirement for evaluating obscenity, which, paradoxically, is unprotected by the First Amendment.¹⁵ This approach vests the Commission with standardless discretion to pick and choose between favored and disfavored speakers. Such arbitrariness is precisely what the vagueness doctrine in First Amendment law is designed to prevent. *NAACP v. Button*, 371 U.S. 415, 432-433 (1963). The government’s ability to assist favored speakers and penalize disfavored ones is the principal vice of vagueness in speech regulation. *Kolender v. Lawson*, 461 U.S. 352, 360 (1983).

Arbitrariness also is a chronic problem with the FCC’s indecency policy that is greatly exacerbated by *Golden Globe Awards*, which gives no guidance for when the “context” of a given program will outweigh its presumed offensiveness. For example, the Commission in the past has held that use of the word “‘fuck’ or ‘fucking’ 10 times in 7 sentences” in a “legitimate news report” on NPR is not actionably indecent, *Industry Guidance*, 16 FCC Rcd. at 8012 (citing *Peter Branton*, 6 FCC Rcd. 610), but it more recently held that the inadvertent, split-

¹⁵ The Commission’s overly narrow view of “context” and “merit” is a significant constitutional defect. See *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 248 (2002) (“work as a whole” requirement is “an essential First Amendment rule [that t]he artistic merit of a work does not depend on the presence of a single explicit scene”); *ACLU v. Ashcroft*, 322 F.3d 240, 252 (3d Cir. 2003) (reviewing material considered to be harmful to minors “in context” is constitutionally deficient because “[t]he taken ‘as a whole’ language is crucial”).

second flash of a penis during a news interview with cast members of a critically-acclaimed off-Broadway production was indecent.¹⁶ With respect to literary or artistic works, the merit of the material may save it from an indecency finding,¹⁷ or, more likely, it may not.¹⁸ There simply is no way to predict when the “context” will save speech from an indecency finding, and there are ominous indications that the Commission plays favorites when it applies its vague standards.¹⁹

Despite its purported attempt to clarify its indecency standards by decreeing that “any use of [the ‘F-Word’] or a variation, in any context, inherently has a sexual connotation,” the Commission has only made matters more confusing.²⁰ To begin with, it is not even clear whether the FCC is purporting to ban just the word “fuck” or would also restrict its euphemisms, including the term “F-Word.”²¹ While in other circumstances it might be reasonable to assume the government intends only to ban the actual word and not its semantic replacements, it is not

¹⁶ *Young Broadcasting of San Francisco, Inc.*, 19 FCC Rcd. 1751 (2004). Some radio stations have declined even to carry advertising for the stage production after the FCC decision. See News Release, *Puppetry of the Penis – Indecent or Art?*, Mar. 30, 2004, attached as Exhibit 1.

¹⁷ See *WPBN/WTOM License Subsidiary, Inc.*, 15 FCC Rcd. 1838 (2000) (considering context, the depiction of full frontal nudity in the film *Schindler’s List* is not actionably indecent).

¹⁸ *Golden Globe Awards* ¶ 9 & n.25 (warning broadcasters that “social or political value” of a work does not save it from an indecency finding and noting that “the works of Joyce, [and] words and phrases found in the writings of D.H. Lawrence [and] James Baldwin” may be considered indecent) (quoting *ACT I*, 852 F.2d at 1340).

¹⁹ When the FCC declined to sanction NPR for its newscast about mob boss John Gotti, for example, Commissioner Ervin S. Duggan suggested that his fellow Commissioners had been influenced by the fact that “the broadcast in question was by National Public Radio.” *Peter Branton*, 6 FCC Rcd. at 611 (dissenting statement of Commissioner Ervin S. Duggan). Now, the FCC has ruled that, even without the evidence of a tape or transcript, and without evidence of what words were actually broadcast, it can determine that material is actionably indecent because of the subject matter discussed “and the *identities of the participants* (a ‘shock jock’ and a porn star).” *Emmis Radio License Corp.*, Mem. Op. and Order, FCC 04-62 (rel. Apr. 8, 2004) (“*Emmis Radio*”) (emphasis added).

²⁰ *Golden Globe Awards* ¶ 8. The Commission’s initial premise that the word at issue has *only* a sexual connotation is simply wrong. See, e.g., WEBSTER’S NEW COLLEGIATE DICTIONARY 463 (1977) (including among the definitions “sometimes used in the present participle as a meaningless intensive”). See also THE F WORD (2d ed., Random House 1999) (a 272-page book with an introduction by Roy Blount, Jr. which traces the etymology of the word “fuck” and sets forth its myriad meanings and usages).

²¹ The Commission order and separate statements use the expression “F-Word” thirty-five times, including in the legal analysis and in the Order’s conclusion, while the words “fuck” or “fucking” appear only in footnotes, largely involving parenthetical references to other cases. See *Golden Globe Awards* ¶ 8 n.32.

safe for licensees to rest on such an assumption where a wrong guess can cost a station a huge fine or lead to license revocation. In the three other *March 18 Indecency Orders*, for example, the FCC reinforced the notion that even innuendo and colloquial references can be actionable where the FCC concludes the sexual connotation is “unmistakable.”²² In this regard, the expression “F-Word” appears easily to qualify since the Commission found it unnecessary to define the term even though roughly eight thousand six hundred other words in the English language also begin with the letter “F.”²³ Moreover, the Commission warned broadcasters that it intends to interpret its mandate broadly, to prohibit “vulgar and coarse language” including “words (or variants thereof) that are as highly offensive as the “F-Word.”²⁴ As a consequence, many other commonly understood euphemisms in addition to the “F-Word” may be unsafe to broadcast.²⁵ But it is impossible to tell from the FCC’s newly-announced standard which words are acceptable and which ones are not.

Which words may be deemed “highly offensive” is a function of contemporary community standards for the broadcast medium – a concept the Commission has never previously defined other than to say it is a national standard based on the “average broadcast viewer or listener.” *Industry Guidance*, 16 FCC Rcd. at 8002. Now, however, in its *March 18 Indecency Orders*, the FCC claims to rely on its “collective experience and knowledge, developed through *constant interaction* with lawmakers, courts, broadcasters, public interest

²² *Capstar* ¶ 9; *Infinity Broadcasting* ¶ 10; *Infinity Radio License* ¶ 5.

²³ WEBSTER'S 3RD NEW INT'L DICTIONARY OF THE ENGLISH LANGUAGE, UNABRIDGED 811-926 (1986).

²⁴ *Golden Globe Awards* ¶¶ 13-14.

²⁵ Some commonly understood euphemisms of the “F” variety include “eff” (or “effing”), “fug,” “frig,” “freaking,” “having fun,” “funch,” “fungoo,” and “futz.” Hugh Rawson, *DICTIONARY OF EUPHEMISMS AND OTHER DOUBLETALK* 173, 177, 179, 182-183 (Revised ed. 1995). Many other well-worn expressions similarly stand in for the word. *Id.* at 232 (listing more than 40 examples). Compare *Palmetto Broad. Co.*, 33 FCC 250, 251 (1962), *aff'd on other grounds*, *Robinson v. FCC*, 334 F.2d 534 (D.C. Cir. 1964) (DJ’s use of expressions such as “let it all hang out” considered “obscene, coarse, vulgar, and suggestive material susceptible of indecent double meaning”).

groups and ordinary citizens, to keep abreast of contemporary community standards for the broadcast medium.” *Infinity Radio License* ¶ 12 (emphasis added). This dubious explanation of the methodology employed in assessing contemporary community standards is legally deficient and further compounds the confusion that attends the Commission’s Section 1464 enforcement scheme.

In fact, there has been no “constant interaction” by the Commission with the courts on the subject of indecency. To the contrary, the last time a court opined on the Commission’s indecency enforcement scheme was nearly ten years ago, and that was at the behest of broadcasters. *See Action for Children’s Television v. FCC*, 59 F.3d 1249 (D.C. Cir. 1995). To the extremely limited extent courts have interacted with the Commission, they have expressly relied on FCC commitments to exercise restraint and caution when regulating indecent material. *E.g.*, *ACT I*, 852 F.2d at 1340 n.14. More significantly, such interactions have been in the context of facial challenges in which the definition and application of community standards are not at issue. Indeed, the Commission has *never* been involved in a case that resulted in a judicial application of “community standards” as currently defined by the FCC. The only case that came close to doing so was a decade ago, but it resulted instead in a settlement that produced (seven years later, in 2001) the Commission’s *Industry Guidance* – a document that now appears to be of limited utility.²⁶

The Commission’s interaction with public interest groups and ordinary citizens is generally one-sided, and clearly tends to reflect the interests of those who choose to complain about broadcast material, at the expense of the interests of the vast majority of listeners and viewers, who cannot reasonably be expected to contact the Commission in support of their

²⁶ *See Evergreen Media Corp. v. FCC*, Civil No. 92 C 5600 (N.D. Ill. Feb. 22, 1994) (agreeing to publish guidelines as to the meaning of the term “indecency” within 9 months).

favorite stations and programming.²⁷ Individual complaints, especially those filed as part of an orchestrated campaign by one or two organizations (as was the case in *Golden Globe Awards*) are a poor substitute for the objective measurement of contemporary community standards through such means as polling or analysis of ratings results, the latter of which the Commission irrationally discounts.²⁸ It should correct that error through reconsideration here.

B. *Golden Globe Awards* Substantially Expands Content Regulation by Adopting a New Standard for Profanity

The Commission's independent rationale for *Golden Globe Awards* – that the isolated use of the word “fuck” was “profane” – further undermines the constitutionality of its indecency policy. This alternative basis for reversing the Bureau decision has the effect of replacing one vague standard with several – broadcasters now must excise any words or images that may be indecent, blasphemous, or vulgar. This new regime defines “profanity” in at least four ways: (1) “personally reviling epithets naturally tending to provoke violent resentment”; (2) “language so grossly offensive to members of the public who actually hear it as to amount to a nuisance”; (3) blasphemy, or divine imprecation; and (4) “vulgar, irreverent, or coarse language.” The decision unhelpfully adds that “[w]e will analyze other potentially profane words or phrases on a case-by-case basis,” while providing no meaningful guidance as to what those words might be. *Golden Globe Awards* ¶¶ 13-14.

²⁷ The Commission periodically issues reminders that “[t]he Commission receives many informal complaints that do not involve violations of the Communications Act, a rule or order of the Commission. The existence of a complaint does not necessarily indicate wrongdoing by the company at issue.” Consumer and Governmental Affairs Bureau, *Report on Informal Consumer Inquiries and Complaints*, Nov. 20, 2003, at 1.

²⁸ See *Infinity Broad. Operations*, 17 FCC Rcd. 27711, 27715 (Enf. Bur. 2002). Contemporary surveys demonstrate far different attitudes among members of the broadcast audience than the FCC presumes. See Kavla McCabe, *Study Reveals Rock Listeners' Views on Indecency*, RADIO & RECORDS, Apr. 9, 2004 at 1; *Rated R for Rock*, RADIO & RECORDS, Apr. 9, 2004 at 15 (reporting results of surveys by Jacobs Media and Edison Media Research on contemporary listeners' attitudes), attached hereto in Exhibit 2.

None of these definitions can survive constitutional scrutiny, as each suffers from obvious vagueness and overbreadth. The range of statements encompassed by blasphemy and divine imprecation, both religiously based, is far removed from the sphere of indecency which the Commission had heretofore sought to regulate. The most commonplace of divine imprecations, such as “Go to Hell” or “God Damn It,” are now actionable under *Golden Globe Awards*.²⁹ By encompassing such protected speech, the profanity standard’s blasphemous and divine imprecation components are impermissibly and unconstitutionally vague and overbroad. By bringing its suddenly heavy hand down into this area of religiously oriented speech, the Commission also has impermissibly breached the First Amendment wall that separates church and state.

The “nuisance” and “personally reviling epithet” prongs fare no better. The “nuisance” definition on its face ranges far beyond indecency to include “grossly offensive” words that do not have a sexual or excretory meaning. The Commission relies on a definition of “nuisance” as including speech that “is prejudicial to the . . . sense of decency or morals of the citizens at large.”³⁰ This open-ended definition wholly encompasses the concept of “indecency” and suggests no logical stopping point. “Personally reviling epithets,” which require a tendency to provoke, are the constitutional equivalent of “fighting words.”³¹ This definition, too, suffers from fatal vagueness and overbreadth, opening up broadcasters to an entirely new range of

²⁹ *Duncan v. United States*, 48 F.2d 128, 134 (9th Cir.), *cert. denied*, 283 U.S. 863 (1931). To the extent the FCC has shown restraint in the recent past and refrained from regulating blasphemous words, such decisions are of little help now since *Golden Globe Awards* reaffirmed the FCC’s authority to do so. *Golden Globe Awards* ¶ 14 (“Broadcasters are on notice that the Commission in the future *will not limit* its definition of profane speech to *only* those words and phrases that contain an element of blasphemy or divine imprecation . . .”) (emphasis added).

³⁰ *Golden Globe Awards* ¶ 13 & n.36 (citing definition from *BALLENTINE’S LAW DICTIONARY* (3d ed. 1969). The same dictionary defines “profane” as “Common rather than sacred. Irreverent toward or contemptuous of sacred things.”

³¹ *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942) (finding that there are “fighting words” that by their ordinary meaning are “likely to cause a fight” or “are threatening, profane or obscene revilings”).

prohibitions on speech that have nothing to do with sexual or excretory organs and activities. The Supreme Court has repeatedly held that “fighting words” regulations must be carefully drawn so as to avoid application to protected expression.³² Moreover, an essential element of “fighting words” is that they be uttered face-to-face, which obviously is impossible in the typical broadcast setting. The vagueness and overbreadth of the new test for profanity is fatal.³³

C. The Commission’s Enforcement Procedures Violate the First Amendment and Basic Principles of Due Process

The procedures and penalties affirmed in *Golden Globe Awards* demonstrate a further lack of regard for constitutional limitations. The Commission’s new approach eviscerates due process requirements in determining whether an indecent broadcast has occurred and, upon finding a transgression, imposes wholly disproportionate and punitive sanctions. The Commission used the decision to reiterate the policy that “serious multiple violations” of the indecency rule could lead to license revocations and that forfeitures may be issued for each indecent utterance in a particular broadcast.³⁴ Furthermore, the Commission reserved to itself the right to declare particular words profane on a case-by-case basis, with all the attendant dire consequences, without giving any indication of what those words might be. Not only are these changes already having a profound chilling effect on speech, *see infra* Section III.D, they are eliminating live broadcasting as it is currently practiced, since *Golden Globe Awards* articulates a technological delay requirement as an “element” of its indecency calculus. *Golden Globe Awards* ¶¶ 11, 17.

³² See, e.g., *Gooding v. Wilson*, 405 U.S. 518, 523 (1972); *Cohen v. California*, 403 U.S. 15, 20 (1971). See also *Lewis v. New Orleans*, 415 U.S. 130 (1974).

³³ See, e.g., *State v. Poe*, ___ P.3d ___, 2004 WL 396052 (Idaho 2004) (striking down state law against using profanity “within the presence or hearing of children”).

³⁴ The Commission has since issued Notices of Apparent Liability based on this new approach. See *Clear Channel Broad. Licenses, Inc.*, FCC 04-88 (rel. Apr. 8, 2004) (“*Clear Channel*”) (proposing a \$495,000 fine based on a “per utterance” calculation).

Even worse, the FCC would now place the burden on licensees to prove that their broadcasts are not indecent. The Commission no longer finds it necessary for complaints to accurately report and substantiate the contents of the broadcast.³⁵ It appears to presume that a broadcast is indecent because of the subject matter at issue and the identity of the speakers. *See Emmis Radio* ¶¶ 10-12. It also has indicated its intention to take action against stations even if they have received no complaints at all. *E.g., Clear Channel* ¶ 16. Moreover, in evaluating licensees' responses to complaints, the Commission has said that broadcasters' good faith attempts to understand and comply with the rules are "irrelevant," *Golden Globe Awards* ¶ 9, thus effectively reading out of the law any requirement that a violation be "willful."³⁶ The Commission also moved recently to implement an increase in indecency fines as threatened in *Golden Globe Awards*, by basing the forfeiture on each individual "indecent" utterance, but the Commission's methodology for doing so is vague and confusing. *Clear Channel*, *supra* note 34 (NAL for a \$495,000 forfeiture). Although the Commission has not yet instituted license revocation proceedings against a licensee, the threat to do so is quite real and has a significant *in terrorem* effect.³⁷

³⁵ In *Golden Globe Awards*, for example, the Commission was untroubled by the fact that certain complainants inaccurately recollected or reported what was actually said. *Golden Globe Awards* ¶ 3 n.4. The decision establishes a new enforcement process in which no tape or transcript need be supplied, or even a precise recollection of the actual broadcast. *See also Emmis, supra*, and *Capstar, supra*.

³⁶ The FCC's new approach conflicts with the Communications Act. Section 503(b) of the Act requires that a violation of the Commission's rules be "willful" or "repeated" before the government may assess a forfeiture, but the approach applied in *Golden Globe Awards* eliminates any such requirements. The fact that an "isolated" reference now may constitute actionable indecency cannot be reconciled with a requirement that the violation be repeated. Moreover, the FCC's disregard of broadcaster intent as "irrelevant" eviscerates not just a "willfulness" requirement, but would punish broadcasters even without a showing of negligence. This approach also conflicts with the First Amendment. *See ACT I*, 852 F.2d at 1340 n. 14 (Commission promised court that it would accord weight to "reasonable licensee judgments" in assessing potential sanctions).

³⁷ *Golden Globe Awards* ¶ 17. As the Nixon Administration's Director of Telecommunications Policy explained to *The Washington Post*, "The main value of the sword of Damocles is that it hangs, not that it drops. Once you take a guy's license away, you no longer have leverage against him." *Yale Broad. Co. v. FCC*, 478 F.2d 594, 605 n.22 (D.C. Cir. 1971) (Bazelon, C.J., dissenting from denial of rehearing *en banc*) (quoting Clay T. Whitehead).

These procedural changes, combined with the new substantive standard for indecency and profanity, converts the FCC into a “roving Commission” capable of broadly suppressing speech it dislikes. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 59 (1963) (condemning commission charged with reviewing material “manifestly tending to the corruption of the youth”). In these circumstances, “the Commission must discharge its constitutional obligations by explicitly considering [a] claim that the FCC's enforcement of [its policies] against [the licensee] deprives it of its constitutional rights.” *Meredith Corp. v. FCC*, 809 F.2d 863, 874 (D.C. Cir. 1987).

D. The FCC’s New Policies Already Are Significantly Chilling Protected Speech

The vagueness and overbreadth of the indecency and profanity standards, and the FCC’s ability to engage in discriminatory enforcement guarantees that broadcasters will “steer far wider of the unlawful zone” and restrict their expression “to that which is unquestionably safe.”³⁸ Indeed, the Commission’s new approach to indecency enforcement already is having this effect across the board in the broadcast industry. Already broadcasters have eliminated or curtailed live programming for fear a single uttered indecency by an individual over which the broadcaster lacks control could lead to fines or other punishment. Radio stations have fired on-air personnel for even inadvertent broadcasts of a single expletive, and numerous songs, long staples of radio playlists, have been removed or edited as too risky to continue airing as they have in the past, in some cases for over twenty years. Television and radio shows once deemed perfectly acceptable – in some cases by the FCC itself – have been canceled or altered. These

³⁸ *Speiser v. Randall*, 357 U.S. 513, 526 (1958); *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964). See also *Kolender*, 461 U.S. at 358; *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 678 (1968) (“the permissible extent of vagueness is not directly proportional to, or a function of, the extent of the power to regulate or control expression with respect to children”).

actions, most occurring in but the first month since *Golden Globe Awards* issued, vividly illustrate the constitutional defects of the Commission's actions and the need for reconsideration.

Among the first casualties of *Golden Globe Awards* have been other live broadcasts, the unpredictability of which, coupled with uncertainty over the new FCC standards, has caused broadcasters to shy away from live fare. A number of radio stations have stopped airing live performances by visiting artists, opting instead to record them for broadcast at a later time, thus losing the spontaneity of the live format. Others have abandoned any use of a live call-in format.³⁹ Broadcasters also have felt compelled to terminate a variety of on-air talent in the new environment the FCC has fostered. This is not limited to the much-publicized purging of Howard Stern from several stations and termination of Todd Clem (either of which is troublesome enough from a constitutional perspective),⁴⁰ but also has included others such as writer, actress, and six-year "fixture" on non-commercial educational station KCRW(FM) Sandra Tsing Loh. She was terminated in "a precautionary measure to show the station had distanced itself . . . in case the FCC investigates" after broadcast of a Loh monologue including a single expletive that was intended to be "bleeped" but inadvertently aired in unedited form.⁴¹

Radio stations also have found themselves constrained to eliminate or edit songs considered classics of middle-of-the road formats and which previously aired in unexpurgated

³⁹ See, e.g., Mark Brown, *Broadcast Words, Actions Stir Efforts to Clean Up "Dirty" Airwaves*, ROCKY MTN. NEWS, Mar. 27, 2004 at 1D ("in Denver, live radio is history"); John Eggerton, *Stations Consider Tape-Delayed News*, BROADCASTING & CABLE, Apr. 6, 2004. These articles and others referenced in this Section III.D are attached in Exhibit 2.

⁴⁰ See, e.g., Sarah McBride, *Clear Channel Dumps Stern After Big Fine*, WALL ST. J., Apr. 9, 2004, at B1; Jube Shiver, Jr., *Radio Chain Boots Stern Off Stations; Clear Channel Makes the Temporary Move Permanent After FCC Proposes Fining it for Airing the Shock Jock*, L.A. TIMES, Apr. 9, 2004, at C1; *Clear Channel Fires Fla Radio DJ Bubba The Love Sponge*, DOW JONES INT'L NEWS, Feb. 24, 2004. Cf. W. Scott Bailey, *Union Calling Clear-Channel's Zero-Tolerance Plan Indecent*, SAN ANTONIO BUS. J., Mar. 12, 2004.

⁴¹ Greg Braxton, *KCRW Fires Loh Over Obscenity*, L.A. TIMES, Mar. 4, 2004, at B1. The station later offered to reinstate Ms. Loh, but she declined, citing a "toxic environment" at the station. Scott Collins, *et al.*, *The Decency Debate*, L.A. TIMES, Mar. 28, 2004, at E26. See Exhibit 2.

form.⁴² Classic Rock format stations have dropped several such songs from their rotation, including The Who's "Who Are You," Pink Floyd's "Money," Lou Reed's "Walk on the Wild Side," Steve Miller's "Rock 'n Me" and "Jet Airliner," Warren Zevon's "Lawyers, Guns & Money," and Steppenwolf's "The Pusher."⁴³ Stations also have been forced to drop or edit more recent songs by such critically acclaimed artists as Pearl Jam ("Jeremy" and "Why Go"), Alice in Chains ("Man in the Box" and "Heaven Beside You"), Guns 'n' Roses ("Its So Easy" and "Mr. Brownstone") and OutKast ("Roses"). Even pop songs generally thought innocuous, such as John Mellencamp's "Jack and Diane" or "Play Guitar" and Sheryl Crow's "A Change Would Do You Good" have been edited for radio, or in some cases, dropped altogether.

Other programming also has been directly affected by sensitivity to the new FCC standards. Principals involved in this year's annual Victoria's Secret fashion show – a telecast the Commission staff has in the past deemed not indecent⁴⁴ and which already had been filmed – elected to scrap the program.⁴⁵ An episode of *ER* was edited to eliminate a brief shot of the

⁴² See *Rated R For Rock*, *supra* note 28, at 54, 60; Mark Brown, *Broadcast Words, Actions Stir Efforts to Clean Up "Dirty" Airwaves*, ROCKY MTN. NEWS, Mar. 27, 2004 at 1D ("Rock songs that have been played for a quarter-century are suddenly being pulled and re-edited."); *Stations Are Pruning Their Pink Floyd and Cleaning Up Steve Miller's "Jet Airliner,"* INSIDE RADIO, Mar. 23, 2004 at 1; Bram Teitelman, *Radio Reacts to Indecency Flak*, BILLBOARD, Mar. 13, 2004; Hotline, THE BOSTON HERALD, Mar. 26, 2004 at E4 ("classic rock stations around the country are 'retiring' hit songs because a word or two in the lyrics might irk the FCC"); Tom Feran, *Indecency Uproar Stirs a Loud Silence*, CLEVELAND PLAIN DEALER, Mar. 26, 2004 at E1 (Pink Floyd's "Dark Side of the Moon" dropped from airplay, along with Warren Zevon's "Lawyers, Guns and Money," Steve Miller's "Jet Airliner," and the Who's "Who Are You?"); Jason Bracelin, *The \$500K #!*@%*, CLEVELAND SCENE, Apr. 7, 2004.

⁴³ Songs such as the Rolling Stones' "Bitch," Nazareth's "Hair of the Dog," and Elton John's "The Bitch is Back" also have been dropped or edited due to use of the word "bitch" (which involves neither sexual nor excretory references).

⁴⁴ See Letter from Charles W. Kelley, File No. EB-01-1H-0661/RBP (Mar. 21, 2002) (dismissing complaint against the Victoria's Secret special because complainant failed to demonstrate "the sexual aspects of the material was, in context, so graphic or explicit as to be patently offensive").

⁴⁵ Shelly Branch and Joe Flint, *Limited Brands Decides to Cancel Lingerie TV Show*, WALL ST. J., Apr. 12, 2004, at B2; Michele Gershberg, *Indecency Uproar Taming U.S. Network TV*, REUTERS, Apr. 12, 2004.

exposed breast of an 80-year-old woman receiving emergency care.⁴⁶ On ABC, the network darkened for some Central and Mountain time zone affiliates a love scene between two characters on a show known for over a decade to feature such material.⁴⁷ Public broadcaster WGBH edited a hint of cleavage out of its *American Experience* documentary “Emma Goldman.”⁴⁸ Further, on “Every Child is Born a Poet: The Life and Work of Piri Thomas” for the *Independent Lens* series, PBS felt it must edit certain expletives (including nonsexual but offensive epithets) even though they appear in the poetry of subject Piri Thomas, a renowned poet, writer and educator, on a program that featured him reading excerpts from some of his work and other parts being dramatized.⁴⁹ The Commission’s recent actions undermine previous attempts by the Bureau to moderate the censorial effects of a vague indecency policy.⁵⁰

The FCC’s new Section 1464 enforcement scheme forces broadcasters to follow the maxim “when in doubt, leave it out.” The chilling effect of this more restrictive regime is obvious. As one experienced observer of the medium put it, “[i]t’s as if someone turned the thermostat down 20 degrees.”⁵¹ The new scheme is antithetical to the First Amendment guarantee that speech in the United States will be “uninhibited, robust, and wide-open.” *New*

⁴⁶ See *The Decency Debate*, *supra* note 41. This article provides a catalog of other television and radio programs that were edited, cancelled or thematically altered in response to the FCC’s actions.

⁴⁷ Dusty Sanders, *Some States Not Exposed to “Blue” Nudity*, ROCKY MTN. NEWS, Mar. 27, 2004, at 1D.

⁴⁸ Lisa de Moraes, *Even Buttoned-Down PBS Gets Caught in the Wringer*, WASH. POST, Mar. 11, 2004. See Exhibit 2.

⁴⁹ See Press Release, PBS Edits “Offensive” Content From Independently-Produced Documentary *Every Child is Born a Poet: The Life and Work of Piri Thomas* in Order to Comply With New FCC Indecency Rules, April 6, 2004, attached as Exhibit 3. Some public broadcasting systems, such as Nebraska Public Television, dropped the documentary altogether.

⁵⁰ Compare *The KBOO Foundation*, 16 FCC Rcd. 10731 (Enf. Bur. 2001) (\$7,000 NAL for broadcast of “Your Revolution”), with *The KBOO Foundation*, DA 03-469 (Enf. Bur., Feb. 20, 2003) (rescinding NAL). In the current environment, it is no longer safe to assume that the Bureau’s latest analysis remains operative.

⁵¹ David Hinckley, *Across the Dial, Tone-Down*, N.Y. DAILY NEWS, Apr. 1, 2004 (quoting Tom Taylor, editor of INSIDE RADIO and citing numerous examples).

York Times v. Sullivan, 376 U.S. 254, 270 (1964). The effect is not limited to having broadcasters edit out a few naughty words here or there, for as the Supreme Court has noted, “we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process.” *Cohen v. California*, 403 U.S. at 26. The general manager of two radio stations owned by Bonneville International Corp. explained:

You have to watch the theme to make sure you’re not offending someone, whether you are discussing gay marriages or the disabled or African-Americans We really don’t want to go there anymore.”⁵²

Such editorial skittishness is widespread on radio and television stations across the nation even though the *Golden Globe Awards* decision is less than a month old. Already this newly restrictive environment has exacted a significant financial toll in the form of canceled programs (that already had been produced) and higher editing and production costs. The Commission must reconsider the decision before the chilling effect becomes even more pronounced.

IV. CONCLUSION

Sweeping changes approved in *Golden Globe Awards* belie the Commission’s claim that its role in overseeing program content is “very limited” and that “the First Amendment is a critical constitutional limitation that demands that . . . we proceed cautiously and with appropriate restraint.” *Golden Globe Awards* ¶¶ 4, 5. The FCC’s new indecency regime cannot fairly be characterized as “limited” or “restrained” to the extent it expands the scope of the indecency standard, adds a “profanity” element, reduces due process protections, and imposes harsher penalties. The FCC is seeking not to enforce contemporary community standards for the broad-

⁵² Diane Torioian Keaggy, *Radio’s “Shock” Therapy*, ST. LOUIS POST-DISPATCH, Apr. 11, 2004 (quoting John Kijowski, general manager of WVRV-FM and WSSM-FM). See also David Hinckley, *DJ Fired For Race Remark*, N.Y. DAILY NEWS, Mar. 23, 2004.

cast medium, but to remake them. *Golden Globe Awards* takes the Commission well beyond established precedent and raises questions about the continuing validity of *Pacifica* itself.

For these reasons, Petitioners respectfully request that the Commission reconsider its new standards for enforcing indecency under 18 U.S.C. § 1464 and 47 C.F.R. § 73.3999. Upon doing so, the Commission should: (1) reverse its finding that the isolated or fleeting broadcast of an expletive may constitute actionable indecency; (2) rescind its decision to add “profanity” as a separate offense under the law; (3) require complaints to be supported by credible evidence, such as a tape or transcript; (4) cease imposing disproportionate fines on a “per utterance” basis; and (5) the Commission should grant reconsideration to seriously examine whether the system of government regulation of content announced in this Order, including its threats of potential license revocations, is fundamentally incompatible with the First Amendment of the Constitution.

Respectfully submitted,



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APPENDIX

The American Civil Liberties Union is a nationwide, non-profit, non-partisan organization with more than 400,000 members dedicated to the principles of liberty and equality embedded in the Constitution. The ACLU has been in the forefront of numerous cases involving free expression, filing including an amicus brief in *FCC v. Pacifica*, acting as lead plaintiff and counsel in *Reno v. ACLU*, 521 U.S. 844 (1997), which concerned regulation of indecency on the Internet, and recently filing an amicus brief in the Second Circuit concerning the procedures used by the FCC in its recent decisions involving indecency. *Jones v. FCC*, 02-6248 (brief filed Jan. 31, 2003). The ACLU appears on its own behalf and on behalf of its members which includes both artists and others who appear on broadcast television and individuals who watch broadcast television.

The American Federation of Television and Radio Artists (“AFTRA”), affiliated with the AFL-CIO, is a diverse union representing close to 80,000 professional performers and broadcasters nationwide who work in news, information and entertainment programming on television and radio as well as in the sound recordings industry, commercials and industrials, and new technologies such as interactive programming and CD ROMs.

Beasley Broadcast Group, Inc., is the nation’s 17th largest radio broadcasting company. Founded in 1961 and headquartered in Naples, Florida, Beasley Broadcast Group owns or operates 41 radio stations (26 FM and 15 AM) in ten large and mid-sized markets in the United States.

Citadel Broadcasting Corporation is a radio broadcaster serving primarily mid-sized markets in the United States. Through its operating subsidiary, Citadel Broadcasting Company, Citadel owns and/or operates 156 FM stations and 68 AM stations in 44 markets.

The Creative Coalition is the leading nonprofit, nonpartisan social and public advocacy organization of the arts and entertainment community. Founded by prominent members of the creative community, The Creative Coalition is dedicated to educating its members on issues of public importance, primarily the First Amendment, arts advocacy, runaway production and public education. The Creative Coalition does not endorse or raise funds for political parties or candidates.

Directors Guild of America, Inc. is a nonprofit corporation that serves as the duly recognized labor organization and exclusive representative for the purposes of collective bargaining of, among others, directors, assistant directors, and unit production managers of theatrical and television motion pictures. DGA has no parent corporation, and has no stock and hence no shareholders.

Entercom Communications Corp. is the nation's fourth largest radio broadcaster, operating in Boston, Seattle, Denver, Portland, Sacramento, Kansas City, Milwaukee, Norfolk, New Orleans, Memphis, Buffalo, Greensboro, Rochester, Greenville/Spartanburg, Wilkes-Barre/Scranton, Wichita, Madison, Gainesville/Ocala and Longview/Kelso, Washington.

The First Amendment Project is a nonprofit organization that is dedicated to protecting and promoting freedom of information, expression, and petition. The First Amendment Project provides advice, educational materials, and legal representation to its core constituency of activists, journalists, and artists in service of these fundamental liberties.

Fox Entertainment Group, Inc. is a multi-faceted entertainment company with operations in four business segments: (1) the production and distribution of filmed entertainment,

including the production of programming for television and cable distribution; (2) television station ownership; (3) the FOX Network; and (4) cable network programming channels.

The Freedom to Read Foundation is a non-profit membership organization established in 1969 by the American Library Association to promote and defend First Amendment rights and to set legal precedent for the freedom to read on behalf of all citizens.

Margaret Cho starred in the ABC sitcom, *All-American Girl* and a series of critically-acclaimed one-woman shows, including *Notorious C.H.O.* and *I'm The One That I Want*, which toured the country and was made into a best-selling book and feature film. Both are now airing on the Showtime Networks. Her newest concert film, *Revolution*, premieres on Sundance Channel in June 2004. Ms. Cho has been honored by, among others, American Women in Radio and Television, Lambda Legal Defense and Education Fund, the Asian American Legal Defense and Education Fund, and the National Organization for Women for “making a significant difference in promoting equal rights for all, regardless of race, sexual orientation or gender identity.”

Media Access Project is a thirty-year-old non-profit public interest law firm which represents the public’s First Amendment right to have access to diverse and antagonistic civic and artistic expression via the electronic mass media.

Minnesota Public Radio[®] operates a 35-station radio network serving virtually all of Minnesota and parts of surrounding states and produces local, regional and national programming for radio, Internet and face-to-face audiences. Minnesota Public Radio reaches 12 million listeners nationwide each week. Of those, 650,000 listen regionally in Minnesota and surrounding states. With nearly 83,000 members, it has the highest percentage of listener membership of any community-supported public radio network in the United States. Minnesota

Public Radio produces more national programming than any other station-based public radio organization in the country. National programs include A Prairie Home Companion[®], Saint Paul Sunday[®], Marketplace[®], Sound Money[®], The Splendid Table[®], Pipedreams[®], and Classical 24[®], a live, nationally broadcast classical music service.

The National Coalition Against Censorship, founded in 1974, is an alliance of 50 national non-profit organizations, including religious, educational, professional, artistic, labor, and civil rights groups, united in the conviction that freedom of thought, inquiry, and expression are indispensable to a healthy democracy. Positions advocated in these comments do not necessarily reflect the positions of each of the participating organizations in the Coalition.

The National Federation of Community Broadcasters is a twenty-nine year old grassroots organization which was established by and continues to be supported by member stations, comprising large and small, rural and urban broadcasters distinguished by their commitment to local programming, community participation and support. The Federation's nearly 250 members come from across the United States, from Alaska to Florida; from every major market to the smallest Native American reservation. While urban member stations provide alternative programming to communities that include New York, Minneapolis, San Francisco and other major markets, rural members are often the sole source of local and national daily news and information in their communities. This membership reflects the true diversity of the American population, with 41% serving rural communities, and 46% that are minority radio services.

Penn & Teller are “a couple of eccentric guys who have learned how to do a few cool things” to the tune of a critically acclaimed Off Broadway show, national tours, best-selling books, lectures at Oxford University and the Smithsonian Institution, and Visiting Scholar status at the Massachusetts Institute of Technology. The duo has a long history in television, including

their Emmy award-winning PBS special “Penn & Teller Go Public,” more than 20 appearances on “Late Night with David Letterman” and appearances on “The Tonight Show with Jay Leno,” “Late Night with Conan O’Brien,” “The Today Show,” “Saturday Night Live,” “The Drew Carey Show,” and “Friends.”

People For the American Way Foundation is a non-partisan citizens’ organization established in 1980 to promote and protect civil and constitutional rights, including First Amendment freedoms. With over 600,000 members and supporters nationwide, the Foundation frequently has been involved in litigation and other efforts to prevent overbroad regulation of free expression in the name of “indecentcy.”

Radio One, Inc., is the nation’s seventh largest radio broadcasting company and is the country’s largest radio broadcasting company primarily targeting African-Americans. Headquartered in Lanham, Maryland, Radio One owns and/or operates 67 stations (53 FM and 14 AM) in 22 markets. Radio One also programs one channel on the XM Satellite Radio system.

The Recording Artists Coalition is a nonprofit, non-partisan coalition formed to represent the interests of recording artists in public policy and legal debates that affect the music industry and the well being of recording artists.

Recording Industry Association of America, Inc. (“RIAA”) is a trade association whose member companies produce, manufacture and distribute over 90% of the sound recordings sold in the United States. The RIAA is committed to protecting the free expression rights of its member companies.

Screen Actors Guild (“SAG”) represents 120,000 professional actors. Headquartered in Los Angeles, SAG has branches across the United States and members work on television and feature films throughout the world.

Viacom Inc. is a leading global media company, with preeminent positions in broadcast and cable television, radio, outdoor advertising, and online. With programming that appeals to audiences in every demographic category across virtually all media, the company is a leader in the creation, promotion, and distribution of entertainment, news, sports, music, and comedy. Viacom's well-known brands include CBS, MTV, Nickelodeon, Nick at Nite, VH1, BET, Paramount Pictures, Infinity Broadcasting, Viacom Outdoor, UPN, TV Land, Comedy Central, CMT: Country Music Television, Spike TV, Showtime, Blockbuster, and Simon & Schuster.

When In Doubt Productions, Inc. is a film production company dedicated to producing films about social and historical issues and the way in which these subjects are reflected and explored through arts and letters.

Writers Guild of America, west represents writers in the motion picture, broadcast, cable and new media industries. Founded in 1933, the Guild represents 9500 writers of news and entertainment programming.

PUPPETRY OF THE PENIS

FOR IMMEDIATE RELEASE
March 30, 2004

Press Contact: Ted Bobrow
(414) 319-5700 ext. 241

Puppetry of the Penis – Indecent or Art?

The Ancient Australian Art of Genital Origami Creates Advertising Controversy in Madison

MADISON – Amid a national uproar centered on the over-exposure of private parts, Puppetry of the Penis proudly announces its arrival in Wisconsin in April. The show will open in Madison at the Barrymore Theatre April 2-4 and move to the Miramar Theatre in Milwaukee April 13-25. But the issue is who *will* announce it?

Recent indecent exposure incidents have been the subject of much national debate. Recently the FCC has fined many stations for airing indecent material, causing stations to use more conservative judgment in programming and advertisements. For instance, Clear Channel radio stations in Madison have rejected airing the “Puppetry of the Penis” ads with the concern that the ads would be considered offensive material to the FCC. However, other Madison stations such as WMMM and WBZU don’t see any issue with the ads and are currently airing them – adding to the growing gray area of what the FCC considers “indecent”.

“We’re excited to play in Madison, as a follow-up to our successful sold out 4-week run in Minneapolis,” said David Foster, the show’s producer. “Our show has taken world’s stages by storm, creating a runaway comedy hit unlike any other. The puppeteers have performed their unique repertoire of ‘genital origami’ for stunned, impressed and amused crowds around the world.

We’d really like to thank Janet Jackson and Justin Timberlake for bringing nudity to a national audience. With everyone talking about exposed body parts, our show fits right in.”

Some people disagree. In London, religious leaders have cried foul, calling Puppetry of the Penis “absolutely vile.” On the contrary, explains David Friend, one of the show’s creators. “Puppetry of the Penis is a comedy. It is not sexual. We do not ever swear. And we certainly make no references to the Bible, Christianity or any religion. However, you may hear the phrase ‘Jesus that’s huge!’ during a performance.”

Since making its debut at the 1998 Melbourne International Comedy Festival, Puppetry of the Penis has grown into a global phenomenon, spreading glorious Aussie culture across the planet. To date, over a million people around the world have seen the show.

Puppetry of the Penis plays at the Barrymore Theatre April 2-4 at 7:00 pm. Tickets are available by calling Barrymore Theatre at 608-241-8633, TicketMaster at 608-255-4646 or visiting ticketmaster.com. Tickets are available for the Milwaukee performances by calling the Miramar Theatre at 414-967-0302 or by calling TicketMaster at 414-276-4545.

Study Reveals Rock Listeners' Views On Indecency

Jacobs, Edison Media collaborate for groundbreaking research

By Kevin McCabe

R&R Sr. VP/Music Operations
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Jacobs Media and Edison Media Research recently released findings of a sweeping study gauging public opinion on the suddenly hotly debated topic of indecency. Employing an approximately 60/40 ratio of men to women, the study revealed that among listeners of Classic Rock, Active Rock and Alternative, programming on network TV, cable TV and radio is rarely, if ever, perceived as too dirty or explicit.

The research clashes with the views of some Washington, DC policymakers, who, since Janet Jackson's breast-baring incident at this year's Super Bowl, have raced to clamp down on broadcast indecency through a series of investigations and fines.

The respondents were overwhelmingly familiar with the self-proclaimed

poster boy for indecency, Howard Stern, and said that his program should not be susceptible to government involvement. Some 93% responded that they were aware that Stern's nationally syndicated radio program was taken off the air at some radio stations but responded to a subsequent question by indicating that people who want to listen to Stern

should be allowed to do so.

Similar consensus was found in another portion of the study, where a substantial percentage of respondents replied that they would simply change stations if something on the radio offended them. Nearly 81% agreed that even if a small group of listeners

INDECENCY See Page 10

Indecency

Continued from Page 1

is offended by a radio show's content, the FCC should not take action against it. The results indicate sharply conflicting opinions of what constitutes indecency among Rock listeners and FCC watchdogs.

To present a comprehensive look at the study's implications, R&R is dedicating two format columns for two consecutive weeks to the Jacobs/Edison project. Part One of the research recap begins on Page 54 of this week's issue.

"Today's radio shows are too dirty and explicit for my taste."

	Percent	Count	Answers
	3.2%	434/13,693	Frequently
	19.3%	2,648/13,693	Sometimes
	34.1%	4,664/13,693	Rarely
	43.4%	5,947/13,693	Never
	100%	13,693/13,693	Summary

Source: Edison/Jacobs survey of Rock listeners.



PART ONE OF A TWO-PART SERIES

Rated R For Rock

New survey finds Rock audience is not offended by edgy content

Hopefully, you TiVo'd or taped the halftime show from this year's Super Bowl. If you did, you may find yourself in possession of a historical artifact worthy of inclusion in the Smithsonian. The Janet Jackson "wardrobe malfunction" was the match that ignited the bonfire of backlash against perceived indecency on TV and radio and brought us to a turning point in American culture.

In much the same way that we look back at the early 1960s and say, "The Beatles changed pop music forever," and look back the late '60s and know with absolute certainty that the effects of psychedelics irrevocably transformed rock music forever, we will look back at 2004 as the time when consciousness of content in American media shifted.

The past two months have been filled with outrage from the FCC, Congress and the NFL. The flames of this conflagration have now reached the front door of one of the most hallowed — and family-friendly — television shows of the past 15 years, *The Oprah Winfrey Show*. In the latest example of the new sensitivity to indecency, the FCC is investigating complaints about an episode of *Oprah* in which the sexual activities of teens were discussed.

In a classic example of a snake eating its own tail, clips from that episode were aired on both Howard Stern's radio show and on ABC-TV's *Jimmy Kimmel Live*. Both hosts were making the point that the standards for indecency are anything but clear. Complaints to the FCC followed forthwith, and now that agency is investigating *Oprah*.

Radio Radio

Back in radio, the focus has recently shifted from air personalities (and their language) to the music. Reports are now surfacing that some Classic Rock stations are going back to songs that have aired for years and editing out expletives contained within the lyrics. "Money" by Pink Floyd and "Jet Airliner" by Steve Miller are two examples that have been cited.

This begs the question "What do the listeners think?" No one had thought to ask this — until now. A new survey by broadcast research company Edison Media Research and consulting firm Jacobs Media that polled almost 14,000 listeners of Active Rock, Classic Rock and Alternative stations provides some important answers.

This is the second survey on indecency performed by these two companies; the first was in fall 2002. With the current white-hot level of interest in this subject, the two companies felt it was time to talk to Rock listeners again.

It probably comes as no surprise that the Rock audience (we'll use the all-encompassing term of Rock as shorthand for all the Rock formats)

is, in general, less hysterical about all this hoopla than listeners to other formats, although it's hard to tell, since no surveys of the other music formats have been done. In fact, one of the conclusions of this survey is that it might be helpful to do surveys of other formats to see what those listeners think.

Nuts & Bolts

Jacobs Media President Fred Jacobs says, "Our new survey argues quite convincingly that, while some of the material on the radio may be shocking, it's what the audience wants."

"These Rock radio listeners are telling us in overwhelming numbers that they want to decide for themselves whether to listen to a radio program, and they believe that the marketplace, not the FCC or watchdog groups, should make the decision about what's available on the radio. The study implies that the people who are offended by edgy morning radio shows are not the people listening."

An overwhelming majority (70%) of the Rock radio listeners in the respondent pool believe that the current focus on some radio shows is an overreaction to the Janet Jackson incident.

"What is fascinating about these people is their ability to separate the Super Bowl episode from their feelings about morning radio programs," says Edison Media Research President Larry Kosin. "A majority of these people think that the Jackson affair was wrong, and yet these same people think that radio personalities should be allowed to say whatever they please. Clearly, what Rock listeners are saying is that the reaction to material depends on the context."

For the next two weeks, R&R is devoting both the Rock and Alternative columns to the results of this very important survey. Here now are the key findings as presented by Edison Media Research and Jacobs Media.

Key Findings

Few Rock radio listeners are offended by what they hear on the radio. We asked respondents, "Think about the radio station you listen to most often in the morning,

Study Methodology

Jacobs Media and Edison Media Research collectively designed and administered this survey via the Internet. In total, 40 Rock radio stations around the United States invited their listeners to participate in the survey. The number of respondents who could come from any individual radio station was capped at 6% of the total sample. The interviews were conducted between March 12-19, 2004.

As with all Internet-based research projects of this kind, the results reflect only those who choose to participate in the survey and do not necessarily represent the views of all Rock radio listeners in the country.

Still, the 40 radio stations that invited their listeners to participate represent a broad cross-section of Rock stations, including large and small stations from large and small markets. Some have very edgy morning shows and some have very mild ones; and some play the newest rock music, and some play only classic rock.

According to audience estimates from Arbitron, just over 50 million people listen to Rock radio stations every week.

Sample Demographics

In total, there were 13,798 Rock radio listeners who completed the survey. These people were distributed as follows:

Male	61%
Female	39%
Under 18	5%
18-24	19%
25-34	28%
35-44	29%
45-54	17%
Over 55	2%
Democrat	26%
Republican	27%
Independent	34%
Attend church regularly	27%
Attend church a few times per year	19%
Rarely or never attend church	54%
Listen to station with "very edgy" morning show	49%
Listen to station with "moderately edgy" morning show	24%
Listen to station with "not edgy" morning show	27%
Listen to Alternative station	24%
Listen to Active Rock station	36%
Listen to Classic Rock station	40%

Graph 1

Think about the radio program you listen to most often in the morning. How often does it offend you in some way?

	Percent	Count	Answers
	2.0%	274/13,678	Frequently
	9.2%	1,265/13,678	Sometimes
	34.2%	4,675/13,678	Rarely
	54.6%	7,464/13,678	Never
	100.0%	13,678/13,678	Summary

How often does it offend you in some way?" (See Graph 1.) More than half (55%) of respondents said "never." Only 11% of respondents said "frequently" or "sometimes."

Significantly, the answers are nearly identical among those who listen to stations with all kinds of shows, from the most to the least

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Rated R For Rock

Continued from Page 54

"edgy." This implies that people choose a show that is unlikely to offend them.

Women were only slightly more likely than men to be offended by what they hear (40% of women are "never offended"; men, 60%). Parents with children under 13 were no more likely to be offended than the group as a whole. Republican and Democrat Rock listeners had no significant difference between them with regard to this question.

As one respondent pointed out, "I am the parent of a 13-year-old boy. If I hear something potentially offensive, I have the right to change the station with my own hand. I am disturbed that the government will 'parent' me by choosing what I can and cannot choose to listen to."

One interesting twist: There was a sizable minority of respondents who said, "Shock-jock radio personalities have gone too far." (See Graph

2.) More than one-quarter of respondents (28.3%) agreed with this statement. Certain subgroups, such as women (32%), parents (32%), frequent churchgoers (40%), Republicans (35%) and Classic Rock listeners (43%), agreed with this statement in larger numbers. Among those who listen to the mildest morning radio shows, 43% agreed with this statement.

Janet Incident A Major Issue

While not personally offended by it, a majority found the Janet Jackson Super Bowl incident to be a "major issue." Our respondents had interesting views on the Jackson kerfuffle. Only 14% of respondents said they were personally offended by it, yet just over half said it is an "important issue."

We see the implication that our respondents can separate what is offensive to them and what is appropriate in different contexts. (See Graphs 3, 4 and 5.)

This is summarized by one of the web poll's participants, who said, "I believe in freedom of speech, and I believe that even shock jocks are entitled to this right. However, I think that programmers should be cognizant of what the expected audience will be."

"Without a doubt, the expected audience for the Super Bowl halftime show included children. That act was totally inappropriate, and anyone who was privy to the planned exposure should be held responsible for abusing the broadcast."

Perhaps not surprisingly, men were much less likely to be offended by Jackson's "costume reveal" than women were, but only 17% of our female respondents said they were personally offended by the stunt. Frequent churchgoers (24%) and Republicans (20%) were slightly more likely than the group as a whole to have been personally offended, but overwhelming majorities of these groups were not offended.

As might be expected, those who listen to the edgiest morning shows were the most likely to say that the incident was not an important issue (56%). Among those who listen to the mildest morning shows, only 39% thought the incident was "not important."

Well over half of all respondents, including many who thought the issue "not important," felt that someone should be punished or sanctioned for it. The entity most felt should be held accountable was Jackson herself (59%), followed by Justin Timberlake (50%) and MTV (21%). Only 34% of our respondents felt that no one should be punished for what transpired.

Howard Is Cool

Rock listeners overwhelmingly support Howard Stern. Howard Stern is the rare radio personality who, because of his exposure across many media, is well known even in markets where his show doesn't run.

Fully 98% of respondents (from a mix of markets where Stern is and isn't aired) said they have heard of him. More than 90% of those respondents were aware that Stern's show had recently been taken off the air in a handful of radio markets because of indecency concerns. (See Graphs 6, 7 and 8.)

Those who knew of Stern's removal in these markets overwhelmingly believe this was an unfair decision. When given the choice between two statements about Stern's elimination, they answered as follows:

- "They were right to take Howard Stern off the air": 20%
- "People who want to listen to Howard Stern should be allowed to do so": 80%

In every subgroup a strong majority said that people who want to listen to Stern should be allowed to do so. The groups most likely to say

Graph 5
Which of these — if any — should be punished or sanctioned as a result of the Super Bowl incident? (Choose as many as apply.)

Percent	Count	Answers
10.5%	1,436/13,693	CBS Television
21.2%	2,906/13,693	MTV
4.0%	548/13,693	NFL
2.1%	290/13,693	CBS local TV stations that carried the game
6.4%	871/13,693	ADL, the halftime show sponsor
10.6%	1,458/13,693	Viacom, CBS's and MTV's parent company
58.7%	8,041/13,693	Janet Jackson
49.7%	6,810/13,693	Justin Timberlake
34.1%	4,675/13,693	None of these

Graph 2
Shock-jock radio personalities have gone too far.

Percent	Count	Answers
28.3%	3,851/13,597	Agree
42.6%	5,819/13,597	Disagree
28.9%	3,927/13,597	Neutral
100.0%	13,597/13,597	Summary

Graph 3
Were you personally offended by the Janet Jackson/Super Bowl incident?

Percent	Count	Answers
14.3%	1,961/13,721	Yes
80.5%	11,047/13,721	No
5.2%	713/13,721	Not sure/don't know
100.0%	13,721/13,721	Summary

Graph 4
Which of these statements best describes your attitude about the Janet Jackson/Super Bowl incident? (Choose one only.)

Percent	Count	Answers
9.0%	1,233/13,749	It's an important issue; the government needs to ensure it doesn't happen again.
42.0%	5,780/13,749	It's an important issue, but it's not worthy of government involvement.
49.0%	6,736/13,749	It's not that important of an issue.
100.0%	13,749/13,749	Summary

Graph 6
Have you heard of the radio personality Howard Stern?

Percent	Count	Answers
98.3%	13,516/13,750	Yes
1.7%	234/13,750	No
100.0%	13,750/13,750	Summary

Graph 7
Are you aware that Howard Stern's program was taken off the air at some radio stations recently because of indecency concerns?

Percent	Count	Answers
93.1%	12,571/13,498	Yes
6.9%	927/13,498	No
100.0%	13,498/13,498	Summary

Graph 8
Which of these statements best describes your feelings about those stations taking Howard Stern off the air?

Percent	Count	Answers
19.5%	2,473/12,656	They are right to take Howard Stern off the air.
80.5%	10,183/12,656	People who want to listen to Howard Stern should be allowed to do so.
100.0%	12,656/12,656	Summary

"They were right to take Howard Stern off the air" were listeners to stations with mild morning shows (30%) and listeners who are frequent churchgoers (32%).

Next week: More poll results and a comprehensive wrap-up with specific recommendations that address the question "So, what's next?"

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Stations Consider Tape-Delayed News

By John Eggerton -- Broadcasting & Cable, 4/6/2004 4:00:00 PM

Conventional wisdom says news and sports are traditionally exempt from indecency concerns.

But in a climate of fear, some station executives are discussing adding a tape delay.

An incident at KRON raised a red flag. The newscast was fined by the FCC after a *Puppetry of the Penis* troupe member exposed his "marionette" during a news segment.

Radio-Television News Directors Association has launched a preemptive strike: a seminar on news and indecency at April's convention. The topic was also broached between station execs and First Amendment attorney John Crigler.

Job one: How to avoid fines.

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<http://www.calendarlive.com/tv/cl-ca-rogues28mar28,2,1881873.story>

THE DECENCY DEBATE

Pulled into a very wide net

Unusual suspects have joined the censors' target list, making for strange bedfellows (wait — can we say that?).

March 28 2004

Janet Jackson's bare breast was one thing. But for a real sign of how sensitive the broadcast indecency issue has become, consider the case of Raquel Smashenburn.

The sight of her bare bottom was too much for executives at UPN, who ordered it obscured in the first episode of their new sitcom "Game Over." Oh, and for the millions who didn't see it, Raquel is an animated character.

Hoping to avoid millions of dollars in fines and protect their licenses, the networks' gatekeepers are now rushing to cover naked body parts, cut foul language and monitor anything that smacks of poor taste ... except when they're not. The only consistent thread running through the current crackdown — which has ensnared culprits ranging from a chronic provocateur like ousted radio personality Bubba the Love Sponge to an accidental offender like NBC's "ER" — is how wildly inconsistent it all seems.

ABC's venerable "NYPD Blue" had to darken one of its trademark sex scenes, yet cops still utter one common barnyard epithet every episode, and the bloody corpses pile up. Radio giant Clear Channel Radio dropped Howard Stern's show from six stations, citing its "inappropriate material"; Viacom's Mel Karmazin, Stern's employer, told a U.S. senator that Stern's show "does not fall within the ... indecency definition." MTV, which produced the Super Bowl halftime show in which Jackson's wardrobe "malfunctioned," has relegated some racy videos to late-night hours, yet FX's gritty, often obscene cop drama "The Shield" is back for its third season in prime time.

In 2001, NBC chief Bob Wright sent a memo to TV executives urging them to ponder the long-term effects of HBO's "The Sopranos." For all the series' success, Wright wrote, "we could not and would not air [the show] on NBC because of the violence, language and nudity."

Staking a position is one thing, but withstanding the audience erosion caused by cable's aggressive programming is something else. Since Wright's memo surfaced, NBC has aired "Kingpin," a hard-hitting series about a Mexican drug lord, as well as envelope-pushing unscripted series such as "Fear Factor" and "Meet My Folks."

Stern has used his show to decry what he calls censorship in the culture. But it's important to note that at least so far, the media companies are censoring themselves — mostly from fear that the indecency debate will end up affecting their balance sheets. As always, it's the bottom line — and not so much a naked bottom — that gets the attention of the big media companies.

Caught in the maelstrom

Josh Schwartz

Creator and executive producer, Fox's "The O.C."



Busted for: Attempted sexual relations between Ryan (Benjamin McKenzie) and Marissa (Mischa Barton).

Punishment: Ryan and Marissa engaged in some grab-fanny last November but, post-Janet Jackson, were told by Fox to chill; the TV couple will stay celibate through the end of the season. Some double-entendres have been scrapped too.

Prior offenses: Quick snippets of hot tub threesomes, background cocaine use, underage keg parties.

His reaction: "It's kind of scary what's going on now. But the show was never going to be about drugs or sex. Because you can never get away with that much on network television anyway."

Going forward: "We've had to pull back on some of the more extreme behavior the kids do over the course of the season. There's not nearly as much drinking. There's not nearly as much drug use."

What else: "I still can't believe that we got away with this, but in the pilot, our hero and heroine, Ryan and Marissa, bonded over a cigarette. It was true to the characters, but something we were never going to be allowed to do again."

'Raquel Smashenburn'

Character on "Game Over," a UPN prime-time series



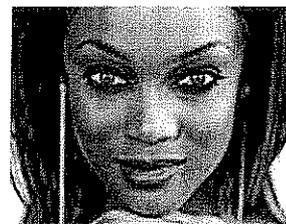
Busted for: The March 10 premiere of this computer-generated, animated sitcom featured a female character's bare backside.

Punishment: Network executives forced the producers to blur the image.

The reaction: The producers were reportedly not pleased but declined to comment. The network likewise declined to comment. But then, few people noticed anyway; that debut episode attracted fewer than 2 million viewers.

Tyra Banks

Creator and executive producer, UPN's "America's Next Top Model"



Busted for: A March 16 "orgy episode" that depicted four female contestants engaged in a late-night tryst with men in Milan, Italy.

Punishment: UPN reportedly ordered the producers to cut certain scenes deemed "inappropriate for broadcast." But as one of UPN's biggest hits, it has been renewed for two more seasons.

Her reaction: Banks wouldn't comment for this story. But she told Conan O'Brien in January that the women "were doing the nasty ... I don't want to say 'orgy' — but I just said it."

John Wells

Executive producer, NBC's "ER"



Busted for: A Feb. 5 episode of the hospital drama contained a glimpse of an 80-year-old patient's breast.

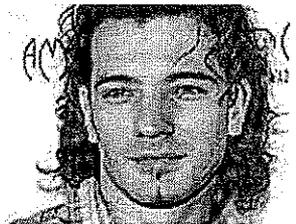
Punishment: Under pressure from its affiliate stations, NBC forced the producers to obscure the shot.

His reaction: "The incidental exposure of an elderly woman's breast in the context of a medical trauma is not comparable" to Jackson's "wardrobe malfunction" at the Super Bowl, he said in a statement.

Going forward: Wells also said such pressure is why "so many of today's producers and viewers are increasingly turning to HBO and other cable outlets that do not censor responsible storytelling."

JC Chasez

Pop singer



Busted for: What were deemed offensive lyrics.

Punishment: Dropped as a performer at the halftime show for the NFL's Pro Bowl Feb. 8, one week after the Super Bowl. NFL officials worried that the song he was scheduled to sing, "Blowin' Me Up (With Her Love)," would be too provocative with such lines as: "She was leaning on me / Getting horny / Maybe we'll get naughty."

Prior offenses: None

His reaction: "The NFL's shallow effort to portray my music as sexually indecent brings to mind another era when innocent artists were smeared with a broad brush by insecure but powerful people," Chasez said in a statement he released after being dumped.

What else: The NFL said Chasez *could* sing the national anthem at the Pro Bowl. He declined, saying, "That's not the America I love. Nor is this the NFL I love."

Sandra Tsing Loh

Humorist, author and creator of "The Loh Life" commentaries that aired for six years on public radio's KCRW-FM (89.9)



Busted for: Using the F-word in a pre-recorded Feb. 29 commentary about her star-struck admiration for Bette Midler and her musician husband's onstage proximity to the singer.

Prior offenses: None

Punishment: Station manager Ruth Seymour fired Loh on March 1, saying her use of the word might endanger the station's license and/or result in heavy fines.

Punishment reconsidered: After an outpouring of support from fans and friends in the media, several cause célèbre interviews and a conversation with Loh's engineer in which Seymour says she learned he was supposed to bleep her comments for comic effect, Seymour offered to rehire Loh, in a better time slot. Loh refused, citing a "toxic environment" at the station.

Her reaction: "It wasn't exactly a free-speech issue since I didn't intend to say that. Now I'm a free-speech pioneer along with Lenny Bruce."

Going forward: On Tuesday, KCRW's crosstown rival, KPCC-FM (89.3), announced it had hired Loh, who'll start at the Pasadena station in June. KCRW, meanwhile, shot back at Loh, claiming she's not as innocent as she's been portrayed.

Chronic offenders

Howard Stern

Syndicated talk-radio personality

Busted for: Lewd talk



Punishment: Clear Channel Radio removed Stern from six stations after he allowed a guest to utter a racial epithet on his Feb. 23 broadcast. On March 18, the FCC fined his employer, Infinity Broadcasting Corp., for a 2001 broadcast. He remains on about three dozen other stations.

Prior offenses: One broadcasting research group estimates that half of all FCC fines for broadcast indecency since 1990 — about \$2 million — have been assessed against Stern.

His reaction: He claims that Clear Channel acted after he began attacking President Bush and urging the election of Sen. John Kerry. "They thought this would be a good political issue, to keep everyone distracted from what's happening in the Bush administration," he said on a recent show.

Going forward: Has threatened to quit broadcast radio and take his show to the less-regulated satellite radio services if Congress passes legislation drastically increasing maximum fines for indecency.

What else: Compares his agony to "Jesus on the cross, having his skin pulled."

Steven Bochco

Executive producer and co-creator, ABC's "NYPD Blue"

Busted for: A steamy sex scene between "Blue" costars Esai Morales and Jacqueline Obradors on the March 2 episode. After 11 seasons of partial nudity and strong language on the series, ABC censors struck.



Punishment: ABC darkened the scene to obscure certain body parts.

His reaction: After ABC asked him to alter the scene, Bochco compiled a highlight reel of previous episodes when "Blue" had shown at least as much skin. "I'm disregarding them and doing the show to the same standards and rules we established 11 years ago," he says.

Going forward: "I don't know if [this] is a battle you can win these days." On the other hand, he doesn't think the current climate will suppress television for long. "Inevitably, even kicking and screaming, the medium does get pulled into the future," he says.

Bubba the Love Sponge

Radio personality



Busted for: Airing seven conversations in 2001 from cartoon characters like Scooby Doo in which they spoke about sexual acts including masturbation and described in detail a male's genitals. Some of these conversations were, according to the FCC, "inserted between advertisements for Cartoon Network's Friday night cartoons that are identified as 'provocative adult cartoons to help you get your freak on.'" Dialogue included Alvin the Chipmunk complaining that he hadn't had sex in almost six weeks.

Punishment: Clear Channel fired Bubba on Feb. 24, after the FCC imposed a \$755,000 fine against the company — the steepest fine ever levied against a broadcaster by the commission.

Prior offenses: In 1998 the FCC fined Bubba (whose birth certificate reads Todd Clem) \$23,000 for indecent material that stemmed from several segments aired in 1997 and 1998 that included descriptions of enemas, child molestation, prison rape and a fictitious serenade between President Clinton and White House intern Monica Lewinsky. In February 2000, Clem broadcast from the studio a stunt in his station's parking lot in which three other men castrated and killed a boar during the station's "Roadkill Barbecue" show. Clem and his cohorts pleaded not guilty to animal cruelty charges. On Feb. 28, 2002, all four men were acquitted.

His reaction: "I am deeply saddened and confused by the actions of Clear Channel," he said in a statement posted on his website Feb. 26. "I have always striven to be a responsible broadcaster and entertainer. The success of my shows, my deep involvement in the community ... fully attests to that belief."

Provocateurs

Bono

Lead singer of U2



Busted for: Using the F-word while accepting a Golden Globe Award on Jan. 19, 2003, for U2's song "The Hands That Built America."

Punishment: None yet. On March 18 of this year, the FCC deemed the singer-activist's comment "indecent," overturning an earlier ruling by its enforcement bureau. No fines were imposed against the singer or NBC.

Prior offenses: None.

His reaction: "You can always cause a stir with an expletive, and it's not something that I'm conscious of.... I don't mean to offend anyone," he told Reuters.

Going forward: "I swear I won't swear," Bono told Reuters before this year's Golden Globes.

Janet Jackson*Pop singer*

Busted for: Exposing her right breast on national television during the halftime show at Super Bowl XXXVIII on Feb. 1.

Punishment: Lost her spot as a presenter on the annual Grammy Awards telecast one week later. CBS instituted a five-minute video and audio delay for the Grammy telecast. She's also out of the running to portray Lena Horne in an ABC-TV movie about the singer's life.

Prior offenses: Sexually provocative song lyrics, music videos and album covers. In 1993, Jackson appeared topless on the cover of Rolling Stone, her then-husband's hands strategically covering her breasts.

Her reaction: Tearful videotaped apology. In her first interview on the subject, printed in Ebony magazine's April issue, Jackson says: "It was not intentional. It was a costume accident ... That was basically it."

Going forward: Her new album, "Damita Jo," is due Tuesday and is widely expected to enter the national sales chart at No. 1. (Review on Page E-44.) The cover photo shows Jackson from the side, nude from the waist up, her arms crossed over her chest. She has appearances slated for Monday on CBS' "The Late Show With David Letterman" and subsequently on ABC's "Good Morning America" — which will use a five-second audio and video delay — Fox's as well as "On Air With Ryan Seacrest" and NBC's "Saturday Night Live."

Justin Timberlake*Pop singer*

Busted for: Ripping the bodice off Jackson's outfit during the Super Bowl performance.

Punishment: Reportedly required to apologize during the Grammy Awards broadcast to keep his role as a performer.

Prior offenses: None

His reaction: "I know it's been a rough week on everybody," he said on the Grammy telecast. "What occurred was unintentional, completely regrettable, and I apologize if you guys are offended."

Going forward: Recently backed out of co-hosting ABC-TV's "Motown 45" anniversary special, which will be taped on April 4 in Los Angeles and air May 3. Timberlake says it is because he is too busy working on his first movie, not because of criticism over his role in the Super Bowl incident or flak he got because he is white and never recorded for Motown.

And yet, life goes on

OK, so there's a decency crusade raging through the airwaves. Yet in keeping with the seeming

arbitrariness of the current media crackdown, there is no shortage of opportunities to see or hear programming that pushes the taste boundaries. Consider these examples:

Violence: USA Network, a basic cable service that reaches nearly 90 million homes, aired the first 10 minutes of Universal Pictures' "Dawn of the Dead" on March 15, a teaser for the sister studio's very bloody horror remake. And USA's new series "Touching Evil" debuted March 12 with a protagonist who has been shot in the head; plots haven't really calmed down since.

Profanity: Amid the usual intra-judge bickering on "American Idol" last Tuesday, cameras caught Simon Cowell with his head on his right hand, just the middle finger extended. It was accidental, he said in a release: "I certainly would never make a gesture like that toward Paula or on national television."

Sex: VH1's breakfast-time show has been airing Britney Spears' "Toxic" video, featuring the singer as a flight attendant introducing a passenger to the mile-high club, and also writhing around in a skin-toned body suit with strategically placed spangles.

Nudity: Perpetually addled rocker Courtney Love revisited her stripping past, showing up on CBS' "Late Show with David Letterman" March 17 and blurting "FCC!" as she raised her top for the nonplused host. Maybe it's because the show aired so late at night or because Love was shot from behind. Either way, it generated much more head scratching over Love's antics than outrage over her skin baring, perhaps a sign that the nation has moved on.

Staff writers Scott Collins, Lynn Smith, Randy Lewis, John Horn and Bob Baker, as well as Times researcher Scott Wilson and contributor Dana Calvo, contributed to this report.



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Rocky Mountain News

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URL: http://www.rockymountainnews.com/drmn/music/article/0,1299,DRMN_54_2759165,00.html

Learn no evil

Broadcast words, actions stir efforts to clean up 'dirty' airwaves

By **Mark Brown, Rocky Mountain News**
March 27, 2004

Forget Reaganomics. This is how the trickle-down theory works in 2004:

Janet Jackson flashed a breast at the Super Bowl.

Advertisement

So now in Denver, live radio is history.

Jackson is old news, but the fallout is finally raining down. After years of setup by shock jocks Howard Stern, Opie and Anthony, some guy called Bubba the Love Sponge and more, Jackson's stunt put the match to the fuse.

None of the offending disc jockeys is from here. None of their syndicated programs was even carried in Denver. No station in this market has ever received an indecency violation notice from the Federal Communications Commission.

Yet because of the blowup, radio throughout Colorado has changed from the way it was only a few weeks ago. Because of the threats of huge fines and vague decency guidelines:

- ▶ Virtually everything you hear on Denver airwaves now is either prerecorded or tape-delayed.
- ▶ DJs feel muzzled by new restrictions on what they can say. They've been told to keep it clean or else.
- ▶ Rock songs that have been played for a quarter-century are suddenly being pulled and re-edited.
- ▶ Songs that already have been censored with editing equipment are being re-edited to make them even cleaner.
- ▶ From here on out, DJs have to sign contracts personally taking the blame for any indecent material on their shows.

Hands are tied

Even KBCO's hallowed Studio C - the bastion of rock tastefulness - is put on a four-second delay now on the unlikely chance that Dave Matthews or Lyle Lovett will take off on a profane rant if they break a guitar string.

"It has swept the country so fast everyone is reeling from it. It's a brave new world out there and we have to figure out how to navigate it," says Mark Remington, vice president for Clear Channel Radio, which owns KBCO-FM (97.3), KRFX-FM (103.5, the Fox), KTCL-FM (93.3), KBPI-FM (106.7) and a host of AM stations in Colorado.

It's like punishing your kid because a kid three states away did something wrong, but broadcasters feel their hands are tied. Even as radio professionals think it's unfair - and privately they seethe about the hypocrisy of it all - they're scrambling to have nothing to chance.

"This is just like another witch hunt," says Jeff Pollack, head of the Pollack Media Group, an L.A.-based international radio



Linda McConnell © News/2003

KRFX-FM morning DJs Rick Lewis, left, and Michael Floorwax have taken intense indecency awareness training.

consulting firm. "It *does* affect you. People are going to be much more conservative. People are running in fear. Broadcasters are very concerned, as they should be. This is about as bleak as it has ever been for an environment of being creative."

"I am paid to help protect our license against these things," says Cat Collins, program director at KQKS-FM (KS107.5), Denver's successful rap/hip-hop station. "It doesn't matter politically how I feel about it."

Big chill

The threat of new half-million-dollar fines and the possibility of a station losing its license to broadcast has tossed a distinct chill into the industry that up till now has been the front line of free speech.

"Even for one violation, if it's bad enough . . . you can lose your license. For a general manager, that's a death knell. Nobody wants to be the scapegoat," Remington says.

The result is a wave of self-censorship on a national and local level. The FCC has given only broad guidelines on what's acceptable; it's up to the stations to make sure they don't cross a line that they can't even see.

"What we're trying to do is insulate ourselves from a mistake," says Mike O'Connor, director of programming for Clear Channel. "These are really just extra precautions to protect us at a time when, frankly, there *is* a witch hunt going on."

"I don't blame the broadcasters. The broadcasters are put in a very difficult place," says Pollack. "The commission has forced broadcasters into a very tough position and a lot of it is unwarranted. Clear guidelines really need to be established. In the climate that we're facing, everything seems to be under scrutiny."

Drawing the line

FCC chairman Michael Powell has been adamant about cleaning up the airwaves, and thus far has levied more fines than ever before in FCC history. When the Jackson flap happened, Powell immediately condemned it and pushed for stricter fines.

Former Clear Channel head Randy Michaels held a conference call with his station managers shortly after Bush came into office to tell them the climate had changed and "pleaded with managers to make sure we're in total and complete compliance," O'Connor says.

"They've been waiting for something to happen to create an environment where they could go after these jocks," Pollack contends. Even though it's apples-and-oranges - a singer on a sports halftime TV broadcast during prime time versus radio shows designed for adults - Jackson's stunt pushed all the buttons.

"That's part of what happened here - people were so outraged that you can't even watch a football game anymore without someone sneaking something in," Remington says. "It was like a lightning rod."

"Yes, (radio talk shows) go over the line once in a while. Of course they do. You slap them for that. But is this the case for the mass hysteria we're seeing around the country?" says Pollack. "The whole question is if I'm disgusted, I can turn off the radio. I don't like the government telling us what they perceive as being decent or indecent."

"If you have one or two people or even 1,000 people complaining about a show, should that be enough to take a show off the air? Should it be enough to create such an environment of financial crisis in terms of the amount of fines?" Pollack says. "There will always be people who have problems with everything."

FCC officials confirmed some information for this article, but wouldn't speak on the record as of press time.

Fines that hurt

Many thought Infinity wrote off the Howard Stern fines as the cost of doing business - he has garnered about \$2 million in fines in the past 14 years while bringing in a reported \$100 million in revenue a year.

The FCC is raising those fines to make them more painful.

"The previous fines were a max of \$27,500 (per violation)," Remington says. "Take it up to a half-million dollars and when someone starts messing up, that gets your attention."

Everyone at Clear Channel has had renewed indecency awareness training, including sales people, Remington says. KBPI's morning-show team was pulled off the air for two days when management thought they may have said something inappropriate; they were reinstated when management found no wrongdoing.

Air talent on the front lines - the Fox's *Rick Lewis & Michael Floorwax's* morning show, KBPI's morning Locker Room crew, KHOW-AM (630) talk-show hosts Scott Redmond and Bob Newman - have been sat down for even more intense talks about what they say and do on the air.

"We *had* to. To not do so would be suicidal, for them and for us. So yeah, we seriously sat down with folks," Remington says. "We've seriously looked at our way of doing business differently."

Clear Channel acknowledges that some of its on-air personalities aren't happy with the new guidelines, but they have no choice.

"If we don't have a license, they don't get to yap on the radio. It's that simple," O'Connor says.

"Sophomoric humor is not banned by the FCC," O'Connor notes, saying the FCC is focused on "patently offensive descriptions of sexual and excretory organs or acts."

When in doubt, drop it

Context also plays a vital role in whether something is deemed indecent. If a morning show team makes graphic sexual jokes, it could bring down the wrath of the FCC. However, when talk radio is tackling subjects such as Kobe Bryant or the CU rape allegations, graphic descriptions of the allegations are generally seen as protected free speech.

That's the dilemma Howard Stern finds himself in. The FCC has gone after him for blunt talk about sex on his syndicated radio show. Stern has fought back, showing that Oprah Winfrey has broadcast similarly explicit descriptions of sex acts without a problem.

"Most of what our guys do is on the up-and-up anyway. It's more the occasional caller who might get through and drop a few f-bombs. It's not like they have to change their whole shtick," Remington says.

But, he says, "if you have any doubt . . . pull it off until we find out where the lines are."

That includes classic rock songs that have been played on the air for decades up till now. Clear Channel went back through its song database and made changes to everything from Steve Miller's *Jet Airliner* to Nine Inch Nails' sexually explicit *Closer*.

"We're scrutinizing every song, both new and existing. The law doesn't discriminate," O'Connor says.

"But the most important thing is to get hold of our (on-air) talent. The FCC seems to be focused on performances or speech. We're going to get to everything we can and hopefully not make any fineable mistakes," O'Connor says.

KS107.5's Collins went through much of the same tweaking, even though the focus of the FCC so far has been on talk rather than music content.

"I've had a meeting with my staff to explain potentially how serious one of their mistakes could be," Collins says. But "knowing the FCC is putting more scrutiny on radio stations . . . my oversight has become a little more focused on the content and the lyrics of the songs we play."

Representatives for Entercom, which owns KQMT-FM (99.5, The Mountain) and KALC-FM (105.9 Alice), were unavailable to talk about changes.

Listening again

Jefferson Pilot-owned KS107.5's format by nature is more risqué and cutting-edge than most other stations. Hot new hits by Ludacris, Eamon and Frankee are not only filled with expletives (edited out for airplay) but extreme sexual content as well.

"I've always been well aware of the sexual content of the music," Collins says. "I don't believe KQKS has ever been indecent since I've been here in 1998."

The station receives

edited, cleaned-up versions of hip-hop songs from the record companies, but Collins and music director John Kage go through each one again to make sure nothing slips by. They'll actually re-edit the songs if they feel the company didn't do a good enough job clipping out obscenities.

Despite the explicit sexual content of some rap songs, the FCC doesn't pursue those complaints as aggressively as those about talk radio. As a song, rap lyrics have more First Amendment protection than talk. In 2000, the FCC went after Pueblo radio station KKMG-FM in a landmark case after the station had played an Eminem song, *The Real Slim Shady*. A \$7,000 fine was eventually assessed, but in 2002, the FCC reversed itself, declaring the song not obscene after all.

"I haven't taken any music off the air. I have gone back and listened to every song we play to see if we should do additional edits," Collins says. "We have done some editing. Now that there's more scrutiny on us, I have completely eliminated (any obscenities) in the music."

They have kept songs off the air that they just didn't feel right about. Last year's track *Purple Stuff* by Big Moe "was actually about drinking cough syrup at parties and getting high on that. I remember telling my music director 'We're not playing this.' To me, it was offensive," Collins says.

Mark Brown is the popular music writer. Brownm@RockyMountainNews.com He hosts a weekly radio show at 6:30 p.m. Sundays on Clear Channel's KRFX-FM.

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INSIDE RADIO

Tuesday, March 23, 2004

Editor: Tom Taylor (609) 883-3321

Stations are pruning their Pink Floyd and cleaning up Steve Miller's "Jet Airliner." What's going on? The indecency scare has rippled down to station playlists, causing programmers to pull or edit some of the real staples of rock and CHR. Gone is the "BS" in Pink Floyd's "Money", and the "funky s-t in the city" line from Steve Miller Band's "Jet Airliner." Also getting sanitized are The Who's "Who Are You?" and "Jeremy" by Pearl Jam. One classic rock programmer says it's odd that 25-year-old songs that have literally made billions of impressions now get neutered. It may be that rock listeners expect to hear those words and don't object to the FCC. While CHR and urban radio have their own issues — dating back to the explicit language in Prince's "Erotic City." And the actual f-word in the title of at least one current CHR track. Consultant Guy Zapoleon tells *Inside Radio* that "with most Top 40s being mothers-and-daughters stations, broadcasters have to be responsible and mindful of what the audience can tolerate in terms of objectionable content. The problem is what the leading-edge audience thinks about bleeping out or editing. If the song becomes massively edited, you have to question whether to play the song altogether."

No FCC indecency fines yesterday. If the FCC was indeed working on about a dozen possible fines as it said a couple of weeks ago, we've still got a half dozen or more to go. Last Friday's FCC confirmation of an ancient fine against Infinity's "Wild" WLLD in Tampa set the Wonder Machine going again: that fine dated from a broadcast of the live "Last Damn Concert" in 1999. That was five years ago. The case is old enough to go to kindergarten.

Entercom buys Providence's WWRX from Stephen Mindich — and will simulcast Boston's WEEI on it. David Field takes the \$14.5 million opportunity to enter the southern New England market and simulcast his highly successful Boston sports talker. There will be some local Providence content. But the deal gives Entercom a chance to spread its big new investment in afternoon talker Glenn Ordway. He signed a five-year deal with 'EEI three months ago (December 22, 2003 *Inside Radio*). Speculation then was that Entercom would aggressively look to syndicate him, and now it can do that in-house, when the LMA with WWRX begins May 1. So who's the seller? Boston Phoenix publisher and station owner Stephen Mindich. He acquired WWRX, Westerly, RI in late Summer 2000 and paid \$16 million for it. That's when he was extending his 'FNX Network both north and south from his Boston base of WFNX. But Providence never really fit in, and eventually WWRX started doing separate programming. It's a class B at 103.7 and should fill out WEEI's signal south and west of Beantown. Broker: Dick Foreman, for the seller.

Arizona station owner Rick Murphy has his eyes set on a new career — in the U.S. House. Murphy announces he'll work to win the Republican nomination for a congressional seat currently held by freshman Rep. Trent Franks. There's a GOP primary September 7 and Murphy says he plans to spend as much as

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Billboard March 13, 2004

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It all started with Janet Jackson's breast.

The singer's "wardrobe malfunction" at the Super Bowl put the Federal Communications Commission on the warpath to stamp out **indecent** and hold congressional **indecent** hearings.

As the federal storm gathered, Clear Channel led **radio** self-regulation on the issue. It fired longtime Florida-based morning host Todd "Bubba the Love Sponge" Clem and pulled Howard Stern's syndicated morning show from the six Clear Channel stations carrying it. Clem's program was cited by the FCC in a recent \$715,000 **indecent** fine against Clear Channel in January.

Viacom-owned Infinity, the company from which Stern's show originates, also reacted. Infinity executives John Sykes and Joel Hollander issued an internal memo Feb. 18 outlining the FCC's current definition of **indecent** and mandating that any show with live phone calls or controversial content should have a delay in place.

The memo also issues content guidelines on avoiding **indecent**. "Failure to abide by this policy is grounds for harsh discipline, including immediate termination," the memo states.

An Emmis Communications spokesperson tells Billboard sister publication Airplay Monitor that Emmis is preparing a zero-tolerance policy on **indecent** as well.

Clear Channel's new Responsible Broadcasting Initiative issued one day before **radio** division CEO John Hogan took the stand before Congress states that any DJ accused of **indecent** will be suspended and immediately terminated if the jock is found to have violated **indecent** codes. It also states, "There will be no appeals and no intermediate steps."

In addition to the measure, Clear Channel is modifying its talent contracts so that any jocks accused of **indecent** will be financially liable for part of any fines levied against the station by

the FCC.

LISTENING CLOSELY

Now stations like modern KBZT (FM 94/9) San Diego are re-examining the music they play.

"The main thing we've done with this FCC witch hunt that's going on is taken a real close look at the music library and made sure there weren't any **songs** in there that we have overlooked," PD Garret Michaels says. "There are quite a number of **songs**, particularly from the grunge era, that occasionally sneak in an f word, and sometimes those are buried in the mix.

"In light of what's going on out there, there's so much watchdogging that we want to be careful and make sure we don't get fined on a technicality," he says.

Michaels cites such core library tracks as Tools "Sober" and Alice in Chains "Heaven Beside You" as **songs** that the station has re-edited.

Regardless of the outcome of the congressional hearings, the FCC's guidelines or individual **radio** groups mandates, the developments of the past several weeks prove that **radio** is entering previously uncharted territory.

"Everything has changed," says one PD who requested to remain anonymous. "It's obvious now that **radio** companies that have 1,300 stations or 600 stations or 200 stations will not hesitate to blow somebody out and ruin one particular **radio** station, or even one particular network, for the protection of its entire network."

SLIPPERY SLOPE

And the commission might be stepping over the line in attempting to decide what's **indecent**. A poll conducted by USA Today found that popular opinion did not back the FCC's crackdown on **indecentcy**. Twenty-seven percent of the respondents said that if people did not like what they were watching or hearing, they should just turn it off, while 16% said the FCC should label shows with questionable content and let listeners decide for themselves.

The FCC's current guidelines consider three criteria when determining whether something is **indecent**: the explicitness or graphic nature of the description of sexual or excretory organs or activities, whether the material dwells on or repeats at length those descriptions and whether the material appears to pander to or is used to titillate or is presented for shock value.

But many of the programmers contacted for this story say the FCC's current guidelines for **indecentcy** are too vague for them to be completely sure that they're avoiding the use of **indecent** material.

"We've scrutinized some bits that have been on the station for years and given the current, scary environment have moved to edit them somewhat to try to ensure that they don't violate a very vague set of rules," another PD who asked for anonymity says.

"That's based on the Bubba decision, where it appears that [the FCC was] fining WXTB [Tampa, Fla.] and Clear Channel for what was inferred rather than what was said," the PD adds. "To my knowledge, that hasn't happened in the past. In my mind, we're now headed down a particularly slippery slope."

"Any time you start to talk about regulating free speech or limiting free speech, that can be a scary topic," another programmer says. "The biggest thing this has done is really made talent uneasy about what to say and what can be said . . . It would be beneficial if the FCC would come out and let everybody know what's **indecent** and what's not."

Some stations have taken a closer look at their production. "It's more than just what the jocks are saying, it's also the messages that were relaying in between the records," another programmer

says.

"There were a couple of liners that we thought were inappropriate," the PD adds. "For us, its not just the sex stuff but any sort of drug references." That includes the liner "Theres a fine line between genius and insanity. Unfortunately, we snorted it."

Others say theyre keeping things status quo.

"So far, I havent changed a thing," active KRFR (Real Rock 104.3) PD Alex Quigley says. That includes the stations risqu liners, which remain on the air.

"What was good enough two weeks ago should be good enough now," Quigley says. "Were not going to change everything suddenly, which is what I feel Clear Channel did. Howard Stern wasnt **indecent** one week ago? Its the same show it has always been."

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HOTLINE:[All Editions]

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ewport Jazz sets 50th bash

George Wein sure knows how to throw a party. The founder of the Newport Jazz Festival is marking the 50th anniversary of the event with a 2004 lineup that's literally a Who's Who of modern jazz.

Among those appearing on one of the three stages (up from two in the past) at Fort Adams State Park on Aug. 14 are George Wein, Branford Marsalis, Ron Carter, James Moody, Jackie McLean, Dave Brubeck, Marian McPartland, Phil Woods, Harry Connick Jr. and Clark Terry. The Aug. 15 slate includes Ornette Coleman, Wynton Marsalis and the Lincoln Center Jazz Orchestra, Wayne Shorter, Herbie Hancock, Roswell Rudd, Dave Douglas, Regina Carter, Chico Hamilton, Lee Konitz, Peter Cincotti, James Carter and the Mingus Big Band.

"I wanted to do a different kind of festival from what we've been doing," Wein said. "I wanted to bring in a lot of individual musicians, older and younger, to reflect that jazz is still a great music and doesn't have to be just a music of the past. At the same time it's got a great history, so let's acknowledge both aspects of it."

The JVC Jazz Festival-Newport kicks off on Aug. 11 with a sacred music concert by Brubeck at Rogers High School in Newport. Tickets go on sale today at 10 a.m. Call 866-468-7619 or go to www.ticketweb.com. For more information, go to www.newportjazz50th.com. - BOB YOUNG

CAN WE SAY THAT?

Rock jocks aren't the only radio people feeling the heat from the Federal Communication Commission's crackdown on broadcast indecency in the wake of Janet Jackson's Super Bowl surprise. Now classic rock stations around the country are "retiring" hit songs because a word or two in the lyrics might irk the FCC.

In Boston, WZLX-FM (100.7) program director Beau Raines said his station has taken Steve Miller's "Jet Airliner," Pink Floyd's "Money" and the late Warren Zevon's "Lawyers, Guns and Money" off the air because there's at least one cuss word in each.

The irony, of course, is all three songs have been played for decades on thousands of stations. But until the FCC clearly defines what it finds objectionable, programmers are being extremely cautious.

Raines said he preferred to at least temporarily retire those tunes rather than play edited versions. "We don't play edits," he said.

DRIVING A STAKE INTO 'ANGEL' FANS

TVguide.com confirmed yesterday that former "Buffy the Vampire Slayer" star Sarah Michelle Gellar will not be appearing on her spinoff's finale set for May 19. Joss Whedon, creator of both series, said it was both the actress' busy schedule and creative reasons that pre-empted a final appearance by Gellar - whose character is the object of the affections of both Angel (David Boreanaz) and Spike (James Marsters).

Whedon doesn't want Angel's send-off to "revolve around a guest star. We will deal with the issue of Buffy and how much she means to Angel and Spike, but I want to end the show with the people who've been in the trenches together, the characters who have lived - and occasionally died - together . . . the regulars." - SARAH RODMAN

MERRIMACK REP SETS FALL SEASON

Merrimack Repertory Theatre celebrates its 26th season this fall with a world premiere, classics by Arthur Miller and Harold Pinter and the return of the Reduced Shakespeare Company.

The season opens with "The Complete History of America (abridged)" by the trio of the Reduced Shakespeare Company (Sept. 10- Oct. 30), followed by Miller's "The Price" (Nov. 11-Dec. 11).

The world premiere of a new adaptation of Leo Tolstoy's "The Kreutzer Sonata," adapted by and featuring Larry Pine, will bow Dec. 30-Jan. 29, followed by Ronald Harwood's "Quartet" (Feb. 10-March 12, 2005), Tazewell Thompson's "Constant Star" (March 24-April 23, 2005) and Pinter's "The Homecoming" (May 5-June 4, 2005).

subscriptions are available at 978-454-3926. - TERRY BYRNE

O INSTEAD WE . . . ZZZZZZZZZZZZZZ

Boston's all-politics-all-the-time-summer of 2004 just got even nerdier with the news that the Boston Globe Jazz & Blues Festival, previously announced as moving to a time closer to the Democratic National Convention, is now going "on hiatus" until 2005. Among the choices offered by the paper in the music festival's stead: the Globe Presidential Film Series, IDEAS Boston 2004 and Globe Talks. - BOB YOUNG

Correction

The Provincetown Repertory Theatre is planning an all-star staged reading of "All About Eve" as a benefit this summer. Earlier this week we named another P-Town theater company.

Compiled by Joel Brown from staff and wire reports.

Caption: GELLAR

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HEADLINE: **Indecency** uproar stirs a loud silence

BYLINE: TOM FERAN, PLAIN DEALER COLUMNIST

BODY:

Warren Zevon saw what was coming, long before and entirely apart from the diagnosis of lung cancer that killed him in September.

Bill Louis remembers the musician visiting WNCX FM/98.5 six years ago to promote a new album. He performed for an hour in the studio on Louis' lunchtime "Classic Cafe."

"One of the **songs**, 'Lawyers, Guns and Money,' had an S-word," Louis said. "He wouldn't talk on the air, but off the air we were talking. He said that **song** is 3 minutes, 29 seconds on the 'Excitable Boy' album and said he got into a back-and-forth about not editing it for a greatest-hits package. They took out '[expletive] hits the fan,' and he said it bummed him more than anything he'd been associated with in music.

"He said if it came to that **song** being played edited, he'd rather not have it played. He requested the **song** never be played again."

Be careful what you ask for.

"Lawyers, Guns and Money," which played for years without complaint about its fleeting use of what has been called a "barnyard epithet," is one of the **songs** that was pulled from the **playlist** at WNCX amid the current frenzy over "on-air **indecentcy**."

"I think he would have some great things to say about this if he were around," said Louis, the program director who has worked at WNCX since 1987. "After Super Bowl Sunday, everything changed."

After Super Bowl Sunday - when a stupid stunt by Justin Timberlake and Janet Jackson provided a nanosecond glimpse of her right breast that became the most-played footage since the Zapruder film - the S-word and a few others hit the fan.

The Federal Communications Commission started imposing big fines for past indiscretions. The U.S. House of Representatives voted to dramatically increase fines for broadcast **indecentcy** up to \$500,000 per infraction. The U.S. Senate, considering similar legislation, could approve the House bill or its own. President Bush has promised to sign it.

But the standards remain vague. The U.S. Supreme Court has defined obscenity but not clearly defined "**indecentcy**."

So **broadcasters** started running for cover by selectively dropping shows and announcing "zero-tolerance" policies.

The S-word runs downhill. It landed at WNCX, among other places, and became an odd blend of crusade, promotion and self-defense.

"The way it started," Louis said, "was we had people vote for the greatest album of all time to get the top 98. We played entire album sides for 30 days at 2 o'clock, and we were going to play the entire No. 1 album two weeks ago Friday. But within three days of starting, the Super Bowl thing happened."

The No. 1 album was Pink Floyd's "Dark Side of the Moon." The first track on side 2, "Money," has the line, "Don't give me that do goody good [expletive]."

"No one has edited that version of the **song** ever in Cleveland," Louis said. "It's probably played a solid 5,000 times since it was released in 1973."

Under the zero-tolerance policy, and a potential fine of \$275,000, Louis felt he couldn't risk playing it. "There's no such thing as safe harbor," he said. "We had to pull it or modify it. It could be edited, but even fleeting references can be handled as gratuitous usage. The law hasn't changed, but the enforcement has changed. And if they hear a bleep, I'll be [bleeped] off, which is another word you can't say."

Louis explained the situation to listeners. "Reaction was remarkable," he said. "There was a sense of outrage and rightfully so." About 23,000 e-mails and maybe a couple thousand phone messages went to Sens. George Voinovich and Michael DeWine in support of "Money."

For now, however, it remains unplayed - along with **songs** such as Zevon's, Steve Miller's 1977 "Jet Airliner" and The Who's "Who Are You" - in a climate of fear and confusion.

How much fear and confusion? "American Idol" judge Simon Cowell propped his head against his middle finger on Tuesday's show. He had to issue a statement the next day that he did not intend an "inappropriate gesture."

Or, presumably, an **indecent** one. That could be a fine situation. Literally.

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The \$500K #!*@%

The FCC's latest mission: Dumbing-down our airwaves.

BY JASON BRACELIN

Craig Callander's business card pretty much says it all. "669: Helping You Hurt Yourself" it reads, an apt encapsulation of his on-air antagonism. As the anti-everything radio personality **Sweet Ass Sassafrass**, Callander is among the funniest and fiercest on Cleveland airwaves. 669, his twice-weekly show on WCSB-FM 88.3, is a mix of scabrous punk rock and humor as abrasive as steel wool. It's Callander's playground, where he violates listeners, airs randy prank calls, and occasionally hosts f-bomb-filled interviews with acts like **Insane Clown Posse**.

Well, not anymore. In the wake of Janet Jackson's **Nipplegate**, the **FCC** has come down hard on stations that air off-color humor or the occasional curse word, which had been permissible in the past.

How bad has it gotten? Even the Butt Trumpet's been silenced.

"Butt Trumpet has a song, 'Fucking Asshole,' that used to be a big request. I won't play that now because I'm kind of nervous about it," says Callander, whose show airs at 5 p.m. Thursdays and 1 a.m. Saturdays. "It's a nasty song, but it's something that I've played for 10 years. Now, in this climate, I won't even consider it, because I don't want to get busted on some stupid technicality. It's so weird how, after all the freedoms that I've enjoyed for so long, I'm nervous about a lot of stuff now."

Rover, an equally pugnacious personality at 92.3 Xtreme, also feels the duct tape on his mouth. The host of *Rover's Morning Glory* (weekdays 5:30 to 10 a.m.), he's had to tone down his show's mix of bawdy comedy and modern rock.

"One of the segments the lawyers made us ax was a daily feature called '**Dear Porn Star**,' where porn star Carmen Luvana would answer listeners' love, sex, and relationship questions," Rover says. "In fact, they said the mere title 'Dear Porn Star' had to go, no matter what the content of the feature was. If she was to give lawn and garden advice or talk about politics, we still couldn't call it 'Dear Porn Star.' Twelve-year-old girls are wearing T-shirts emblazoned with the words 'Porn Star' across their chests, but I can't say the term on the air."

The FCC's regulatory powers were amplified last month, when the commission reversed its decision on an indecency ruling from October 2003. That ruling followed U2 frontman **Bono's** nationally broadcast speech at the Golden Globes, in which he uttered, "This is really, really fucking brilliant." At the time, the FCC said the curse was permissible because it was fleeting and didn't describe sexual or excretory functions -- long the standard for forbidden words.

By March, the excretory functions had hit the fan. After an appeal filed by the Parents Television Council, the FCC did an about-face, ruling that Bono's words were in fact indecent and broadening the definition of "profane" speech to include just about all swear words or racy commentary, regardless of context. A new "Indecency Bill" before the Senate would greatly amplify fines: First offenses, currently \$27,500, would jump to \$275,000; by



A fine mess: Rover (center) and his friends just got a little less Xtreme.

your third slipup, the tab hits \$500,000. After that, stations' broadcasts licenses may be revoked. Even DJs can be fired.

That's why, after decades of spinning classic rock, WNCX Program Director **Bill Louis** had to slash his playlist, removing songs by the Who ("Who Are You"), Warren Zevon ("Lawyers, Guns and Money"), and the Steve Miller Band ("Jet Airliner") because they contain mild profanity. He'd been spinning Pink Floyd's "Money" for 17 years without a single complaint, but its use of "bullshit" forced Louis to shelve it. "This puts everybody on red alert for anything that could create a fine in that area," he says.

Stations like WCSB, whose annual budget is well under \$50,000, could easily be put out of business by a single violation.

"You're not going to take any chances," Callander says. "I wouldn't even care if I got a fine, but I don't want to be the person who gets the station in trouble just for taking a stand. It seems like the FCC wants to baby-proof and Nerf everything and make it so safe that no one could possibly be offended. You never know what they're going to go after. You could be next."



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Indecency uproar taming US network TV

Mon Apr 12, 2004 05:07 PM ET

By Michele Gershberg

NEW YORK, April 12 (Reuters) - Whether you believe it is a new sexual McCarthyism, or you see it as a long-awaited campaign against programming that's crossed the line into indecency, U.S. television is about to get toned down a notch.

Broadcasters may stage a retreat from edgy shows over the next few seasons as a regulatory campaign to clean up the airwaves gains surprising strength from election-year politics, media analysts said on Monday.

In a sign of what's to come, even underwear vendors are rethinking how they use sex to sell. Television network CBS confirmed on Monday that the much-hyped Victoria's Secret lingerie fashion show, an annual special, would not air this year.

Shari Anne Brill, director of programming at media buyer Carat USA, said racy programs have not lost their popularity, but networks are becoming more wary of being labeled indecent.

"There will be stricter self-regulatory guidelines because it seems that in this climate, everyone is afraid to cross the line," Brill said.

Provocative programs known to win ratings might receive a partial scrubbing to tone down storylines. Networks may be quicker to scrap weaker shows famed mainly for their shock value and scrutinize new scripts far more closely.

"This new hypersensitivity of the past year or so is changing the content of broadcasting," said Robert Thompson, professor of media and popular culture at Syracuse University. "Right now everybody is looking to take the heat off, turn the public attention down a few notches for a season or two."

Analysts said Victoria's Secret owner Limited Brands (LTD.N: Quote, Profile, Research) appeared keen to avoid negative publicity as Washington boosts indecency fines, especially since its last runway show drew lukewarm ratings and failed to push up sales.

Industry insiders largely declined to comment on the pressure an anti-indecency campaign could exert on their new program strategies.

But media watchers said the chilling effect of a Federal Communications Commission crackdown -

- which radio shock jock Howard Stern has likened to a "McCarthy-type witch hunt" -- is already creeping into programming plans.

It is a shift from the past five or six years, when broadcasters have sought to emulate daring and popular shows on cable television -- including HBO's Mafia crime series "The Sopranos" and sexual misadventure story "Sex and the City."

"They're going with a very homogenized, much more family-centric route, moving completely away from the edgy type of content," said media industry commentator Jack Myers. "The ability to take risks and break down established taboos is at an end for now."

Broadcast networks and the media conglomerates that own them -- including Viacom (VIAb.N: Quote, Profile, Research), Walt Disney Co. (DIS.N: Quote, Profile, Research) and News Corp. (NCP.AX: Quote, Profile, Research), are loath to fight for foul language during a U.S. election year, especially as they seek regulatory concessions on other issues, including ownership laws, analysts said.

Public outrage against televised nudity and foul language mushroomed after singer Janet Jackson's breast was exposed during the Super Bowl telecast in February, adding fuel for raising FCC fines on indecent material.

Some advertisers turned skittish even earlier as protests over perceived indecency gained ground ahead of the 2004 vote.

Youth retailer Abercrombie & Fitch (ANF.N: Quote, Profile, Research) pulled a catalog featuring scantily clad and naked models off store shelves, while automaker Chrysler cut a sponsorship of the "Lingerie Bowl" -- a televised game of tackle football between models in bras and panties.

Last week, broadcasters got a stronger taste of their vulnerability when the FCC proposed a \$495,000 fine against Clear Channel Communications (CCU.N: Quote, Profile, Research) for comments by Howard Stern. Clear Channel had already dropped Stern. (Additional reporting by Jean Scheidnes)

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ACROSS DIAL, TONE-DOWN 'Indecency' flap has radio stations edgy:[SPORTS FINAL Edition]

DAVID HINCKLEY DAILY NEWS STAFF WRITER. *New York Daily News*. New York, N.Y.: Apr 1, 2004. pg. 91

Full Text (735 words)

copyright Daily News, L.P. Apr 1, 2004

After Patty Steele of WPLJ read a Daily News gossip tease Tuesday morning about a "Sopranos" star possibly being "outed," she joked that co-hosts Scott Shannon and Todd Pettengill were "in the corner whispering."

"You can't whisper about something like that on the air anymore," Pettengill shot back. "Or you'll have the whole FCC raining down on you."

The national frenzy about media indecency - launched when Janet Jackson's breast was exposed during the Feb. 1 Super Bowl half-time show - has cast a cloud on radio shows far beyond its most prominent target, Howard Stern of WXRK.

Consider this: - At one time, the Star and Buc Wild morning show on WQHT let the f- and s-words regularly slip onto the air and spoke about sex in terms like "twist the b-out."

The current show, under DJ Sway, has none of that.

"We have to be careful what we say, what we do, everything," said show member Miss Info. "We can't have a sex therapist in the studio to do a demonstration."

- Virtually all call-ins are now tape-delayed, to avoid the Ryan Seacrest problem. On his first day at KIIS in Los Angeles in February, he had two live callers say the f-word. So great is the demand for radio tape-delay equipment that manufacturers are back-ordered for at least a month.

- Hip-hop stations WQHT (97.1 FM) and WWPR (105.1 FM) have become more vigilant about editing words out of rap songs.

"The record companies send edited versions," said Andy Rosen, regional vice president for WWPR parent Clear Channel. "Then we listen and if necessary do our own further edit."

- Even callers to sports-talk radio are affected. "We prefer not to have someone on the air saying, 'The Mets suck,'" said Tim McCarthy, general manager of WEPN (1050 AM). "It isn't a big problem, but we want to err on the side of caution."

- Stern, of course, has been telling listeners daily that parts of his riffs with strippers and other staples of his show are being killed. "It's making it less funny," he said. "It's not my show anymore."

McCarthy, Rosen and others stress that despite the fury of the current flap, most shows and hosts are not "at risk."

In addition, New York stations aren't as draconian as other stations around the country that have refused ads for "Puppetry of the Penis" and edited four-letter words out of rock warhorses like Pink Floyd's "Money" and Steve Miller's "Jet Airliner."

or is anyone in New York picking up the new ultra-clean syndicated shows from John Tesh and Marie Osmond.

However, the potential for increased FCC fines - with the potential for individuals being hit, too - for indecent material that gets on the airwaves has everyone thinking twice.

"What's going on is still very scary," said Tracy Cloherty, vice president of WQHT's parent, Emmis Broadcasting. "We're under all this pressure not to be 'indecent,' but the FCC won't tell us what 'indecency' is. It's an unbelievable position. I've never seen anything like it."

"You double-check everything you're going to say," said Freddie Colon, long-time New York deejay who's now in Arizona. "I wouldn't tell a joke now that might have any racial overtone. I'll see a funny story in the paper about a naked guy in the paper that I would have used three months ago. Now, I won't."

The concern over this issue was underscored yesterday when the National Association of Broadcasters (NAB) convened an extraordinary "summit" on indecency.

The NAB hopes to formulate an industry-wide response that would defuse current legislation that threatens much higher fines and potential license revocation for indecency violations.

"The curtain has come down fast," said Tom Taylor, editor of the radio trade sheet Inside Radio. "And it affects everyone. Even if you're the safest adult contemporary station, you could be doing a remote from an auto dealership and someone passing by could yell a word and you could conceivably be held liable.

"It's as if someone turned the thermostat down 20 degrees. It's had a very chilling effect."

[Illustration]

Caption: WATCHING THEIR WORDS: Scott Shannon (left) and Todd Pettengill of the "Scott and Todd in the Morning Show" on WPLJ. AP Howard Stern (above) THOMAS MONASTER DAILY NEWS DELAYED REACTION: Two crude callers to Ryan Seacrest's KIIS show have led to tape-delayed call-ins. COREY SIPKIN DAILY NEWS CLEANER AIR: DJ Sway of WQHT

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DJ FIRED FOR RACE REMARK:[SPORTS FINAL Edition]

DAVID HINCKLEY DAILY NEWS STAFF WRITER. **New York Daily News**. New York, N.Y.: Mar 23, 2004. pg. 74

Full Text (316 words)

copyright Daily News, L.P. Mar 23, 2004

Weekend jock Raqiyah Mays was fired yesterday by WWPR (105.1 FM) after criticizing interracial dating during her weekend show.

Power-105 officials said in a statement that the station "decided to release her based upon inappropriate remarks she made to listeners during her broadcast on Saturday.

"The station received many E-mails, phone calls and messages from listeners who were displeased and felt alienated as a result of her actions."

Mays' comments on interracial dating came while she was running a station contest in which listeners could win tickets to an Usher concert by making a confession. "Confession" is the title of Usher's latest record, which has sparked heavy buzz in radio.

"I made a confession of my own," Mays said yesterday. "I said I was concerned about interracial relationships when the African-American community has our own inner work and healing to do. If I see a white woman dating an African-American man, I feel, as do many African-American women, that there is one less black man available to us."

The host of a 10 a.m. to 2 p.m. shift on Saturdays, Mays said she was shocked by getting the boot from the Clear Channel station.

She claimed she was the victim of a "climate of pins and needles" stemming from the firestorm over indecency following the Janet Jackson and Howard Stern controversies.

"I wasn't speaking against anybody," Mays said. "I was just being honest. Unfortunately, the industry is under FCC scrutiny and the climate is ripe for reactionary measures."

"I am being censored not for sexual indecency, but racial indecency."

A hip-hop writer who is executive editor of The Ave magazine, Mays came to WWPR a little over a year ago from Sirius Satellite Radio.

WWPR said no one was ticketed to replace Mays on Saturdays, but it could turn out to be Egypt, who recently left WBLS and has done some weekend shifts at Power.

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THE TV COLUMN

Lisa de Moraes

Even Buttoned-Down PBS Gets Caught in the Wringer

Viacom CEO Sumner Redstone confided to investors this week that "a woman's breast is not such a big deal" to him. We wish him a speedy recovery.

Ironic, isn't it, that thanks to Mr. Redstone's MTV and CBS, which produced and aired, respectively, the little Super Bowl halftime number that's come to be known as the Breast Heard Round the World, TV execs all over the country have been engaged in vigorous debate about that part of the female anatomy which no longer holds any interest for the 80-year-old Mr. Redstone.

Take PBS station WGBH, for example, where suits went back and forth about how much cleavage to show in its upcoming "American Experience" documentary "Emma Goldman."

You cannot expect to make a documentary about a colorful 20th-century anarchist and advocate of free speech and free love—a woman J. Edgar Hoover once called one of the most dangerous people in America—without including a little anarchy, a little free speech and a little free love in the piece.

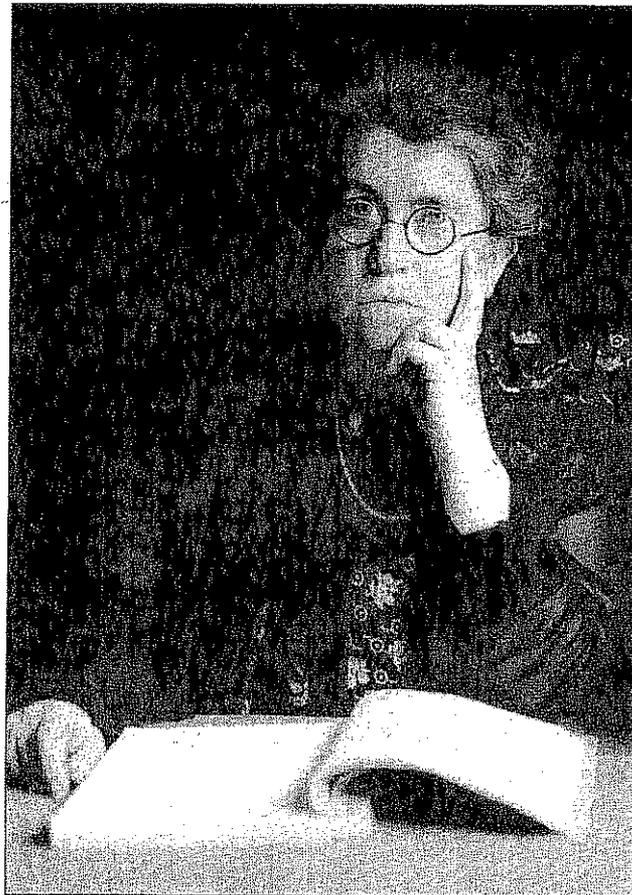
In calmer times, this would not be a problem.

But since Justin Timberlake unleashed Janet Jackson's right breast during the Super Bowl halftime show and it began its scorched-earth march through the TV industry, it's a big problem.

So the executive producer of "American Experience" agreed to cut a couple of seconds of a scene re-creation in the documentary, in which Goldman's lover is seen unbuttoning the front of her chemise, revealing about as much cleavage as Susan Sarandon showed off in that black number she wore to this year's Academy Awards.

According to "American Experience" executive producer Mark Samels, during the normal finishing process this documentary, like all "American Experience" documentaries, went to an attorney at WGBH for what's called "errors and omissions" analysis. While screening the project, Samels reports, the attorney raised concerns about the love scene.

Here is where Samels's version of what happened differs from that of the public TV



INTERNATIONAL INSTITUTE OF SOCIAL HISTORY

A documentary about activist Emma Goldman included a scene regarded by a PBS station's lawyer as too revealing.



Viacom CEO Sumner Redstone told investors that a woman's breast "is not such a big deal."

source who was among those who brought this to the attention of The TV Column.

According to our source, the showing of cleavage was what knotted the attorney's knickers; he thought it would be objectionable to the Federal Communications Commission,

which has been on a sort of shock-and-awe campaign against TV smut—at least the broadcast stuff—since its chief wandered in on the halftime show while watching the Super Bowl with his family.

According to Samels, it wasn't the cleavage that had the attorney grinding his teeth; it was the question of nippleage.

Mel Buckland, who wrote, produced and directed the documentary, declined to comment for this article, nervously telling The TV Column that she had been expressly told by folks at "American Experience" not to discuss the situation and explaining that she was afraid of the career consequences if she did talk to the press. (Just to refresh your memory: This is still about a documentary on the life of a woman who lobbied in this country, back in the early 1900s, for freedom of—among other things—speech.)

Samels says the "American Experience" team assured the

WGBH attorney that there was no nippleage in the scene.

According to Samels, the attorney passed along the documentary to an outside attorney who does work for WGBH on communications issues, for a second opinion.

"That person also agreed that it looked like a full breast was exposed, which was a pretty common-sense line of decency we haven't crossed," Samels explained.

However, a spokeswoman for "American Experience" with whom we spoke yesterday afternoon said the outside attorney did not screen the documentary; rather, the in-house attorney had described the scene in question and the outside attorney advised that "he didn't perceive any legal issues with it."

Back to Samels, who tells The TV Column that the "American Experience" people "went back and did a frame-by-frame analysis, because we had only looked at it 50 times while making it.

"I didn't see a fully exposed breast, and sure enough, there isn't," he said.

"What there is is a shadow of a blouse which gives the appearance of the revealing of a nipple, the full breast."

That, he says, is why they agreed to remove what he calls 51 frames and our source says is about two seconds of the love scene.

Samels insists, however, that even after the nip and tuck, there is "enough cleavage to drive a truck through in this scene."

We will pause here for a minute while you try to get that image out of your head.

Our public TV source and Samels do agree that it's pretty ironic that a documentary about a woman who preached free love and free speech should be mired in a discussion about whether it's okay to show a breast on TV.

"What I love about it is that it shows the country has never gotten away from its Puritanical roots," Samels said. "Which once again calls for exploration of American history. You can only understand who we are by knowing how we got this way."

That, of course, is a shameless plug for "American Experience," which bills itself as television's longest-running history series.

Oh well, that's showbiz.

Contact:

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Program website: <http://www.pbs.org/everychildisbornapoet>

**PBS EDITS "OFFENSIVE" CONTENT
FROM INDEPENDENTLY-PRODUCED DOCUMENTARY
EVERY CHILD IS BORN A POET: THE LIFE & WORK OF PIRI THOMAS
IN ORDER TO COMPLY WITH NEW FCC INDECENCY RULES**

The FCC has made sweeping changes in the past few weeks regarding the use of language on television with the "Decency Enforcement Act of 2004." There has been a rapid transformation in policy in the wake of Bono saying "fuck" on the Golden Globes and Janet Jackson exposing her nipple during the Super Bowl. In short, language that used to be at the discretion of the broadcaster (i.e. station or network) is now at the discretion of the FCC. The FCC is now leveling fines of up to \$250,000 against stations that do not comply with the new regulations approved by Congress.

The independently-produced film EVERY CHILD IS BORN A POET: THE LIFE & WORK OF PIRI THOMAS, scheduled to be broadcast on the national PBS series INDEPENDENT LENS tonight, April 6th at 10:00 p.m., is right smack in the middle of these new controversial policies. EVERY CHILD IS BORN A POET tells the story of renowned poet, writer, educator Piri Thomas. The film includes the author reading excerpts from, as well as dramatizations of selections from his classic autobiographical novel Down These Mean Street (Random House, 1967). The book chronicles Thomas' coming-of-age in the 1930's, 1940's and 50's, his experiences as a teen gang member in East Harlem, as a junkie and an armed robber, and the six years he spent in prison, before becoming an educator and activist, pioneering gang violence prevention, drug rehabilitation, and educational reform efforts in New York City in the 1960's and 70's.

Following the issuance of the new FCC rules, PBS has decided it must edit out of EVERY CHILD IS BORN A POET "obscene" words like "fuck" and "shit." In fact, some PBS affiliate stations are requesting that additional words such as "piss," "nigger" and "spic," not mandated by the FCC rules, be removed as well. Nebraska Public Television has decided to pull the show completely. All the language in question is from Thomas' literary texts, not from interviews or other extemporaneous material.

It seems that history repeats itself, yet again. At the time of its publication, Down These Mean Streets was hailed for its unflinching description of ghetto life and racism in America, while decried by some as being obscene. Down These Mean Street was banned in a number of schools and libraries in the early 1970's, due to concerns about its language. The "offensive" language currently being censored by the government brings into question how the FCC rules effect not only freedom of speech, but artistic

- more -

integrity, as well. In 1972, before the decision was overturned, the Supreme Court upheld a lower court's ruling to allow School District 25 in Flushing, Queens to ban Down These Mean Streets from student libraries. In a dissenting opinion, Justice Potter Stewart and Justice William O. Douglas asked, "Are we sending children to school to be educated by the norms of the school board or are we educating our youth to shed the prejudices of the past, to explore all forms of thought, and to find solutions to our world's problems?"

The new FCC rules effect content involving "offensive" language and sexuality, but do not touch upon violence. Before the new regulations went into effect, the FCC went as far as to try to mandate that broadcasters pixilate the mouths of individuals speaking offensive words, but backed off before Congress gave its approval. Major networks and cable programmers may be willing to test or openly flaunt the new rules, but PBS stations, already struggling with limited resources and annual budget re-authorization hearings in Congress, are unwilling to take on the challenges to freedom of speech and expression.

The series INDEPENDENT LENS is a co-production of The Independent Television Service (ITVS) and PBS. The Mission Statement for ITVS is as follows:

The Independent Television Service (ITVS) brings to local, national and international audiences high-quality, content-rich programs created by a diverse body of independent producers. ITVS programs take creative risks, explore complex issues, and express points of view seldom seen on commercial or public television. ITVS programming reflects voices and visions of underrepresented communities and addresses the needs of underserved audiences, particularly minorities and children.

In an era that encompasses both the explosion of commercial information enterprises and a consolidation of media empires, the role of public sector media becomes critical to a free, open, and informed society. ITVS holds the following values as essential to carrying out the organization's work:

- Freedom of expression is a human right.
- A free press and public access to information are foundations of democracy.
- An open society allows unpopular and minority views to be publicly aired.
- A civilized society seeks economic and social justice.
- A just society seeks participation from those without power, prominence, or wealth.
- A free nation allows all citizens forums in which they can tell their own stories and express their own opinions.

www.itvs.org

About When In Doubt Productions, Inc.

When In Doubt Productions, Inc. is dedicated to producing films about social issues and the way in which these issues are reflected and explored in arts and letters. More information about When In Doubt Productions, Inc. is available at www.everychildisbornapoet.org.

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