

Washington and “Indecency”: Regulation or Censorship?

A veteran broadcasting insider spotlights current efforts by Congress and the FCC to set limits in the wake of the Super Bowl and Howard Stern.

By Tack Nail

Much to the relief of broadcasters and First Amendment advocates, the frenetic pace of legislators and regulators in Washington earlier this year to legislate and regulate against indecency (using a very broad definition to include profanity), obscenity and violence has slowed down considerably. But opponents and proponents both predict the crusade to place new and tougher restrictions (such as increasing the maximum fine for the airing of each indecent comment from \$27,000 to \$500,000, with license revocation a distinct possibility for repeated violations) on the users of over-the-air spectrum space will pick up speed again this fall and most particularly when the new Congress is in place early next year.

While alleged indecent broadcasts have been under incessant attack ever since FCC Commissioner Michael Copps

joined the agency nearly three years ago, fueling the most recent Washington outcries were the Janet Jackson “wardrobe malfunction” during the Super Bowl halftime in January and the earlier use of the f-word as an adverb by pop band U2’s lead singer Bono in accepting a Golden Globes Award. Dozens of members of Congress blasted Viacom’s CBS for airing the Jackson incident in statements and at hearings and all five FCC commissioners issued their own expressions of disapproval. In the weeks after the Super Bowl, the Commission noticeably increased its anti-obscenity activities – leveling large fines against Viacom-Infinity Radio’s Howard Stern program.

With an early Congressional adjournment planned for campaigning this fall, lobbyists and legislators agree that there is almost no possibility that any of several bills now pending in

Congress will get final approval this year. Some of those bills also provide for fines against performers such as Bono for broadcast indecency – almost sure to be declared unconstitutional by the courts if such fines become law, according to noted First Amendment attorney Robert Corn-Revere and others. But a former high-level congressional staffer, who is now a lobbyist, issued this warning: “The old baseball phrase ‘wait till next year’ is very appropriate here. Broadcasters had better not get complacent because the anti-indecency juggernaut on the Hill will return and ways will be found to draft legislation that will get around First Amendment strictures and stand up in court.”

That could be hard to do, according to staunch protectors of the First Amendment language saying: “Congress shall make no law... abridging the freedom of speech or of the press...” Veteran consumer advocate Henry Geller, general counsel of the FCC in the 1960s (during the Newton Minow and Rosel Hyde administrations) and former director of the National Telecommunications and Information Administration in the Carter Administration, points out that the 1978 U.S. Supreme Court *Pacifica* decision (438 U.S. 726) established that indecent programming – defined by the FCC as “material patently offensive by contemporary community standards” – is permissible between 10 p.m. and 6 a.m. If Congress approves legislation extending the indecency ban beyond 10 p.m. or to cable programming, “such action would likely be held unconstitutional,” according to Geller – a position with which most First Amendment advocates agree. Said Geller:

“What is really involved here is that Congress and the FCC do not want broadcasting to become like the *Sopranos*, a place where minors will hear ‘filthy words like f---, s--- or p--- with great frequency.’ And, he said, if the FCC in its rule-making on indecent language ignores the context in which such language is used, it will encounter “serious difficulties” in court – such as in an airing of the famous Johnson and Nixon White House tapes containing verboten words.

Unlike obscenity – described by the FCC as “vulgar, irreverent or coarse language” – indecent language aired after 10 p.m. has the protection of the First Amendment. But, said Geller, the FCC’s standard for obscene language “is so broad and subjective that it is as if the FCC were the national ‘nanny’ of good taste in language... For an agency to reach out to use a standard for fines and/or revocation [of a license] shows amazing disrespect for the First Amendment and the promotion of robust, wide-open expression” on television and radio stations. And, Geller says flat out that if Congress and/or the FCC were to extend the indecency rules to also attempt to embrace cable programming “it would be struck down” by the courts as unconstitutional.

In a 1973 decision (*CBS vs. DNC*), the Supreme Court pointed out that the regulation of broadcasting calls for the FCC “to walk a tightrope to preserve the First Amendment values written into the Communications Act. But, contends Geller, the FCC in its attempts to regulate indecency “has done a poor job of ‘walking the tightrope’” by issuing blanket rulings “with no strong acknowledgment of the importance of

context and what is most offensive to First Amendment values to reach out to cleanse the airwaves of vulgar, irreverent or coarse speech. The result is to create a chill [among broadcasters]... The Commission should take prompt steps to correct the balance and to give a much sounder signal to the broadcasting media” about what is and isn’t permissible in the indecency area.

We solicited Geller’s views for this article as representative of the positions trade associations, First Amendment advocates and even some consumer groups – such as Action for Children’s TV founder Peggy Charren. Broadcasters complain that the FCC’s indecency rules are too vague and recent actions – such as a new proclivity to issuing fines, most particularly against the Howard Stern radio program – are having a chilling effect on what is broadcast. Just how chilling?

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In a White Paper titled “FCC Regulation of Obscene and Indecent Broadcasts,” Washington lawyer Kathleen Kirby, outside attorney for the Radio-TV News Directors Association, stated: “In light of the increased aggressiveness of the Commission’s enforcement policy, the continued complexity of predicting what material the FCC ultimately may decide is indecent, and the likelihood of dramatically increased fines, we recommend that stations avoid broadcasting any material that could reasonably be considered indecent by the FCC” except during the 10 p.m. – 6 a.m. “safe harbor” hours. And from veteran cable executive Geraldine Laybourne: “I don’t think we should use the word ‘indecency.’ We should call it

[government actions] what it is – censorship.”

Major beneficiaries of the government crackdown have been the half-dozen or so manufacturers of equipment needed to delay live broadcasts for five or 10 seconds – as witness the heavy traffic at their exhibits during the April convention of the National Association of Broadcasters (NAB). During a legal forum at the convention, attorney Dennis Corbett said “the only way” radio stations can protect themselves is to tape delay live broadcasts “even if you have a milquetoast format.” Echoing that sentiment, David Solomon of the FCC stressed that stations should use “effective delay” technology to screen out indecent comments. Schurz Communications TV Vice President Marci Burdick said stations would be “nuts” not to use such equipment, despite

the fact its “incredibly expensive.”

In mid-May, Jonathan Rintels, executive director of the Center for Creative Voices in Media, and board member Peggy Charren, founder of Action for Children’s TV, told the FCC that its “overly broad, vague” rules on indecency are causing the “censoring of appropriate, protected, salutary creative work, harming adults and children... Creative, original, controversial, non-homogenized, decent and appropriate programming, already in short supply on television, is severely endangered... Our concern is not hypothetical or far-fetched.” An veteran newsman told us the indecency legislative proposals and the FCC’s recent actions are “causing great concern and consternation” in newsrooms. The Radio-TV News Directors Association is dismayed that

broadcast news would not be exempted from the legislation now pending in Congress.

There are many in Washington officialdom who disagree with these assessments of the government's attempts to put a stranglehold on broadcast indecency and obscenity. And, there have been many proposals to place cable and satellite programming under the strictures. In March, the House of Representatives overwhelmingly passed a bill raising the maximum fine for broadcasting indecency more than 1,000 percent – from \$27,500 to \$500,000 and restricting the hours such programs could be aired to late night. The measure also authorizes the Commission to not only fine the station which aired the indecency but also the individual responsible. A bill reported favorably by the Senate Commerce Committee March 9 and awaiting a Senate vote would raise the maximum fine to \$275,000 and places a cap of \$3 million in fines per 24 hour period against an offending station and \$500,000 per 24 hours for individuals.

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The Senate and House Commerce Committees each held separate hearings last winter, where the subject of broadcast indecency was very much in the forefront and all five FCC commissioners testified at both. In response to criticism of the agency for allegedly not enforcing the existing rules, FCC Chairman Michael Powell told the senators that the FCC currently has in place “the most aggressive enforcement regime in decades” to enforce rules against obscenity and indecency, including the possibility of license

revocation proceedings for “egregious and continuing disregard of decency law.”

On the House side, Rep. Heather Wilson (R-N.M.) chastised then Viacom President Mel Karmazin (who resigned June 1) and National Football League Commissioner Paul Tagliabue, in complaining about the Janet Jackson Super Bowl incident, that “we need to ask ourselves where you corporate CEOs went wrong... You knew that shock and indecency create a buzz that moves market share and lines your pockets.” Her sentiments were echoed by most of the other Committee members present at the well-attended hearing, with Rep. Edward Markey (D-Mass.) complaining that many station executives consider their licenses to use the spectrum “as mere corporate commodities and they air content replete with raunchy language, graphic violence and indecent fare... It is increasingly clear that the paltry fines the FCC assesses [for indecency] have become nothing more than a joke... simply a cost of doing business.”

Markey was critical of what he called the “FCC’s utter unwillingness” to revoke licenses or raise indecency issues during the license-renewal process. “Clearly, Congress will have to address these shortcomings at the FCC,” he said. Rep. John Dingell (D-Mich.) – who has been in Congress longer than any other House member – criticized “the seeming indifference” of broadcasting executives to do anything to curtail indecency and violent broadcasts and Fox and NBC officials for not accepting invitations to testify at the hearing: “I can conclude only that they are insufficiently aware of the

seriousness of concern [by member of Congress and the public]. It appears that these executives consider these [fines] nothing more than lunch money – a small cost of doing business.”

A majority of the FCC – Commissioners Capps, Kevin Martin and Jonathan Adelstein – two Democrats and a Republican, have been most outspoken in urging stronger actions against indecent, obscene and violent programming. In his Congressional testimony, Capps noted that when he joined the FCC two and a half years ago his first public statement was on indecency. “Every time I visit a town or city across America, I hear the same refrain from people: We are fed up with

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patently offensive programming... People all across this land of ours are demanding action – action now – to stop the increasing sex and violence bombarding their airwaves.” But, he said, the Commission still has not compiled “a record [against indecency] to match our rhetoric.”

In echoing Capps’ sentiments, Martin said that “television today contains some of the coarsest and most violent programming ever aired – and more of it. Indeed, the networks appear to be designing programs to ‘push the envelope’ and the bounds of decency.” The FCC also should move against such programming on satellite and cable, Martin said: “Increasingly, I hear a call for the same rules to apply to everyone” – radio, TV, satellite and cable. “Like millions of others, I was appalled by the [Super Bowl] halftime show,” Adelstein

told the Committee members. “Not just for the shock-value [Jackson] stunt... but for the overall raunchy performance displayed in front of so many children... I could highlight any number of tasteless commercials that depicted sexual and bodily functions in a vile manner... Any sense of [network] controls appeared out the window so long as the advertiser paid the multi-million dollar rate... Enough is enough... Gratuitous use of swear words or nudity have no place in broadcasting... We need to act forcibly now.”

Powell also joined in his colleagues’ criticism, saying the halftime show “represented a new low in prime-time television [and] is just the latest example in a growing list of deplorable incidents

over the nation’s airwaves.” He said the Commission “has already begun wielding our sword” against

indecency and obscenity, pledged “we will continue to vigorously monitor industry developments...” The fifth commissioner, Kathleen Abernathy, said the Commission must enlist the help of broadcasters – such as the use of delay mechanisms in live broadcasts – in its fight against indecent programming. Today’s broadcasters, she said, “are trying to retain audiences that have been deserting them in droves in favor of cable programming that is not subject to indecency restrictions. As a consequence, broadcast licensees are constantly pushing the programming envelope in an attempt to be more like cable.”

The NAB was late in joining the indecency imbroglio, waiting until March 31 to host a “Summit on Responsible Programming” which was closed to the news media. At that

summit, the NAB announced the formation of a task force – but the Association has done nothing since then on “responsible programming,” except to name co-chairmen. No members of the task force have been named, nor has the first meeting been scheduled more than two months later. “My take on the whole thing is its nothing but window dressing, just window dressing, by the NAB,” according to a prominent lobbyist.

All five commissioners, many members of Congress and public service advocates have repeatedly called on the broadcast industry to adopt a voluntary code of ethics – a call the NAB has ignored so far but which, we’re told, will be considered by the task force. (Note: NAB President Edward Fritts did not respond to a request for comment on this

article.) The NAB did adopt a “Statement of Principles” on programming content in June 1990, which it reaffirmed in 1992, but its provisions “have been totally ignored,” according to a former NAB board member. The NAB had separate radio and TV “Code of Good Practices” until both were dropped in April 1983 – following a U.S. District Court decision ruling that only a small portion of the TV Code dealing with advertising time standards violated antitrust laws. Even when the Code was in force, “there was a history of avoiding programming issues,” according to former NAB Executive Vice President John Summers (who was the staffer overseeing the Code), who told us the Code Authority “was much more inclined to deal with advertising issues.”

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