



Welcome

to a presentation of

THE MARYLAND-D.C.-DELAWARE BROADCASTERS ASSOCIATION

in cooperation with

FLETCHER, HEALD & HILDRETH, P.L.C.

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Fletcher, Heald & Hildreth

The Law of Communications

Regulation of Broadcast Indecency

A survey of FCC decisions
1975-2008

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WARNING

The following presentation includes language and images that may offend some people.

It also includes governmental policies that may offend others.

Parental discretion is advised.

18 U.S.C. §1464.

Broadcasting obscene language

Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both.

U.S. Constitution – Amendment 1

Congress shall make no law . . . abridging the freedom of speech. . . .

47 U.S.C. §326. Censorship

Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

Timeline

**2006 Omnibus, 21 FCC
Rcd 2664 (2006)**

Janet Jackson, 2004

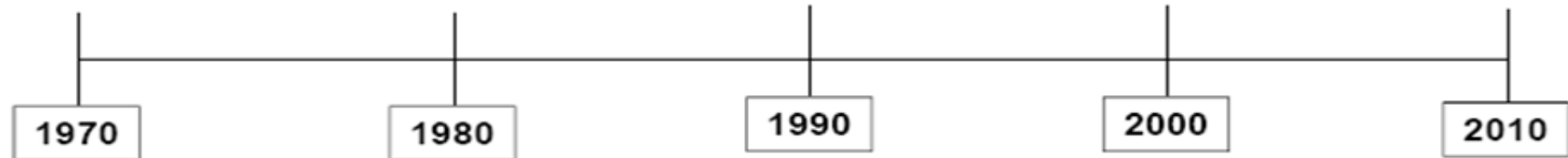
**Pacifica Foundation v. FCC,
438 U.S. 726 (1978)**

**Infinity, Pacifica, UCSB,
62 R.R. 2d 1218 (1987)**

**Sagittarius Broadcasting Corp.,
10 FCC Rcd 12245 (1995)**

**Golden Globe Awards, 18 FCC
Rcd 19859 (EB 2003), rev'd 19
FCC Rcd 4975 (2004)**

**WGBH Educational Foundation,
69 FCC 2d 1250 (1978)**



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



Pacifica *(continued)*

Pacifica Foundation, 56 FCC 2d 94 (1975)

“Indecency” defined as:

Language that describes . . . sexual or excretory activities and organs

in terms patently offensive as measured by contemporary community standards for the broadcast medium.

Considerations of context (*i.e.*, claims of literary, artistic, political or scientific value) are irrelevant when children may be in the audience.

Broadcast of Carlin’s seven words is specifically forbidden.

Pacifica *(continued)*

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

Stevens, J.:

Broadcasting has “most limited First Amendment protection” because:

“uniquely pervasive presence in the lives of all Americans”

“uniquely accessible to children”

Decision is narrow and limited to the facts of the case (*i.e.*, broadcast of the Carlin monologue). “Context is all-important”.

Pacifica *(continued)*

Powell, J., concurring (with Blackmun, J.), emphasizes:

Narrowness of ruling, limited only to this broadcast of Carlin monologue (“verbal shock treatment”)

Importance of “unique” character of broadcast medium

Anticipation of “cautious[]”, “orderly development” of this area of the law “in the first instance by the Commission, and then by the reviewing courts”.

WGBH Educational Foundation, 69 FCC 2d 1250 (1978)

The Boston Globe Saturday, July 22, 1978 19

FCC head says expletives don't all have to be deleted

The "seven dirty words" recently condemned by the US Supreme Court are not, despite that ruling, forbidden on radio and television, Charles D. Ferris, Federal Communications Commission chairman, said yesterday.

Ferris told the New England Broadcasters Assn. that "the particular circumstances of the Pacifica decision are as likely to occur again as Haley's Comet." He characterized the material condemned by the court, a George Carlin comedy routine featuring 12 minutes of expletives, as "verbal shock treatment" intended to offend.

The case stemmed from a New York father's complaint in 1973 after he and his young son heard a broadcast of Carlin's recording by a noncommercial educational radio station operated by the Pacifica Foundation.

Two of the seven words that Carlin talked about were broadcast by WGBH-TV (Channel 2) and radio in Boston, Ferris said — once in a play aired at 5:30 p.m. Despite a challenge from Morality In Media, a religious activists' group, the FCC unanimously renewed WGBH's license Thursday.

"I do not want the public to take this (Pacifica) case as a signal to write to us for relief whenever they hear a word they find personally offensive," Ferris said. "The Supreme Court specifically did not find that 'an occasional expletive' would justify any sanction."

Ferris said he would enforce the Supreme Court's principles but he still opposes even minimal censorship by the FCC.

He encouraged broadcasters to use "robust speech" and delve into "controversial matters" and



CHARLES FERRIS . . . opposes censorship

gave only passing mention to the court's argument that broadcasters do not have full First Amendment rights, both because the public owns the airwaves and because broadcast media pervade the home.

In a news conference, Ferris confirmed that CBS had made "material misstatements" to the FCC in explaining how a series of televised tennis tournaments came to be mislabeled as "winner-take-all."

WGBH Educational Foundation, 69 FCC 2d 1250 (1978)

Decision released less than a month after *Pacifica*.

Petitioner targeted WGBH-TV, alleging broadcast of “offensive, vulgar and otherwise material harmful to children”, including (among other things), “shit” and “bullshit”.

WGBH Educational Foundation, 69 FCC 2d 1250 (1978)

Pacifica “affords this Commission no general prerogative to intervene in any case where words similar or identical to those in *Pacifica* are broadcast. . . .We intend strictly to observe the narrowness of the *Pacifica* holding.”

Cites Powell’s “verbal shock treatment” description

Pacifica should be construed “consistent with the paramount importance we attach to encouraging free-ranging programming and editorial discretion.”

Petition denied, renewal granted

Timeline

**2006 Omnibus, 21 FCC
Rcd 2664 (2006)**

Janet Jackson, 2004

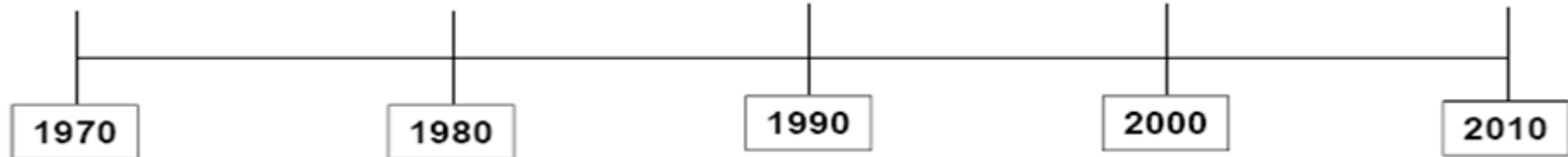
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69 FCC 2d 1250 (1978)**



1987 Change In Indecency Policy (Infinity/Pacifica/UCSB)

Public Notice – 62 Rad. Reg. 2d (P&F) 1218 (1987)

Infinity Broadcasting Corporation of Pennsylvania, 2 FCC Rcd 2705 (1987)

Pacifica Foundation, Inc., 2 FCC Rcd 2698 (1987)

Regents of the University of California, 2 FCC Rcd 2703 (1987)

“New” generic definition of actionable indecency:

“Language or material that depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs” when broadcast “at a time of day when there is a “reasonable risk that children may be in the audience”.

Exclusive and repeated use of “expletives” is per se indecent.

1987 Change In Indecency Policy (Infinity/Pacifica/UCSB)

Public Notice – 62 Rad. Reg. 2d (P&F) 1218 (1987)

Infinity Broadcasting Corporation of Pennsylvania, 2 FCC Rcd 2705 (1987)

Pacifica Foundation, Inc., 2 FCC Rcd 2698 (1987)

Regents of the University of California, 2 FCC Rcd 2703 (1987)

Use of non-expletives *may* be indecent if, in context, “its meaning can reasonably be considered to contain patently offensive references to sexual or excretory activities and organs”, *i.e.*, when double entendres/innuendo “are intermingled with explicit references that make the meaning of the entire discussion clear or capable only of one meaning”.

1987 Change In Indecency Policy (Infinity/Pacifica/UCSB)

Public Notice – 62 Rad. Reg. 2d (P&F) 1218 (1987)

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“Expletives” defined as

Well, they weren’t defined at all, other than a passing reference to “patently offensive expletives and vulgarities such as those found indecent in the Pacifica case”.

Sagittarius Broadcasting Corporation, 10 FCC Rcd 12245 (1995)

FCC enters Consent Decree with Infinity:

- Infinity pays \$1.715 million in “voluntary contributions”
- Infinity promises to educate its staff about FCC indecency policies
- FCC drops \$1.706 million in forfeiture proceedings and agrees not to consider any other complaints that were pending as of September, 1995

Sagittarius Broadcasting Corporation, 10 FCC Rcd 12245 (1995)

- FCC avoids further judicial review of indecency policy
- Infinity erases all pending complaints from its record
- Infinity now cleared to buy/sell stations

Golden Globe Awards, 18 FCC Rcd 19859 (Enforcement Bureau 2003)

In January, 2003, the Golden Globe Awards ceremonies were broadcast, live and nationwide. The award for Best Original Song (“The Hands That Built America”, featured in the movie “Gangs of New York”), went to U2 frontman Paul Hewson, better known as Bono. He accepted the award graciously:

Video Insert

Golden Globe Awards, 18 FCC Rcd 19859 (Enforcement Bureau 2003)

Complaints roll in, 234 in all (217 of which are filed by persons associated with the Parents Television Council).

In October, 2003, Enforcement Bureau denies all complaints:

- “Fucking” used “as an adjective or expletive to emphasize an exclamation”, not as “a description of sexual or excretory activity or organs” and thus not covered by indecency policy.
- Fleeting and isolated remarks of this nature do not warrant Commission action.

Golden Globe Awards, 18 FCC Rcd 19859 (Enforcement Bureau 2003)

The Parents Television Council asked the full Commission to review the Bureau's decision. And in February, 2004, while the PTC request was pending . . .

Video Insert

Janet Jackson (2004)

Jackson's right breast was exposed for approximately one-half second.

The repercussions started immediately afterward and continue six years later.

Janet Jackson (2004)

Complaints were filed almost immediately – more than half a million in the first six months. It took just six months for the Commission to issue a Notice of Apparent Liability, 19 FCC Rcd 19230 (released September 22, 2004).

But even before then, the Commission modified its indecency policy by reversing the Enforcement Bureau's decision in the Golden Globe Awards case and issuing three other decisions in long-pending (up to five years) radio cases.

Janet Jackson (2004)

Post-Janet Jackson policy

A single use of “fuck” (or any variant) is indecent.

The “F-word” is “one of the most vulgar, graphic and explicit descriptions of sexual activity in the English language” whose “use invariably invokes a coarse sexual image.”

“Isolated and gratuitous” uses of such language “would likely lead to more use of the offensive language”, which would jeopardize “the well-being of the nation’s children” who would be exposed to “the most objectionable, most offensive language”.

Janet Jackson (2004)

So Bono's use of the word was indecent.

It was profane, too.

New policy strips “profanity” of “sacrilegious” component, instead refers to, and adopts, alternate definition:

[P]ersonally reviling epithets naturally tending to provoke violent resentment or denoting language so grossly offensive to members of the public who actually hear it as to amount to a nuisance.

Bono's use of “fucking” deemed “profane” under new definition.

2006 Omnibus Indecency Decision

21 FCC Rcd 2664 (2006)

More than two dozen television programs reviewed.

Two-stage indecency analysis applied:

Does the material describe or depict sexual or excretory activities or organs?

If yes, then the Commission will consider:

- explicitness or graphic nature
- whether the material dwells on or repeats at length the offensive description
- whether the material “panders to, titillates or shocks the audience”.

2006 Omnibus Indecency Decision

21 FCC Rcd 2664 (2006)

Pixilation of sexual organs is “not necessarily determinative”.

Lack of nudity is immaterial where “the sexual nature of the scene is unquestionable”.

Use of “bleeping” to mask language not specifically addressed.

2006 Omnibus Indecency Decision

21 FCC Rcd 2664 (2006)

“Profanity” pared down to include only material “so grossly offensive to members of the public who actually hear it as to amount to a nuisance.”

“Profanity” further narrowed to include only “words that are sexual or excretory in nature or are derived from such terms” – so the use of racial or ethnic epithets is ***not*** “profanity”.

2006 Omnibus Indecency Decision

21 FCC Rcd 2664 (2006)

Some grossly offensive language – *i.e.*, “the most offensive words in the English language”, “likely to shock the viewer and disturb the peace and quiet of the home” – deemed “presumptively profane”

The only “presumptively profane” words identified to date: Fuck and Shit . . . which suggests that you can NEVER broadcast either of those words, except, of course

. . .

2006 Omnibus Indecency Decision

21 FCC Rcd 2664 (2006)

. . . even “presumptively profane” words may be aired in “unusual circumstances”, *i.e.*, “where it is demonstrably essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance.”

2006 Omnibus Indecency Decision

21 FCC Rcd 2664 (2006)

Language NOT included on short list of “presumptively profane” terms:

Hell Damn “Little Banana” Poop Crap Bitch

“You suck” Dick Dickhead Wang “Pissed off”

“Up yours”

Ass (“kiss my ass”, “fire his ass”, “wiping his ass”)

But these, and other, non-presumptively profane terms ***might*** be deemed profane if used in certain contexts – although FCC provides no guidance as to what those contexts might be.

Quiz Time

Situation No. 1

Time: 8:30 a.m.

Program: “The Early Show” (CBS morning news show)
December 13, 2004

Problem: Interviewee, a recent evictee from “Survivor: Vanuatu”, describes a fellow contestant on the show as a “bullshitter”.

Quiz Time *(continued)*

Situation No. 1

“Vulgar, graphic and explicit”, “shocking and gratuitous” –
“***particularly during a morning news interview***”

Quiz Time *(continued)*

Situation No. 2

Time: Between 8:00-10:00 p.m.

Program: Billboard Music Awards Show
December 10, 2003

Problem:

Video Insert

Quiz Time *(continued)*

Situation No. 2

“[C]learly describes sexual and excretory activity”

The “F-Word”, . . . one of the most vulgar, graphic, and explicit depictions of sexual activity in the English language [,] . . . invariably invokes a coarse sexual image.”

Ditto for the “S-Word”.

Not sustained or repeated, but so what?

Use of language “during a live broadcast of a music awards ceremony when children were expected to be in the audience, was shocking and gratuitous.”

Quiz Time *(continued)*

Situation No. 3

Time: Between 8:00-10:00 p.m.

Program: Billboard Music Awards Show
December 9, 2002

Problem:

Video Insert

Quiz Time *(continued)*

Situation No. 3

“[I]nherently describes sexual activity”

The “F-Word”, . . . one of the most vulgar, graphic, and explicit depictions of sexual activity in the English language [,] . . . invariably invokes a coarse sexual image.”

Not sustained or repeated, but so what?

Use of language during “a live broadcast of an awards ceremony when children were expected to be in the audience, was shocking and gratuitous.”

Quiz Time *(continued)*

Situation No. 4

Time: Between 8:00-11:00 p.m.

November 11, 2004

Problem:

Video Insert

Quiz Time *(continued)*

Situation No. 5

Time: Before 10:00 p.m.

Spring, 1997

(decided by FCC – January, 2000)

Problem:

Video Insert

Quiz Time *(continued)*

Situation No. 5

“[T]he material broadcast depicted a historical view of World War II and wartime atrocities”

Not presented in a pandering, titillating or vulgar manner

Quiz Time *(continued)*

Situation No. 6

Time: 8:00 p.m.

November 20, 2001

Problem:

Video Insert

Quiz Time *(continued)*

Situation No. 6

“[S]cene depict[s] Buffy kissing and straddling Spike shortly after fighting with him”

“[N]ot . . . sufficiently graphic or explicit to be deemed indecent”

Quiz Time *(continued)*

Situation No. 7

Time: 8:30 a.m.

Program: “The Early Show” (CBS morning news show)
December 13, 2004

Problem: Interviewee, a recent evictee from “Survivor: Vanuatu”, describes a fellow contestant on the show as a “bullshitter”.

Quiz Time *(continued)*

Situation No. 7

“The Early Show” is produced by CBS News and addressed a variety of other topics . . . which clearly fall under the rubric of news programming. [W]e . . . did not give appropriate weight to the nature of the programming at issue (i.e., news programming).”

2006 to Present – The Courts Weigh In

In 2006, Fox appeals Omnibus Order with respect to Cher/Nicole Richie incidents to the Second Circuit.

Meanwhile, CBS appeals the Janet Jackson decision to the Third Circuit.

2008 to Present – The Courts Weigh In *(continued)*

In 2007, the Second Circuit reverses the FCC’s decision on statutory grounds – the FCC failed to adequately explain its apparent abandonment of the “fleeting expletives” policy.

In extended dictum, the Second Circuit expresses skepticism that the Commission’s indecency policy could pass constitutional muster, primarily on vagueness grounds.

2006 to Present – The Courts Weigh In *(continued)*

In 2008, the Third Circuit reverses the FCC's Janet Jackson decision, on essentially identical statutory grounds as the Second Circuit. The Third Circuit refrains from opining about the constitutionality of the indecency policy.

The FCC asks the Supreme Court to review both the Fox and CBS cases, and the Supreme Court agrees.

Because the Fox case arrives at the Supreme Court first, it is briefed and argued first.

2006 to Present – The Courts Weigh In *(continued)*

In 2009, the Supreme Court reverses the Second Circuit with respect to its statutory holding and remands the case to the Second Circuit for further consideration. The majority of the Supreme Court does not address the Second Circuit's constitutional analysis.

Simultaneously, the Supreme Court reverses and remands the Janet Jackson case back to the Third Circuit.

2006 to Present – The Courts Weigh In *(continued)*

On remand, in 2010 the Second Circuit concludes that the indecency policy is unconstitutionally vague. The FCC asks the Second Circuit to reconsider that decision. The Commission's petition for rehearing is currently pending.

The Third Circuit has not acted on the CBS/Janet Jackson case since the 2009 remand.

Where do we go from here?

The indecency policy has been ruled unconstitutional by the U.S. Court of Appeals for the Second Circuit.

While the FCC could try to argue that that ruling affects **only** stations in the Second Circuit – *i.e.*, New York, Connecticut and Vermont – that would be a difficult position to defend.

In light of the Second Circuit ruling, the FCC may be expected to withhold action on any indecency-related matters pending any change in that ruling.

Where do we go from here?

Clock continues to count down on any pending complaints.

Federal government is subject to five-year limit on enforcement actions (28 U.S.C. §2462).

Section 2462 bars actions in Federal court aimed at collecting fines or forfeitures if those actions are not commenced within five years after the underlying claim accrues.

Where do we go from here?

When do claims accrue? Not yet finally decided, but existing precedent suggests either:

- at time of allegedly indecent broadcast, or
- at time FCC learned of the broadcast.

Where do we go from here?

While threat of FCC prosecution may have been lifted, at least for the time being (and possibly permanently), the need to consider audience and advertiser response remains.

But those considerations are between the broadcaster and the audience and the advertisers – the FCC need not enter into the decision-making matrix.

Thank you.

Questions?