

Before the Federal Communications Commission
Comments of the Student Press Law Center
GN Docket No. 13-86

In response to Public Notice, DA 13-581

FCC Reduces Backlog of Broadcast Indecency Complaints by 70% (More Than One Million Complaints); Seeks Comments on Adopting Egregious Cases Policy

Filed June 19, 2013

A. Introduction and Summary

The Student Press Law Center is a nonprofit advocacy organization based in Arlington, Va., that works with the student media nationwide. The SPLC has 40 years of experience providing information and training to students and educators about the legal rights and responsibilities that accompany gathering and distributing news across all media platforms, including over-the-air broadcasting.

When student broadcasters contact the SPLC for assistance, they frequently are confused about their responsibilities as it regards compliance with the Commission's indecency standards. Locating the "line" between permissible and impermissible content is a source of constant uncertainty for those working in student media, and that uncertainty often results in excessive "self-censorship" of news and entertainment content that would be of value to the audience. Clear guidance from the Commission would dispel some of this uncertainty.

An indistinct "fleeting expletive" standard, with case-by-case determination of the journalistic or artistic merits of a particular program, provides insufficient guidance for all those working in broadcasting, but especially for those working in the environment of nonprofit educational broadcasting. If the Commission remains in the business of policing indecent content, enforcement actions should be limited – and broadcasters should be clearly notified of such limits – to instances of (as the Supreme Court described George Carlin's monologue in *Pacifica*) "verbal shock treatment." Consistent with its recent determination as to recordkeeping violations, the Commission should enact relief from fines for noncommercial educational broadcasters in light of their unique challenges and unique public-service role.

B. Nonprofit Educational Broadcasting Fulfills Uniquely Valuable Community Needs

In its recent Policy Statement and Order in the case of William Penn University and its KIGC-FM broadcast station (Docket No. DA 13-1074) the Commission recognized that student-run noncommercial educational broadcasters fulfill a distinctly valuable public-service role. By its Order of May 13, 2013, the Commission created a limited "safe harbor" for first-time violators of recordkeeping standards such as "public file" requirements, enabling them to enter into voluntary compliance plans that ameliorate their financial exposure. The Commission based its policy decision on the important role that student-run noncommercial educational stations play, and the unique staffing and budgetary challenges that they face:

Student volunteers at these stations are young and unlikely to have had any work experience in regulatory compliance matters, particularly those involving the FCC requirements to which [educational] stations are subject. As students leave the school or assume other responsibilities that conflict with their time devoted to station activities, new student volunteers must be recruited and trained on an ongoing basis by the remaining students, often without any professional oversight other than that provided by faculty advisors.

This recent pronouncement is consistent with the Commission's longstanding recognition that nonprofit educational broadcasters provide an essential community service of which regulators should be mindful and protective. *See Info. Needs of Communities*, FEDERAL COMMUNICATIONS COMMISSION, 2011 WL 2286864 at *68, *196 (June 2011). In a September 2011 interview, FCC Commissioner Copps said that college broadcasters "have an increasingly important role to play in the media age in which we live if we are not going to completely lose sight of what is happening in our communities(.)" *Audio of Interview with FCC Commissioner Michael J. Copps*, 92.1 WPTS, <http://wptsradio.org/?tag=indecenty>.

Student and other hyper-local broadcasters offer a uniquely accessible form of mass communication. As the Commission has approvingly noted, licensing frequencies to non-sophisticated broadcasters allows for "highly local radio stations grounded in their communities." *In re Creation of a Low Power Radio Service*, 15 F.C.C. Rcd. at 2208 ¶ 3. These local broadcasters, who include members of under-represented minorities, are often best able to serve their communities because they are in fact part of that community. *Id.* at 2213 ¶ 17.

The FCC has many times acknowledged that it licenses spectrum to unsophisticated broadcasters and in fact designates swaths of spectrum to be used by individuals who may not have any broadcast experience at all. *In re Creation of a Low Power Radio Service*, 15 F.C.C. Rcd. 2205, 2206 ¶ 1 (2000) (the low power FM radio service "will provide opportunities for new voices to be heard and will ensure that we fulfill our statutory obligation to authorize facilities in a manner that best serves the public interest"), *reconsidered in*, 15 F.C.C. Rcd. 19208 (2000). The Commission has even taken steps to make it easier for inexperienced broadcasters to license spectrum from the FCC. *See In re Creation of a Low Power Radio Service*, 22 F.C.C. Rcd. 21912, 21944 ¶ 78 (2007) ("This tool enabled unsophisticated potential applicants to identify without expense available FM spectrum in their local communities.").

The Commission's commitment to licensing spectrum to unsophisticated entities is further demonstrated by regulations regarding university-licensed broadcast frequencies. The FCC allows universities to license frequencies by creating an exception to its rules in order to "promote our goals of maximizing diversity of ownership in a community and providing a medium for new speakers, including students, to gain experience in the broadcast field." *In re Creation of Low Power Radio Service*, 15 F.C.C. Rcd. at 19241 ¶ 84. When licensing a low power FM station to a university under these

rules, the FCC mandates that the station “be managed and operated by students of the university, although as the licensee, the University must retain ultimate control of the station's operations.” *Id.* Thus, not only has the FCC acknowledged that it will license spectrum to inexperienced and unsophisticated individuals, but it actually promotes the practice.

C. Student Broadcasters Are Especially Vulnerable to Overzealous Indecency Enforcement

As the Commission recognized in the recent Policy Statement and Order in the case of William Penn University (Docket No. DA 13-1074), student broadcasting operations often lack the financial capacity to absorb fines in the high five figures or even six figures. *See In re William Penn Univ.*, “Policy Statement and Order,” Docket No. DA 13-1074 (May 13, 2013) at 3, ¶ 5 (noting trend of financially strapped colleges selling off over-the-air broadcasting operations: “We are concerned that imposing forfeitures at levels that are likely to exceed the annual budgets of student-run radio stations could exacerbate this trend, foreclosing opportunities for the education, training and real-world experience of current and future student volunteers by these stations.”). A fine that would be a mere “speeding ticket” to a network affiliate could constitute the “death penalty” for an educational station with a budget of the size of William Penn’s KIGC-FM (\$6,650 a year).

Student-run educational stations are at heightened risk of incurring crushing financial liability for “fleeing expletives” for three reasons. First, they may lack the staffing and equipment to pre-screen all programming for stray curse-words. Second, student-run stations represent a training ground for future broadcast professionals, and a “zero tolerance for mistakes” regime simply is unrealistic in an educational setting. Finally, campus stations exist to serve a primary listening audience whose tastes exist at the outer edges of the “community standards” the Commission enforces, including ethnic and minority listeners whose needs often go unmet by mainstream commercial broadcasters. Campus broadcasting cannot function as a laboratory for experimentation – experimentation that is essential unless “community standards” are to remain frozen in 1978, never to evolve – if it must conform to ill-defined notions of indecency that inadequately protect *bona fide* artistic and journalistic expression.

Vague regulations chill speech by forcing would-be speakers to self-censor and “steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.” *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964). Given the unique characteristics of collegiate broadcasting, the FCC’s policies have had a tangible chilling effect.

Student broadcasting outlets rarely generate enough revenue to offset their costs. The Commission should not penalize institutions for providing students with training opportunities. Student broadcasters pride themselves on being public service related learning institutions more than money-making operations. *In re Creation of Low Power Radio Service*, 15 F.C.C. Rcd. at 2213 ¶ 17.

Under current regulations, the FCC may fine a licensee as much as \$325,000 for *each* indecent utterance. 47 C.F.R. § 1.80(b)(1). The Commission may reduce forfeiture amounts if it would cause a licensee undue financial hardship. However, the Commission will only consider the financial standing of the named licensee when making such a determination. *See In re Tri-State Univ.*, 24 F.C.C. Rcd. 4961, 4963-64 ¶ 9 (MB 2009). College broadcasting outlets are often operated by students but licensed to the university itself. As a result, the FCC will not reduce a forfeiture amount even if it exceeds the broadcaster's entire annual budget because it is the university's finances, not the student operated broadcaster's finances, that the Commission considers. *See In re State Univ. of N.Y.*, 13 F.C.C. Rcd. at 12811 ¶ 5 (1987) (original forfeiture amount exceeded the station's budget). Indeed, when Cortland University's student radio station was fined in 1987 for broadcasting indecent terms, the university "shut down the station to resolve the problem(.)" Steve Knopper, *College Radio Suffers Growing Pains*, BILLBOARD, July 9, 1994, at 84. In essence, the FCC's indecency policy has the very real potential to sink successful hyper-local broadcasters who serve a uniquely beneficial role in society.

The threat of financial ruin, combined with the uncertainty engendered by an unpredictable enforcement regime, has chilled collegiate broadcasters' speech. The FCC has forced collegiate broadcasters to adopt policies that favor self-censorship over free speech. For instance, WXUT-FM is operated by the students of the University of Toledo but owned by the university itself. In its manual, the station acknowledges that broadcasters often will not know what speech is prohibited by the FCC and should engage in aggressive self-censorship. *Obscenity/Indecency Policy, WXUT-FM*, <http://wxut.pbworks.com/f/Obscenity.pdf> (students "must carefully monitor what we say and play. WHEN IN DOUBT, DON'T"). Similarly, KWUR-FM, which is operated by the students of the Washington University in St. Louis but owned by the university, warns students, "If you have to think about it, don't say it." *The KWUR Bible*, oldsu.wustl.edu/file.php?id=545. At WESN-FM, a station licensed to the Illinois Wesleyan University, students are told that on-air policies are in place "due to either a campus policy or an FCC regulation" and warned that students may not discuss "anything that graphically or explicitly describes sexual or 'potty' functions or activities." *The WESN DJ Manuel*, <http://www.iwu.edu/~wesn/info/djmanual.htm>.

Communities are often best served through live local broadcasts. Live broadcasts are inherently unscripted and unpredictable, posing a unique risk that someone will blurt profanity at times even unbeknownst to a careful broadcast technician. A "fleeting expletive" enforcement regime thus deters broadcasters from offering valuable live programming.

Live broadcasting is essential in the face of a natural disaster or emergency. *See The Info. Needs of Communities*, 2011 WL 2286864, at *68, *196. Live broadcasting of news events promotes listener calls and comments, thereby furthering civic participation. Additionally, live broadcasting ensures that listeners are able to gather timely and unfiltered information to make important decisions. Finally, live broadcasting is the only viable means to present certain programming. In the age of the

Internet and social media, it is not viable to delay the broadcast of programs such as popular sporting events. If CBS had to scrub-clean its upcoming Super Bowl broadcast to make sure that a sideline microphone did not broadcast a fan swearing at a referee, it could delay the program's broadcast to the point of appearing untimely to an audience following the action via online media. Live broadcasting must be preserved to ensure an informed public and the vitality of broadcasting.

Additionally, the Commission's indecency policy restricts broadcasters' ability to offer a community desired music and entertainment. Although we all may be nostalgic for a simpler time, the reality is that George Carlin's vocabulary words have become commonplace in the mainstream entertainment enjoyed by tens of millions of people. The Academy of Motion Picture Arts and Sciences – the arbiter of artistic achievement in American cinema – presented an Oscar in March 2006 to the rap artists Three Six Mafia, a musical act popular among college audiences that frequently performs on campuses, for their gritty song, "It's Hard Out Here For a Pimp," which includes the lyric: "It's fucked up where I live, but that's just how it is." Three Six Mafia, *It's Hard Out Here For a Pimp*, on HUSTLE & FLOW SOUNDTRACK (Atlantic Records 2005). For better or for worse, we live in a society in which coarse language is now routine – including in the music favored by college audiences.

A college student (or for that matter, a young child) wishing to hear a popular song containing profanity could do so by accessing it at any time, day or night, on the Internet, see *Reno v. ACLU*, 521 U.S. 844, 874 (1997), or on a cable program such as mtvU, see *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813-14 (2000), but could not hear it on the radio. (It should be noted, however, that even many non-FCC regulated broadcasters, in adherence to their own audiences' expressed tastes, will willingly refrain from airing profanity or nudity, a "marketplace" solution that is always preferable to content-based government regulation.) What constitutes harmful or taboo speech is allowed to evolve in every other format of communication, but the FCC's indecency regime freezes societal norms in over-the-air broadcasting.

Although the *Pacifica* plurality upheld the Commission's indecency rules in the limited context of a one-of-a-kind program that "represented a rather dramatic departure from traditional program content," *Reno*, 521 U.S. at 867, there is no "dramatic departure" in playing the chart-topping songs of the day; that is, and long has been, the bread-and-butter of radio programming. Rather, the "dramatic departure" is in telling listeners waiting to hear their favorite songs to check back at midnight. It was rare in George Carlin's heyday for a chart-topping song to use explicit profanity, but the popularity of songs such as pop artist Cee-Lo Green's 2010-11 chart-topper, "Fuck You," which sold some 3.7 million copies and was certified as a "gold" single, indicates just how community standards can and must be allowed to evolve. College broadcasters are not permitted to offer their community the entertainment programming that its members routinely enjoy, unless they alter that programming by replacing or "bleeping" indecent terms. Doing so changes the meaning and impact of an artist's expression. Thus, the FCC's indecency regime unduly hampers collegiate broadcasters from offering their community the programming it desires.

While the FCC advises that broadcasters may purchase “delay” technology, *Remand Order*, 21 F.C.C. Rcd. at 13311 ¶ 32, that option may be prohibitively expensive for a small collegiate or hyper-local broadcaster. The AirTools 6100, a standard broadcast audio delay technology, retails for over \$2,500. To implement that technology, additional in-studio audio equipment, new computer software, multiple employees, and training may be needed.

Moreover, “delay” technology is itself vulnerable to human failings. A radio technician, who is focused on the main elements of the broadcast, may overlook the muttered use of an indecent term in the background – but a vigilant advocacy organization may, upon repeated playings, unearth the profanity and bring a complaint. In such a scenario, the FCC may force a broadcaster to pay a fine regardless of the broadcaster’s investment in “delay” technology.

Finally, the need for “delay” technology underscores the vagueness and chilling effect that the FCC’s indecency regime promotes. By suggesting that broadcast outlets purchase “delay” technology, the Commission thereby expects a college student with little radio experience, no legal training, and her nervous finger on a “delay” button to weigh the FCC’s confusing indecency precedent and come up with a definitive conclusion in mere seconds. This is a daunting task, particularly given the fact that the Commission – with its scores of trained attorneys – has had trouble consistently applying the indecency regime. *See Omnibus Order*, 21 F.C.C. Rcd. at 2699 ¶ 142 (live broadcast “legally actionable”) *rev’d*, *Remand Order*, 21 F.C.C. Rcd. at 13328 ¶ 72 (live interview not actionably indecent); *In re KBOO Found*, 16 F.C.C. Rcd. at 10733 ¶ 8 (broadcast actionably indecent) *rescinded by*, 18 F.C.C. Rcd. at 2474 ¶ 9 (broadcast not indecent). Given the unique characteristics of college radio, “delay” technology forces a student broadcaster to make a choice: self-censor every questionable term, thereby eliminating the speech from the marketplace of ideas, or risk the station’s future. The existence of a delay button does not obviate the FCC’s unconstitutional chilling of speech – to the contrary, it *gives effect* to the chilling.

In sum, the FCC’s indecency regime restricts college broadcasters’ ability to fulfill their communities’ news and entertainment needs. There is a distinct interest in providing communities with live, cutting edge and local broadcasting. The prospect of ruinous forfeitures for “fleeting expletives” inhibits the ability of student broadcasters to offer programming that is available in competing mass media without fear.

D. A “Fleeting Expletive” Enforcement Regime is Constitutionally Suspect

While the Supreme Court has declined to squarely address the constitutionality of a “fleeting expletive” enforcement standard under the First Amendment, *see FCC v. Fox Television Stations, Inc.*, 132 S.Ct. 2307 (2012), the standard exists under a constitutional cloud.

A regulation violates the First Amendment if it “sweeps too broadly, penalizing a substantial amount of speech that is constitutionally protected.” *Forsyth Cnty., Ga. v. Nationalist Movement*, 505 U.S. 123, 130 (1992). The “fleeting expletive” standard casts a shadow over news, artistic programming, and other speech that the government has no compelling interest in regulating.

The indecency regime employed during the past decade bears little resemblance to the narrow scheme of content-based regulation upheld as constitutional in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). Penalizing a single blurted curse-word is a departure from *Pacifica*’s foundational justification of protecting vulnerable ears from the “repetitive, deliberate use” of “patently offensive” language delivered over a uniquely accessible medium.

The “fleeting expletive” indecency regime, on its face, prohibits substantially more speech than is necessary to protect children. The FCC has no legitimate interest in restricting speech that does not harm children even if it is “unsuitable” for them, *Brown v. Entm’t Merch. Ass’n*, 131 S. Ct. 2729, 2736 n.3 (2010), or may be offensive, *Pacifica*, 438 U.S. at 745. Even assuming *arguendo* that repetitive verbal shock treatment harms children, see *Pacifica*, 438 U.S. at 749, that is no longer all the Commission’s indecency policy prohibits.

The Commission has asserted that its contextual “patently offensive” standard limits its indecency authority only to those depictions that harm children or protects individuals’ privacy in ways similar to that upheld in *Pacifica*. Even if that contextual standard saves the FCC’s indecency regime from being substantially overbroad – and it does not – it renders the regime unconstitutionally vague.

Because there is no categorical safe harbor for journalistic or artistic programming, broadcasters are left to guess whether their particular programs will qualify as contextually “meritorious” so as to be entitled to enforcement leeway. Particularly in light of the blurring of lines between news and entertainment programming in mainstream media – programs from HLNtv’s “Nancy Grace” to Comedy Central’s “The Daily Show” to syndicated programs such as “Dr Phil,” “Katie” and “TMZ on TV” possess elements of both news and entertainment – this is a more difficult judgment than it may seem. Putting government agencies into the business of refereeing the journalistic or artistic merits of particular programs – or of individual episodes of programs, or of individual phrases in individual segments of programs – fails to provide the predictability and certainty that will enable station managers to make educated programming decisions.

The FCC has erected an indecency enforcement structure that allows it to consider (or not consider) any contextual factor, in sum or in isolation, to determine whether a program is patently offensive. This is the essence of an unconstitutionally vague system. For instance, the FCC’s current indecency policy regulates news programming, though to what extent is unclear. See *Remand Order*, 21 F.C.C. Rcd. at 13327 ¶ 71 (“To be sure, there is no outright news exemption from our indecency

rules.”). The FCC does not contend, nor could it, that indecent terms broadcast in a news program harm children to the point that such terms should be proscribed. Indeed, the *Pacifica* plurality noted that if the FCC began regulating discussions of socially important issues, its indecency regime may well not pass constitutional muster. *Pacifica*, 438 U.S. at 733.

When the government purports to sit in the director’s chair and make after-the-fact determinations about whether profanity is artistically necessary, the potential for viewpoint-based abuse is readily apparent. Even if regulators go into the exercise with the best of intentions, it is impossible to divorce an assessment of artistic merit from personal taste, and the programs at greatest risk of being labeled insufficiently artistic disproportionately will be those appealing to niche or “counter-culture” audiences with non-mainstream tastes.

E. Conclusion

The Commission has recognized both that educational broadcasters provide essential training and programming diversity opportunities, and also that they are financially fragile. Consistent with its recent determination that student-run nonprofit educational stations should receive special solicitude in the imposition of forfeitures for recordkeeping violations, the Commission should likewise rethink its “fleeting expletive” enforcement standards with an eye toward enabling low-budget educational broadcasters to offer live programming and contemporary chart-topping music without fear of a door-closing forfeiture.

Respectfully submitted, this 19th day of June, 2013

_____/s/_____
Student Press Law Center
Frank D. LoMonte, Esq., Executive Director
1101 Wilson Boulevard, Suite 1100
Arlington VA 22209-2275
(703) 807-1904
(703) 807-2109 fax
www.splc.org
director@splc.org