

COMMENT: FCC INDECENCY VIOLATIONS: SHOULD THE FCC BE ABLE TO FINE NON-BROADCAST LICENSEES FOR INDECENCY VIOLATIONS?

By: Shahrokh Sheik

I. Introduction

"Freedom of utterance is abridged to many who wish to use the limited facilities of radio [and T.V.]." ¹

If a radio or television personality could be personally fined up to half a million dollars for a potentially indecent comment, he or she may refrain from uttering the comment altogether. In February 2005, the U.S. House of Representatives passed the Broadcast Decency Enforcement Act of 2005 (hereinafter, "the Act"), ² which increased Federal Communications Commission (hereinafter, "FCC") indecency fines for both broadcast licensees and non-licensees up to half a million dollars. ³ On June 15, 2006, Congress passed legislation that ultimately excluded language increasing the fine for non-licensees. ⁴ Although the American public dodged a bullet at [*458] that moment, the issue of fining non-licensees will likely arise in future political agendas.

Therefore, this comment focuses on the portion of the House bill that pertained to liability of non-licensees and argues that such a fine violates constitutional protections of free speech. The potential for a half million-dollar indecency fine on a non-broadcast licensee, i.e., an individual, would have a significant chilling effect on constitutionally protected speech in the broadcast medium. ⁵ Thus, such an Act would violate the First Amendment to the U.S. Constitution. ⁶

In addition, existing broadcast indecency laws permit the FCC to impose indecency liability on non-licensees. However, the FCC has yet to impose such liability. This comment concurrently argues that to fine non-licensees, irrespective of the fine amount, would be unconstitutional.

Recently, the FCC has been increasingly vigilant in fining radio and television broadcasters for indecency violations. ⁷ Many attribute the increase in the enforcement of broadcast indecency standards to the 2003 Super Bowl halftime show. ⁸ During the halftime show, Janet Jackson's "wardrobe malfunction" exposed a portion of the pop-singer's breast on nationally broadcast television. ⁹ The incident spawned a flurry of complaints to the FCC from outraged viewers that perceived the conduct as indecent and inappropriate for a nationally broadcast sporting event. ¹⁰ Moreover, this incident resulted in a surge of indecency complaints for various television and radio programs, ¹¹ and increased the federal [*459] government's interest in broadcast indecency standards. ¹² As a result, the FCC has made the enforcement of indecency standards for television and radio broadcasts a higher priority. ¹³

Although FCC indecency fines have historically been imposed only on broadcast licensees, non-

broadcast licensees are now at a significant risk of being fined as well because of the recent enactment of the Act.¹⁴ Since 2002, the FCC's indecency fines against radio and television broadcasters have considerably increased in dollar amount.¹⁵ For example, CBS was fined a record-breaking \$ 500,000 for the Jackson incident, which occurred at the 2003 Super Bowl.¹⁶ In 2004, the FCC proposed a \$ 755,000 fine on Clear Channel for broadcasting portions of the "Bubba the Love Sponge" show, which it deemed indecent.¹⁷ That same year, Fox Television Networks was fined \$ 1.2 million for airing the show "Married by America."¹⁸ However, the FCC did not fine Janet Jackson, Bubba the Love Sponge, nor the producers of "Married by America" in their capacities as artists or creators.

Even though these individuals were the direct source of the indecent material, the FCC never imposed a fine against the individuals.¹⁹ The reason for this inaction is rather unclear. There are currently indecency rules that apply to individuals.²⁰ However, since indecency fines have never before been imposed on individuals, courts have yet to review the constitutional validity of the Act. Proponents of the Act argue that holding [*460] individuals personally liable "is the fastest way of cleaning up the airwaves."²¹ On the other hand, critics of the rule argue that the FCC only has authority to regulate the broadcasters of indecent content, not the individual performers.²² Even former FCC Chairman Michael Powell voiced concern about the validity of fining performers who violate indecency standards and acknowledged that such action might raise potential constitutional concerns.²³

This Comment addresses the legitimacy of an FCC broadcast indecency fine against an individual, i.e. a non-broadcast licensee. Part II discusses FCC broadcast decency regulatory authority as set forth by the Telecommunications Act of 1934, judicial decisions for cases challenging FCC indecency procedures, and policy statements by FCC commissioners.²⁴ Part III analyzes the Act's provision that increased the indecency fine amount for non-licensees and eliminated the prior notice requirement.²⁵ Part IV argues that allowing the FCC to fine non-licensees is unconstitutional because it fails the strict scrutiny analysis required for content-based prohibitions on speech.²⁶ Additionally, the fine would be unconstitutionally vague and overbroad, and invalid as a matter of policy because FCC authority should apply only to broadcast licensees. Part V concludes that indecency authority over non-broadcast licensees violates the First Amendment because it will chill constitutionally protected speech.²⁷

II. The Creation and Authority of the FCC

Congress established the FCC through the Federal Communications Act of 1934.²⁸ "In the early 1900s, the uncontrolled proliferation of radio [*461] stations" in a limited broadcast spectrum created chaos within the broadcast industry when broadcast signals began to interfere with one another.²⁹ Congress soon realized that government regulation over the public airwaves was necessary "to develop and enforce an allocation system that would bring order from the chaos."³⁰ Under the Communications Act of 1934, and pursuant to the Commerce Clause of the U.S. Constitution, Congress created the FCC to allocate the radio spectrum among broadcast licensees and to develop general standards of operations among broadcasters.³¹ Congress originally intended for the Act to apply solely to radio broadcasts; however, it has consistently been read to also apply to television broadcasts.³²

A. The Authority of the FCC

The authority granted to the FCC by 47 U.S.C. 303 primarily refers to engineering and technical aspects of regulating the broadcast spectrum in accordance with "public convenience, interest, or necessity."³³ The Act does not include language granting the Commission authority to regulate broadcast content. In fact, 47 U.S.C. 326 expressly denied the FCC the power of censorship and mandated that no FCC regulation should interfere with the right to free speech through radio communications.³⁴ As originally drafted, the second sentence of 326, however, did prohibit the radio transmission of obscene, indecent, or profane language.³⁵ In 1948, Congress deleted this second sentence from Title 47 of federal communications law and placed it under Title 18 of federal criminal law.³⁶

Congress empowered the FCC to administratively enforce 18 U.S.C. 1464,³⁷ which prohibits the utterance "of obscene, indecent, and profane language by means of radio communication."³⁸ The FCC enforces content-regulation as specified in 1464 through revocation of broadcast licenses,³⁹ imposition of monetary fines,⁴⁰ and the issuance of warnings.⁴¹ "Although 1464 is a criminal statute, the [FCC] has authority to impose civil penalties for the broadcast of indecent material without regard to the criminal nature of the statute."⁴² Section 1464 clearly provides for criminal penalties for violation of the statute, but it has never been applied literally.⁴³ Rather, the FCC has opted to impose civil monetary penalties pursuant to its authority under 47 U.S.C. 503(b).⁴⁴

B. The Indecency Enforcement Process

The FCC does not monitor the airwaves for indecent material.⁴⁵ The FCC pursues indecency violations only after receiving a public complaint.⁴⁶ If the complaint meets the requirements for a valid complaint, the FCC's enforcement bureau then conducts its own indecency analysis.⁴⁷ If the complaint is worth pursuing, the FCC will send a letter of inquiry ("LOI") to the broadcaster seeking information regarding the circumstances of the indecent remark or act.⁴⁸ After the broadcaster's response, the FCC may issue a Notice of Apparent Liability ("NAL").⁴⁹ After the broadcaster's response to the NAL, the FCC will either rescind the NAL or issue a forfeiture order.⁵⁰

C. U.S. Supreme Court Rulings on FCC Indecency Regulations

The Supreme Court has upheld the FCC's authority to regulate content.⁵¹ In *National Broadcasting Co. v. United States*, the Court stated:

"we are asked to regard the Commission as a kind of traffic officer, policing the wave lengths to prevent stations from interfering with each other. But the Act does not restrict the Commission merely to the supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic."⁵²

The courts have generally found that 326's ban on censorship by the FCC does not limit the FCC's authority to sanction licensees for violating 1464.⁵³ Further, the D.C. Circuit Court of Appeal upheld FCC procedures "for imposing indecency forfeitures against broadcasters."⁵⁴

Despite these interpretations, the First Amendment to the United States Constitution and 326 of the Communications Act limit the Commission's role in regulating program content.⁵⁵ The FCC's content regulations must be careful not to censor program material and violate a "broadcaster's freedom of expression."⁵⁶ The First Amendment protects indecent speech;⁵⁷ however, the Supreme Court has recognized that due to the uniquely pervasive nature of the broadcast medium in the home, broadcasters are afforded more limited First Amendment protections than other mediums.⁵⁸ In *Sable Communications of America v. FCC*, the Court addressed the competing interests between First Amendment protections and content regulation.⁵⁹ The Court held that indecent speech was constitutionally protected, and the government could only "regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further [that] interest."⁶⁰

The Supreme Court first validated the FCC's regulation over indecent broadcasts in *FCC v. Pacifica Foundation*.⁶¹ The "Court quoted the Commission's definition of indecency with apparent approval."⁶² The Commission defined indecency as "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs."⁶³ Since the Commission did not deny [*465] broadcasters permission to air the material prior to its release, but rather reviewed completed broadcasts in accordance with its regulatory duties, the Court did not find the procedures akin to censorship.⁶⁴ The Court recognized that the government had a compelling interest in protecting its children from exposure to indecent broadcasts.⁶⁵

In the years following the *Pacifica* decision, several federal court decisions,⁶⁶ Commission proposals,⁶⁷ and Congressional directives have sought to balance the government's interest of assisting parents in controlling the material available to young children against First Amendment standards.⁶⁸ In 1987, the Commission narrowed its Safe Harbor period for indecent broadcasts to the period of 12:00 AM to 6:00 AM, and included all materials encompassed by its indecency definition within the scope of 1464.⁶⁹ However, the courts did not agree that the existing indecency standards constituted the least restrictive means to achieve the government's interest.⁷⁰

In one of the final decisions outlining FCC indecency authority, the D.C. Circuit Court of Appeals reaffirmed the government's position that protecting children is a compelling interest, and held that the Commission's revised Safe Harbor period of midnight to 6:00 AM comported with the least restrictive means requirement.⁷¹ In an earlier decision regarding the same issue, the D.C. Circuit denied upholding Congress' directive to impose a twenty-four hour ban on all indecent broadcasts.⁷² Further, the Court expanded the already existing Safe Harbor period from "12:00 AM to 6:00 AM" to "10:00 PM to 6:00 AM," after balancing the government's compelling interest in protecting children against the adult population's right to see and hear indecent material.⁷³

Since the challengers in the above-mentioned cases, which dealt with [*466] the government's indecency regulation authority, were broadcast licensees, then the cases' precedent value should reasonably be limited to broadcast licensees. Although 1464 expressly applies to anyone who utters obscene, indecent, or profane language over the radio,⁷⁴ the FCC has never imposed a civil fine pursuant to 1464 against an individual, i.e. a non-licensee.⁷⁵ Section 503(b)(5) of the 1934 Communications Act expressly penalizes non-licensees for indecency,⁷⁶ which would place

individuals who actually utter the indecent language potentially open to FCC sanctions pursuant to 1464. Once again, however, the FCC has never acted on this provision and fined a non-licensee.⁷⁷

III. The Broadcast Indecency Enforcement Act of 2005

In January 2004, as part of a major Defense Department bill, congressional legislators proposed the Broadcast Decency Enforcement Act of 2004, which would increase the FCC's authority to regulate indecent material that is broadcast over public airwaves.⁷⁸ The House passed its version of the Act by a 391-22 vote, and the Senate passed its version by a 99-1 vote.⁷⁹ However, the Senate scrapped the Act from the defense bill after controversial media ownership provisions, unrelated to the indecency issue, threatened the bill's passage.⁸⁰

In January 2005, congressional leaders reintroduced the Act as a stand-alone bill.⁸¹ In February 2005, the House of Representatives passed the Act by a 389-38 vote.⁸² The Act increases the amount the FCC can fine non- [*467] licensees from \$ 11,000 to a staggering \$ 500,000.⁸³ Congressman Fred Upton (R-MI) reintroduced the House version because he believed that the current FCC indecency fine amounts were ineffective.⁸⁴ Congressman Upton stated, "at the current level, fines are more of a cost of doing business, rather than a deterrent. With passage of this legislation, I am confident that broadcasters will think twice about pushing the envelope."⁸⁵

The House overwhelmingly approved its version in February 2005;⁸⁶ however, House sponsors ultimately acted on the less stringent Senate bill sponsored by Sen. Sam Brownback, R.-Kan., and approved by the Senate in May 2006.⁸⁷ The House passed the bill on June 7, 2006 with a 379-35 vote, and President Bush signed the bill into law on June 15, 2006.⁸⁸

The issue still remains, however, as to whether FCC indecency fines will pass constitutional muster if imposed against a non-licensee. The current forfeiture provision that applies to non-broadcast licensees, section 503(b)(5) of the 1934 Communications Act,⁸⁹ prohibits the FCC from imposing forfeiture liability unless the non-licensee,

(A) is sent a citation of the violation charged; (B) is given a reasonable opportunity for a personal interview with an official of the Commission, at the field office of the Commission which is nearest to such person's place [*468] of residence; and (C) subsequently engages in conduct of the type described in such citation.⁹⁰

Section four of the House's 2005 Act amended this forfeiture provision to exclude the above-mentioned notice requirements for non-licensees.⁹¹ It proposed that section 503(b)(5) read such that the notice provisions for licensees shall not apply "in the case of a determination that a person uttered obscene, indecent, or profane material that was broadcast by a broadcast station licensee or permittee, if the person is determined to have willfully or intentionally made the utterance."⁹²

Further, the Act included language that allowed the FCC to assess indecency fines against non-licensees only for intentional utterances.⁹³ Additionally, section two of the House's 2005 Act raised the amount of that fine from \$ 11,000 to a maximum of \$ 500,000.⁹⁴ While the Broadcast

Indecency Enforcement Act of 2005 does not include such amending language, provisions that allow fining non-licensees still exist under FCC authority as discussed above.⁹⁵

IV. Indecency Liability Over Non-broadcast Licensees is Unconstitutional

Certain provisions in the 1934 Communications Act, which permit FCC indecency fines against non-broadcast licensees,⁹⁶ and the 2005 Act, which increase the amount of those fines,⁹⁷ should be deemed [*469] unconstitutional if assessed against non-licensees. Indecency liabilities for non-licensees do not meet the constitutional limitations for content-based regulations on speech. This section first discusses constitutional standards for inhibiting protected speech within the broadcast medium. It will then briefly review the validity of indecency regulations as applied to broadcasters. Finally, it will conclude with an analysis of why indecency regulations, as applied to individuals, is not only unconstitutional, but also bad public policy.

A. Constitutional Requirements for Inhibiting Protected Speech

The First Amendment to the Constitution reads in relevant part, "Congress shall make no law ... abridging the freedom of speech."⁹⁸ The Supreme Court has not interpreted this amendment as protecting all forms of speech.⁹⁹ The Court has recognized that indecent speech is constitutionally protected; however, the broadcast medium is an exception to this protection because of the medium's uniquely pervasive and intrusive presence in the home.¹⁰⁰ "Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment right of an intruder."¹⁰¹

The Supreme Court has held that content-based regulations must pass a strict scrutiny analysis, which means that the government can only "regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means."¹⁰² Section 1464 is a content-based regulation because it cannot be violated without reference to the obscene, indecent, or profane content of the speech, and as such, it is subject to strict scrutiny.¹⁰³

In *Pacifica*, the Court upheld the FCC's authority to regulate the broadcast of indecent speech by broadcast licensees.¹⁰⁴ Furthermore, the [*470] *Action For Children's Television* court found that the regulatory procedure for indecency violations by licensees satisfies strict scrutiny.¹⁰⁵ However, since the FCC has never imposed an indecency fine on a non-licensee,¹⁰⁶ the Supreme Court has never ruled on the FCC's authority over non-licensees. Therefore, the issue of whether holding individuals liable for indecency violations will meet the Court's least restrictive means requirement remains unresolved. Part C of this subsection attempts to resolve this issue.

Even without Supreme Court precedent, the FCC has no jurisdiction over non-broadcast licensees. Congress originally created the FCC to regulate public airwaves by controlling the proliferation of radio stations through the issuance of broadcast licenses.¹⁰⁷ A person is not allowed to broadcast any radio or television content over the public airwaves without a license issued by the FCC.¹⁰⁸ Further, "the statutory scheme of all broadcast regulation follows the public trustee concept, by which broadcast station owners, as trustees of the public interest, receive limited-term licenses in exchange for a promise to serve that interest."¹⁰⁹

Therefore, since broadcasters are FCC license holders and are public trustees for the airwaves, the FCC should hold broadcasters accountable for protecting the public from indecent broadcasts.¹¹⁰ Even former FCC Commissioner Powell, during a broadcast industry summit, stated that non-licensees "have always enjoyed protection under the First Amendment and slamming them with large fines would be "a very touchy area for the FCC."¹¹¹

B. The Constitutional Validity of Indecency Regulations as Applied to Broadcasters

The Supreme Court has upheld FCC regulation over broadcasters of indecent programming because the government has a compelling interest in protecting children from indecent broadcasts.¹¹² Courts have found that the means adopted by the Commission to achieve this articulated interest comport with the "least restrictive means" requirement,¹¹³ and that the Commission's safe harbor provisions and indecency enforcement procedures are sufficiently narrow to pass constitutional scrutiny.¹¹⁴ As a result, courts have found that the government's interest in protecting children sufficiently outweighs a broadcaster's right to air indecent programs during the hours of potentially high exposure to children.

While current FCC indecency regulations over broadcasters apparently comport with the Court's requirement for inhibiting the broadcast of constitutionally protected speech, the same cannot be said for the broadcast indecency regulations as applied to individuals. To withstand strict scrutiny, content-based regulations must be narrowly drawn to serve the government's "interests without unnecessarily interfering with First Amendment freedoms."¹¹⁵ However, the judicial findings and the FCC reports concerning indecency regulation have only analyzed the regulations' constitutionality as applied to broadcasters, and not as applied to individuals.

C. The Constitutional Validity of Indecency Regulation Over Individuals

Imposing indecency liability over individuals is invalid because it violates constitutional restrictions for content-based regulations.¹¹⁶ In *Sable*, the United States Supreme Court held that imposing indecency fines on non-licensees failed to satisfy the strict scrutiny standard because the government's interest was not sufficiently compelling to justify extending indecency liability beyond the licensees.¹¹⁷ Further, holding individuals potentially liable for fines up to a half-million dollars, for example, for an [*472] indecent utterance is not the least restrictive way to achieve the interest of protecting children from indecent material, nor is it an aid for parents in that endeavor. Such activity has the potential to chill constitutionally protected speech. This is further evidenced by the regulations' failure to comport with constitutional doctrines of vagueness and overbreadth.¹¹⁸

1. The Compelling Interest is Not Sufficient to Extend Liability to Non-licensees

The Supreme Court has recognized the government's interest in protecting children as sufficiently compelling.¹¹⁹ Although courts recognize that this interest justifies indecency regulation over broadcasters,¹²⁰ the interest does not validate expanding regulation to non-licensees.

While FCC indecency complaints have increased considerably over the past few years,¹²¹ the increase does not evidence that more Americans today desire stricter indecency enforcement. In 2002, the FCC received approximately 13,900 indecency complaints, and in 2004, it received approximately 1 million.¹²² While some may perceive this dramatic increase in complaints as a public outcry over indecency, the reality is that members of one organization, the Parent's Television Counsel ("PTC"), accounted for 99% of the logged complaints.¹²³ In fact, a poll conducted by Harker Research in 2004 revealed that a majority of Americans are not offended by indecent broadcasts.¹²⁴

Even more interestingly, out of the approximately one million indecency complaints filed in 2004, the FCC issued only twelve NALs.¹²⁵ The million-plus complaints pertained to three hundred fourteen programs on radio and television.¹²⁶ Accordingly, the Commission found less than five percent of the programs complained about to be potential indecency violations. In 2003, that number was less than one percent.¹²⁷ Furthermore, certain programs that received the highest number of FCC indecency complaints, such as "The Howard Stern Show" and "Desperate Housewives," are some of the highest rated programs on radio and television.¹²⁸ Such information is not intended to diminish the government's interest in protecting children from indecent material. Rather, it is presented to illustrate the lack of a compelling public interest to extend indecency liability to individuals.

The small amount of actual indecency violations found by the FCC compared to the large amount of complaints by the viewing public strongly indicates that the compelling government interest to protect children from indecent broadcasts is already being achieved. Further, the substantial demand for programs typically classified as indecent demonstrates the public's desire to see and hear those programs.¹²⁹ Therefore, Congress will be unable to demonstrate how the compelling interest justifies extending liability to non-licensees.

Further, under the FCC's public interest mandate, all FCC regulations must comport with public convenience, interest, and necessity.¹³⁰ Therefore, the government's interest to protect children from indecent [*474] speech has to be weighed against an adult's right to say and hear that speech.¹³¹ The current indecency regulations adequately achieve the government's stated interest in protecting children from indecent material while adhering to the public's interest in having the freedom and option to watch programs that may be indecent.¹³² Even former FCC Chairman Michael Powell stated that the FCC must weigh any action against indecent programming with the fact that such programming is constitutionally protected speech.¹³³

2. The Least Restrictive Means Requirement is Not Met

Even assuming the government's interest is sufficiently compelling, imposing potential liability against non-licensees for indecency violations is not the least restrictive means to achieve the government's interest. Current indecency regulation over broadcasters adequately serves to further the government's interest in protecting children from exposure to indecent content. Moreover, many legal scholars, jurists, and even some FCC Commissioners, have stated that the current indecency regulations are inappropriate as a matter of law and policy.¹³⁴

However, assuming that indecency regulations over broadcasters are valid, these standards alone

sufficiently achieve the government's compelling interest to protect children from indecent broadcasts. If the ultimate goal is to prevent the broadcast of indecent content on radio and television, then the ultimate focus should be on the broadcast licensees. The broadcasters are the ones who are licensed to broadcast; therefore, they are the only ones who should be held responsible for adhering to the standards necessary for maintaining the license.¹³⁵ One FCC Commissioner noted that broadcasters, as "stewards of the public airwaves," bear the responsibility to keep the "airwaves decent."¹³⁶

In addition, broadcasters are the ones who control what content is ultimately broadcast, not the individuals.¹³⁷ In an FCC order fining licensees for the utterance of the "F-word" during the 2003 Golden Globe Awards broadcast, the Commission stated, "one way broadcasters can easily ensure that they are not subject to enforcement action ... is to adopt and successfully implement a delay/bleeping system for live broadcasts."¹³⁸ If the FCC has acknowledged that indecency violations can "easily" be avoided by the broadcaster's actions alone, then extending liability to non-broadcast licensees is not the least restrictive means to promoting the government's interest. "If a less restrictive alternative would serve the government's purpose, the legislature must use that alternative."¹³⁹

3. Constitutional Doctrines of Vagueness & Overbreadth are Implicated

Imposition of monetary fines for violation of 1464 on non-licensees will be invalid because the FCC's indecency definition is unconstitutionally vague. "A law is unconstitutionally vague if a reasonable person cannot tell what speech is prohibited and what is permitted. Unduly vague laws violate due process whether or not speech is regulated."¹⁴⁰

Section 1464 prohibits the utterance of any indecent language by means of radio communication.¹⁴¹ The FCC has defined indecency as "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs."¹⁴² Section four of the House version of the 2005 Act imposed liability when a person utters obscene, indecent, or profane material broadcasted by a "licensee or permittee, if the person is determined to have willfully or intentionally made the utterance."¹⁴³

To extend broadcast indecency liability to non-licensees violates the constitutional doctrine of vagueness because the average person will probably not know when sexually explicit language violates the FCC's indecency definition, since broadcasters themselves seem rather unclear about the definition.¹⁴⁴ Presumptively, the government expects the average person to know what language will be considered "patently offensive as measured by contemporary standards of the broadcast medium."¹⁴⁵ In 2004, the FCC had over one million indecency complaints, but found only twelve actual indecency standard implications.¹⁴⁶ This statistic demonstrates the extreme complexity in attempting to identify what content the FCC will actually find indecent. Most likely, the average person will be unable to make such a determination;¹⁴⁷ therefore, broadcast indecency law applied to non-licensees violates the doctrine of constitutional vagueness.

Furthermore, applying 1464 and section 503(b)(5) to non-licensees violates the First Amendment doctrine of overbreadth. "The overbreadth doctrine prohibits the government from banning

constitutionally unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process." ¹⁴⁸ Federal courts have upheld the constitutionality of regulating indecent broadcasts at times when children are more likely to hear such broadcasts, ¹⁴⁹ meaning that indecent broadcasts within the safe harbor period are not constitutionally protected speech. ¹⁵⁰

Courts have found that broadcast indecency laws pass constitutional muster when applied to broadcasters; however, the statute will become overbroad if liability is extended to non-licensees. Given the public's [*477] misperception as to what constitutes indecency under FCC standards, the average person is likely to refrain from any similar speech, fearing that it may be deemed indecent, and hence, subject to a fine. ¹⁵¹ The FCC did not find over ninety-five percent of the 2004 indecency complaints to be actual indecency violations. Thus, it can reasonably be presumed that a significant amount of the chilled speech likely to result from extending indecency liability to non-licensees will most likely not be indecent at all. As such, indecency liability over non-licensees is unconstitutionally overbroad because a substantial amount of protected speech will potentially be chilled.

Therefore, as applied to non-licensees, the indecency liability against non-licensees violates the doctrine of constitutional vagueness because the average person will be unlikely to know what speech the FCC deems indecent until after a fine has been imposed. In addition, such regulation is unconstitutionally overbroad because the fear of a heavy fine will serve to chill speech that is constitutionally protected.

The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity. ¹⁵²

4. Indecency Liability Over Non-licensees is Bad Public Policy

Finally, the FCC indecency regulations must be restricted solely to broadcast licensees as a matter of public policy. Since indecent speech is constitutionally protected especially within the safe harbor period, ¹⁵³ broadcasters presumably have greater knowledge of FCC indecency standards, including the safe harbor period, than non-licensees. ¹⁵⁴ Further, broadcasters potentially have more resources, knowledge, and economic motivation to challenge an FCC indecency fine than would a non- [*478] licensee. ¹⁵⁵

Why should individuals be liable for indecent broadcasts when they have no control over what or when the content will be broadcast? Broadcasters control what is ultimately transmitted since they control the censor mechanisms, i.e., bleeping devices, dump buttons, and delay features. ¹⁵⁶ Indecency liability over non-licensees may even decrease a broadcaster's incentive to diligently monitor transmitted content because they may rely on the non-licensees reluctance to utter even seemingly indecent speech. Therefore, holding only broadcasters liable is the least restrictive

means to ensure that the speech is not broadcast within the safe harbor period. This will avoid a chilling effect on speech and the non-licensees' reluctance to utter even a word that seems remotely indecent.

V. Conclusion

The federal government should not impose radio and television broadcast indecency regulation on non-broadcast licensees. In the context of broadcast indecency, the government's regulations must comport with constitutional restrictions on content-based speech.

This dramatic fine increase on individual Americans raises profound and serious First Amendment issues. Due to uncertain, vague, and changing definitions of indecency, this disproportionate fine would have a significant chilling impact on free and creative discourse and programming over the American airwaves.¹⁵⁷

The public interest to protect children from indecent broadcasts is adequately protected with current FCC indecency regulations over broadcasters; therefore, to extend indecency liability to non-licensees is not the least restrictive means available. Such regulation would be unconstitutional because it would chill protected speech, without significantly serving an increased public interest.

FOOTNOTES:

¹ Nat'l. Broad. Co. v. United States, 319 U.S. 190, 226 (1943).

² H.R. Res. 310, 109th Cong. (2005) (enacted).

³ See Krysten Crawford, Breasts, butts, backs ... oh my! Smut took center stage in 2004. What's really going on?, CnnMoney, Dec. 17, 2004, http://money.cnn.com/2004/12/16/news/fortune500/yir04_indecency/index.htm (Although "only Congress has the power to raise indecency fines," the FCC has increased penalties "under a provision that allows regulators to adjust fines for inflation."); Doug Halonen, Higher Indecency Fines Back in Play; Measure Floated to Raise Limit on Levies to \$ 500,000, Television Week, at 29, Oct. 11, 2004, available at <http://www.tvweek.com/article.cms?articleId=26217> ("Besides raising the cap for individual violations, the other key provisions in the new bill would clear the way for the FCC to fine a group broadcaster up to \$ 3 million for indecencies aired within a 24-hour period and allow the agency to force on-air performers to pay penalties for violations.").

⁴ S. 193 Broadcast Decency Enforcement Act of 2005; see also Jim Abrams, Broadcast Indecency Bill Up For Vote, June 7, 2006, available at <http://www.forbes.com/home/feeds/ap/2006/06/07/ap2800326.html> (last visited Aug. 21, 2006). "The legislation, sponsored in the Senate by Sen. Sam Brownback, R-Kan., does not go as far as a bill sponsored by Upton that the House passed last year. That measure would have increased the maximum fine to \$ 500,000, allowed fines for individual performers and given the FCC the authority to revoke the licenses of broadcasters fined three or more times." Id.

¶5. See *infra* Part IV.

¶6. U.S. Const. amend. I ("Congress shall make no law ... abridging the freedom of speech, or of the press ...").

¶7. See Leon Lazaroff, Much ado about indecency, *Chi. Trib.*, Nov. 20, 2004, at B1, available at <http://pqasb.pqarchiver.com/chicagotribune/access/739300251.html?dids=73930025> ("In September, the agency handed CBS parent Viacom Inc. a \$ 550,000 fine for Jackson's Super Bowl incident, at the time the largest indecency penalty ever assessed for a single occurrence. A month later, Fox was hit with an even larger fine - a nearly \$ 1.2 million penalty for an April 2003 episode of the failed reality show "Married By America."").

¶8. Clay Calvert, Bono, the Culture Wars, and a Profane Decision: the FCC's Reversal of Course on Indecency Determination and Its New Path on Profanity, 28 *Seattle U. L. Rev.* 61, 79 (2004) (discussing other reasons that may have contributed to the renewed enforcement of indecency standards by the FCC and Congress such as Bono's Speech at the Golden Globe Awards and Nicole Richie's rant at the 2003 Billboard Music Awards).

¶9. *Id.*

¶10. Anna Smyth, Playing it safe, *The Scotsman*, Jan. 28, 2005, at 35, available at <http://news.scotsman.com/features.cfm?id=101892005>.

¶11. See Federal Communications Commission, Indecency Complaints and NALs: 1993-2006, <http://www.fcc.gov/eb/oip/ComplStatChart.pdf> (In 2002, the FCC received 13,922 indecency complaints. In 2004, the Commission received 1,405,419 complaints.).

¶12. John Eggerton, Republicans Make "Indecent" Proposal to Bush, *Broadcasting and Cable*, Feb. 8, 2005, <http://www.broadcastingcable.com/index.asp?lawyout=articlePrint&articleID=CA502343> ("The next FCC Chairman will oversee an important time in our nation's history, and they must be ready to aggressively enforce the laws that Congress has passed.").

¶13. *Id.* ("The FCC has been entrusted with promoting the public interest with respect to our public airwaves, and as such, should firmly enforce our federal decency laws, applying the plain meaning of the statute, and the Congressional intent behind the statute."); see Katherine A. Fallow, *The Big Chill? Congress and the FCC Crackdown on Indecency*, *Comm. Law.*, Spring 2004, at 1 (Spring 2004) (The FCC "vowed to begin a 'thorough and swift' investigation. Television and radio executives summoned before congressional panels were grilled on what steps they would take to make the air-waves more suitable for family viewing.").

¶14. See Crawford, *supra* note 3.

¶15. Indecency Complaints and NALs, *supra* note 10.

¶16. Smyth, *supra* note 10.

¶17. Chris Blake, Congress Praises Clear Channel Cleanup, *The Washington Times*, Feb. 27, 2004, at 1.

¶18. Frank Ahrens & Leonard Shapiro, NFL Strives For G-rated Super Bowl, *Washington Post*, Feb. 6, 2005, at A1.

¶19. Brooks Boliek, FCC Brass Uneasy Over Artists Fines, *Hollywood Reporter*, Apr. 1, 2004, available at http://www.hollywoodreporter.com/thr/article_display.jsp?vnu_content_id=1000476554.

¶20. 47 U.S.C. 503(b)(5) (2000).

¶21. David Hinckley, Performers Denounce Plans to Hike FCC Fines, *New York Daily News*, Mar. 17, 2004, at 80.

¶22. See *id.* ("It's pretty weird to talk about fining an artist when we aren't regulated by the FCC." (quoting Don Henley, singer for the Eagles, during an indecency debate on XM Satellite Radio)); see also Terry Lane and Michael Feazel, Indecency Bill Could Add Safe Harbor Amendment for Violence, *Comm. Daily*, Mar. 9, 2004, at 46 (In a statement by the American Federation of Television and Radio Artists (AFTRA), the performer's union emphasized a basic FCC policy "that "responsibility for complying with FCC regulations rests with the licensees,' not the performers who have little control over program content" or when the program is aired.).

¶23. See Boliek, *supra* note 19.

¶24. *Infra* Part II.

¶25. *Infra* Part III.

¶26. *Infra* Part IV.

¶27. *Infra* Part V.

¶28. 47 U.S.C. 151 (2000); Christine Peaslee, *Action for Children's Television v. FCC: Indecency Fines and the Broadcast Medium-When Subsequent Punishments Become Prior Restraints; A Subsequent Restraint Review*, 20 *W. New Eng. L. Rev.* 241, 245 (1998).

¶29. John D. Zelezny, *Communications Law: Liberties, Restraints, and the Modern Media* 12 (3d ed. 2001).

¶30. T. Barton Carter, et al., *The First Amendment and the Fifth Estate: Regulation of Electronic Mass Media* 35 (5th ed. 1999).

¶31. See Peaslee, *supra* note 28, at 245 (stating that the Act gave the FCC "exclusive jurisdiction to regulate all radio transmissions"); see *FCC v. League of Women Voters of Cal.*,

468 U.S. 364, 376 (1984) (The Supreme Court has "long recognized that Congress, acting pursuant to the Commerce Clause, has the power to regulate the use of this scarce and valuable national resource...to ensure through the FCC that only those who satisfy the "public interest, convenience and necessity' are granted a license to use television and radio broadcast frequencies.")

¶32. Stuart N. Brotman, *Communications Law and Practice* 3-3 (Law Journal Press 2004).

¶33. See Carter, et al., *supra* note 30 ("Congress provided in 303 of the Communications Act of 1934 that "except as otherwise provided in this Act, the Commission from time to time as public convenience, interest, or necessity requires shall [have powers to assign bands of frequencies to the various classes of radio stations and assign individual frequencies; decide the times each station may operate; establish areas to be served by each station; regulate the apparatus used with respect to the sharpness of the transmissions; take steps to prevent interference, suspend licenses upon a showing that a licensee has violated any statute or regulation or transmitted obscene communications... .").

¶34. 47 U.S.C. 326 (2000). "Nothing in this Act 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." *Id.*

¶35. Joseph E. Edwards, *Validity, Construction, and Application of Federal Criminal Statute* (18 U.S.C.S. 1464) Punishing Utterance of Obscene, Indecent, or Profane, Language by Means of Radio Communication, 17 A.L.R. Fed. 900, 902 (1993).

¶36. *Id.*; Carter, et al., *supra* note 30, at 223.

¶37. *In re Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C.S. 1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 F.C.C. Rcd. 7999, 7999 (2001) [hereinafter *In re Industry Guidance*] (stating the statutory basis and judicial foundation for FCC indecency enforcement).

¶38. 18 U.S.C. 1464 (2000) ("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.").

¶39. 47 U.S.C. 312(a) (2000) (authorizing the FCC to revoke any station license for willful violation of "any rule or regulation of the Commission").

¶40. 47 U.S.C. 503(b) (2000); Tara Phelan, *Selective Hearing: A Challenge to the FCC's Indecency Policy*, 12 N.Y.L. Sch. J. Hum. Rts. 347, 381 (1995) ("This power allows the FCC to consider a broadcaster's past program and refuse renewal to a licensee who is found to have been airing patently offensive material. Thus speech, although not obscene, may be restricted as 'indecent' if found to be offensive to the average listener.").

¶n41. See *In re Industry Guidance*, 16 F.C.C. Rcd. at 7799.

¶n42. *Id.* at 7999 fn.2 (citing *FCC v. Pacifica Found.*, 438 U.S. 726, 739 n.13 (1973)).

¶n43. Jeremy A. Lipschultz, *Broadcast Indecency FCC Regulation and the First Amendment* 7 (1997).

¶n44. 47 U.S.C. 503 (2000) (allowing any person to be liable to the United States for a forfeiture penalty for non-compliance).

¶n45. Jacob T. Rigney, *Avoiding Slim Reasoning and Shady Results: A Proposal for Indecency and Obscenity Regulation in Radio and Broadcast Television*, 55 *Fed. Comm. L.J.* 297, 314 (2003).

¶n46. *Id.* ("The Commission generally requires three elements of a complaint before they consider it: "(1) a full or partial tape or transcript or significant excerpts from the program; [footnote omitted] (2) the date and time of the broadcast; and (3) the call sign of the station involved.").

¶n47. *Id.* at 306 (The indecent material must first "describe or depict sexual or excretory organs or activities" and "second, the broadcast must be patently offensive as measured by contemporary community standards for the broadcast medium. The Commission further explains that the "full context in which the material appears is critically important," and that no specific words or phrases are automatically patently offensive. Further, the Commission explains that because of the fact-specific nature of differing contexts, it is difficult to catalog comprehensively all of the possible contextual factors that might exacerbate or mitigate the patent offensiveness of particular material.").

¶n48. *Id.* at 315.

¶n49. *Id.*

¶n50. *Id.*

¶n51. *Nat'l Broad.*, 319 U.S. at 215-216.

¶n52. *Id.*

¶n53. Brotman, *supra* note 32, at 2-69-2-70; see also Kate McSweeney, *Highjacking the First Amendment for Economic Gain: The Federal Communications Commission, the Consolidation of the Public Airwaves, and Smut: A Comment on the Broadcast Industry*, 11 *Geo. Mason L. Rev.* 609, 629 (2003) ("The Supreme Court held [that] the prohibition in 326 "has never been construed to deny the [FCC] with the power to review the content of completed broadcasts in the performance of its regulatory duties." (citing *Pacifica Found.*, 438 U.S. at 735)).

¶n54. Zelezny, *supra* note 29, at 477; see *Action for Children's Television v. FCC*, 59 F.3d 1249, 1252 (D.C. Cir. 1995).

¶n55. *In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 F.C.C. Rcd. 4975, 4977 (2004) [hereinafter *In re Complaints Against Various Broadcast Licensees*].

¶n56. *Id.*

¶n57. See *Cohen v. California*, 403 U.S. 15, 26 (1971); Erwin Chemerinsky, *Constitutional Law: Principles and Policy* 999 (2d ed. Aspen Publishers 2002).

¶n58. *Pacifica Found.*, 438 U.S. at 748-750.

¶n59. *Sable Commc'ns v. FCC*, 492 U.S. 115, 126 (1989).

¶n60. *Id.*

¶n61. *Pacifica Found.*, 438 U.S. at 738.

¶n62. *In re Industry Guidance*, 16 F.C.C. Rcd. at 8000; see also Peaslee, *supra* note 28, at 246, fn. 25.

¶n63. *In re Industry Guidance*, 16 F.C.C. Rcd. at 8000 (This indecency definition "has remained substantially unchanged since the time of the *Pacifica* decision.").

¶n64. *Pacifica Found.*, 438 U.S. at 735.

¶n65. *Id.* at 748-749 (noting that broadcasting, among all forms of communication, deserves the most limited First Amendment protection).

¶n66. *Action for Children's Television v. FCC (ACT I)*, 852 F.2d 1332, 1340 (D.C. Cir. 1988); *Action for Children's Television v. FCC (ACT II)*, 932 F. 2d 1504 (D.C. Cir. 1991).

¶n67. *In re Infinity Broadcasting Corp.*, 2 F.C.C. Rcd. 2705, 2705 (1987); *In re Pacifica Radio*, 2 F.C.C. Rcd. 2698, 2699 (1987); *In re Enforcement of Prohibitions Against Broadcast Obscenity and Indecency in 18 U.S.C. 1464*, 4 F.C.C. Rcd. 457, 457 (1988).

¶n68. Brotman, *supra* note 32, at 2-77-2-79.

¶n69. *Id.* at 2-77.

¶n70. See *id.* at 2-79.

¶n71. *Action for Children's Television*, 58 F.3d at 667; see also Carter, et al., *supra* note 30, at 251.

¶72. Action for Children's Television, 932 F.2d at 1509.

¶73. Action for Children's Television, 58 F.3d at 664.

¶74. 18 U.S.C. 1464 (2000).

¶75. American Federation of Television and Radio Arts, Stop Increased Indecency Fines Against Individual Performers, Announcers and Broadcast Journalists, Sept. 24, 2004, available at <http://www.unionvoice.org/aftranetwork/alert-description.tcl?alertid=1072807> (last visited Jun. 20, 2006) (Since the FCC "has never fined an individual performer, announcer, or broadcast journalist, this legislation represents a striking shift away from the FCC's long-standing policy that holds that the broadcast licensee is responsible for programming decisions.").

¶76. See infra note 89 and accompanying text.

¶77. American Federation of Television and Radio Arts, see supra note 74.

¶78. H.R. 3717, 108th Cong. (2004) (enacted); S. 2056, 108th Cong. (2004) (enacted).

¶79. Commerce Markup Expected to Pass 'Indecency' Measure, Nat'l J. Congress Daily, Feb. 8, 2005, available at 2005 WLNR 1780842.

¶80. Halonen, supra note 3, at 29; Molly M. Peterson, House, Senate Renew Crackdown Efforts On Broadcasters, Nat'l J. Congress Daily, Jan. 27, 2005, available at 2005 WLNR 1169797.

¶81. Peterson, supra note 80.

¶82. Final Vote Results for Roll Call 35, H.R. 310, Feb. 16, 2005, <http://clerk.house.gov/evs/2005/roll035.xml>; H.R. 310, 109th Cong. 2 (2005) (enacted) (One of the key provisions in the Act increases the maximum fine amount for individuals who violate decency standards on a radio or television broadcast from \$ 11,000 to \$ 500,000. Another provision raises the fines against broadcasters that air content the Commission deems indecent from \$ 32,500 to \$ 500,000.); H.R. 310, 109th Cong. 9 (2005) (enacted) (In addition to monetary fines, the proposed legislation allows the FCC to consider broadcast license revocations and suspensions for continued indecency violations.).

¶83. Doug Halonen, Lawmakers Target Indecency, Television Week, Jan. 31, 2005, at 4, available at <http://www.tvweek.com/article.cms?articleId=27156>.

¶84. Id.

¶85. Id.

¶86. Final Vote Results for Roll Call 35, H.R. 310, supra note 82.

¶87. Baptist Press Staff, President Bush Signs Into Law Tenfold Increase In Fines For Broadcast Indecency, June 19, 2006, <http://www.bpnews.net/bpnews.asp?ID=23499>.

¶88. Id.

¶89. 47 U.S.C. 503(b)(5) (2005) ("No forfeiture liability shall be determined under this subsection against any person, if such person does not hold a license, permit, certificate, or other authorization issued by the Commission, unless ... such person (A) is sent a citation of the violation charged; (B) is given a reasonable opportunity for a personal interview with an official of the Commission, at the field office of the Commission which is nearest to such person's place of residence; and (C) subsequently engages in conduct of the type described in such citation. The provisions of this paragraph shall not apply, however, if the person involved is engaging in activities for which a license, permit, certificate, or other authorization is required, or is a cable television system operator, if the person involved is transmitting on frequencies assigned for use in a service in which individual station operation is authorized by rule pursuant to section 307(e) of this title, or in the case of violations of section 303(q) of this title, if the person involved is a non-licensee tower owner who has previously received notice of the obligations imposed by section 303(q) of this title from the Commission or the permittee or licensee who uses that tower.").

¶90. Id.

¶91. See H.R. 310, 109th Cong. 4 (2005) (enacted).

¶92. Id.

¶93. See supra notes 89-92 and accompanying text.

¶94. H.R. 310, 109th Cong. 2 (2005) (enacted) ("Section 503(b)(2) of the Communications Act of 1934 (47 U.S.C. 503(b)(2)) is amended - (1) by redesignating subparagraphs (C) and (D) as subparagraphs (D) and (E), respectively; (2) by inserting after subparagraph (B) the following new subparagraph: "(C) Notwithstanding subparagraph (A), if the violator is (i) a broadcast station licensee or permittee, or (ii) an applicant for any broadcast license, permit, certificate, or other instrument or authorization issued by the Commission, and the violator is determined by the Commission under paragraph (1) to have broadcast obscene, indecent, or profane material, the amount of any forfeiture penalty determined under this section shall not exceed \$ 500,000 for each violation."; and (3)...by adding at the end the following: "Notwithstanding the preceding sentence, if the violator is determined by the Commission under paragraph (1) to have uttered obscene, indecent, or profane material (and the case is not covered by subparagraph (A), (B), or (C)), the amount of any forfeiture penalty determined under this section shall not exceed \$ 500,000 for each violation.").

¶95. See supra note 89 and accompanying text.

¶96. 47 U.S.C. 503(b)(5) (2000).

¶n97. H.R. 310, 109th Cong. 4 (2005) (enacted).

¶n98. U.S. Const. amend. I.

¶n99. Rigney, *supra* note 45, at 300 (For example, "incitement, fighting words, and child pornography are all speech related activities that are not protected by the First Amendment.")

¶n100. *Id.* at 304-305; see Chemerinsky, *supra* note 57, at 1001.

¶n101. *Pacifica Found.*, 438 U.S. at 748.

¶N102. *Sable Commnc'ns*, 492 U.S. at 126; see also Rigney *supra* note 45, at 304; *In re Industry Guidance*, 16 F.C.C. Rcd. at 8000.

¶n103. *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813-814 (2000) ("The speech here, all agree, is protected speech; and the question is what standard the Government must meet in order to restrict it. As we consider a content-based regulation, the answer should be clear: The standard is strict scrutiny.").

¶n104. *Pacifica Found.*, 438 U.S. at 749-750.

¶n105. *Action for Children's Television*, 58 F.3d at 656.

¶n106. American Federation of Television and Radio Arts, *Stop Increased Indecency Fines Against Individual Performers, Announcers and Broadcast Journalists*, Sept. 24, 2004, http://www.unionvoice.org/aftranetwork/notice-description.tcl?newsletter_id=1072823.

¶n107. See *supra* notes 30-41 and accompanying text; see also Henry John Uscinski, Comment, *Deregulating Commercial Television: Will the Marketplace Watch Out For Children?*, 3 *Am. U. L. Rev.* 141, 143-145 (1984-1985).

¶n108. *Consol. Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 543 (1980).

¶n109. Brotman, *supra* note 32, at 3-4; see also carter, et al., *supra* note 30, at 35 ("Congress provided in 303 of the Communications Act of 1934 that "except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires shall [have the powers to assign bands of frequencies to various classes of radio stations and assign individual frequencies; ... suspend licenses upon a showing that a licensee has violated any statute or regulation or has transmitted obscene communications... .]").

¶n110. Diane L. Hofbauer, "Cableporn" and the First Amendment: Perspectives on Content Regulation of Cable Television, 35 *Fed. Comm. L.J.* 139, 161 (1983).

¶n111. Boliek, *supra* note 19.

¶n112. Action for Children's Television, 58 F.3d at 656.

¶n113. Id. at 657.

¶n114. See supra notes 69-73 and accompanying text; see also, e.g., Pacifica Found., 438 U.S. 726; Action for Children's Television, 58 F.3d 654.

¶n115. Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 637 (1980).

¶n116. Critics of the Act argue that the regulation amounts to "a violation of the Constitution's free speech protection." Genaro C. Armas, Congress to Tackle Indecency (Feb. 3, 2005), <http://cbsnews.com/stories/2005/02/16/entertainment/main67448.shtml>.

¶n117. Sable Commc'ns., 492 U.S. at 126.

¶n118. American Federation of Television & Radio Artists, Speak Out to the Senate on Indecency - No Individual Performer Fines! (May 27, 2005), available at http://www.unionvoice.org/aftranetowrk/alert-description.tcl?alert_id=1445095 ("Due to uncertain, vague, and changing definitions of indecency, this disproportionate fine would have a significant chilling impact on free and creative discourse and programming over the American airwaves.").

¶n119. Pacifica Found., 438 U.S. at 749.

¶n120. See Part II.C.

¶n121. Indecency Complaints and NAL, supra note 11.

¶n122. Id. (The 1,405,419 indecency complaints received by the FCC in 2004 pertained to 314 programs: 140 television programs, 145 radio programs, and 29 cable programs.).

¶n123. See Chris Baker, 36 TV Complaints Rejected by the FCC, The Washington Times, Jan. 25, 2005, available at <http://www.washtimes.com/business/20050125-120432-2604r.htm> (visited March 12, 2005) ("... an investigation by Internet blogger Jeff Jarvis, formerly a TV Guide critic, found that the FCC had received 90 complaints about that show written by 23 persons. All but two of those 23 persons used identical form letters issued by the Parents Television Council, meaning the actual number of distinct complaints about "Married by America" was three.")

¶n124. April 2004: Indecency Survey, Press Release, Mar. 2004, <http://www.harkerresearch.com/trend/ts-04122004.htm> (last visited Mar. 15, 2005) (The group surveyed 300 men and women, ages 18-54, from across the country and found that a majority of Americans are not offended by what they hear on the radio. "When asked whether or not they were offended by the use of profanity on the radio, 57% said they were not at all offended. This figure is in stark contrast to other recent polls - some suggesting that as much as 84% of Americans are offended by what they hear over the air While some commented that they would not want their children to hear these discussions, an even larger majority (63%) said they

were not offended by sexual discussions on the air.").

¶n125. Indecency Complaints and NALs, *supra* note 10.

¶n126. *Id.*

¶n127. *Id.* (In 2003, the FCC received 202,032 indecency complaints regarding 375 programs and it issued only three NALs.).

¶n128. Nielsen Media Research Top 20, week of Jan. 16-22, 2006, available at <http://tv.yahoo.com/nielsen>; Krysten Crawford, Life Without Stern Isn't Looking Pretty: Radio Stations that Dropped the Ribald Radio Star a Year Ago Have Seen Ratings Plummet, CNNMoney, available at http://money.cnn.com/2005/01/27/news/newsmakers/stern_ratings/index.htm (visited on Mar. 20, 2005).

¶n129. See, e.g., Crawford, *supra* note 128 ("Third in the market a year ago, the station now ranks No. 11 during Stern's former 6 to 10 a.m. time slot.").

¶n130. See Carter, et al., *supra* note 30, at 35 ("Congress provided in 303 of the Communications Act of 1934 that "except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires shall... .").

¶n131. *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 73 (1983) ("The government may not "reduce the adult population ... to reading only what is fit for children." (internal citation omitted)).

¶n132. See, e.g., *Pacifica Found.*, 438 U.S. at 749-750.

¶n133. *In re Complaints Against Various Broadcast Licensees*, 19 F.C.C. Rcd. at 4977.

¶n134. *Baker*, *supra* note 123; see also *Action for Children's Television*, 58 F.3d at 671 (Edwards, C.J. dissenting) ("I believe it is no longer responsible for the courts to provide lesser First Amendment protection to broadcasting based on its alleged unique attributes").

¶n135. *Speak Out to the Senate on Indecency*, *supra* note 118.

¶n136. *In re Complaints Against Various Broadcast Licensees*, 19 F.C.C. Rcd. at 4994.

¶n137. *Speak Out to the Senate on Indecency*, *supra* note 118.

¶n138. *In re Complaints Against Various Broadcast Licensees*, 19 F.C.C. Rcd. at 4982.

¶n139. *Playboy Entm't Group, Inc.*, 529 U.S. at 813.

¶n140. *Chemerinsky*, *supra* note 57, at 910.

¶141. 18 U.S.C. 1464 (2000).

¶142. In re Industry Guidance, 16 F.C.C. Rcd. at 8000 (This indecency definition "has remained substantially unchanged since the time of the Pacifica decision.").

¶143. H.R. 310, 109th Cong. 4 (2005) (enacted); In re Complaints Against Various Broadcast Licensees, 19 F.C.C. Rcd. at 4978 ("In making indecency determinations, the Commission has indicated that the 'full context in which the material appeared is critically important,' and has articulated three 'principal factors' for its analysis: "(1) the explicitness or graphic nature of the description or depiction of sexual or excretory organs or activities; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; (3) whether the material appears to pander or is used to titillate, or whether the material appears to have been presented for its shock value.' In examining these three factors, we must weigh and balance them to determine whether the broadcast material is patently offensive because "each indecency case presents its own particular mix of these, and possibly, other factors.' In particular cases, one or two of the factors may outweigh the others, either rendering the broadcast material patently offensive and consequently indecent, or, alternatively, removing the broadcast material from the realm of indecency." (internal italics omitted)).

¶144. Baker, supra note 123 (quoting FCC Commissioner as stating, "some broadcasters contend the commission has not been adequately clear about how it determines whether a broadcast is indecent. Today's rather cursory decisions do little to address any of these concerns.").

¶145. In re Industry Guidance, 16 F.C.C. Rcd. at 8000.

¶146. Indecency Complaints and NALs, supra note 11; see also Crawford, supra note 3 (noting that the bulk of FCC indecency complaints are dismissed every year).

¶147. See Rigney, supra note 45, at 321 (stating that the current indecency law "employs terms that are far too subjective to be enforced on a national scale").

¶148. 16 Am. Jur. 2d Constitutional Law 411 (1998); see also Chemerinsky, supra note 57, at 912 ("A law is unconstitutionally overbroad if it regulates substantially more speech than the Constitution allows to be regulated.").

¶149. See e.g., Pacifica Found., 438 U.S. 726.

¶150. Id.; see also supra notes 69-73.

¶151. The Associated Press, House votes to raise fines for indecent programming, <http://www.firstamendmentcenter.org/news/asp?id=12864>.

¶152. NAACP v. Button, 371 U.S. 415, 432-433 (1963) (internal citations omitted).

¶n153. See supra notes 69-73.

¶n154. Speak Out to the Senate on Indecency, supra note 118.

¶n155. Id.

¶n156. In re Complaints Against Various Broadcast Licensees, 19 F.C.C. Rcd. at 4982 ("Broadcasters can easily ensure that they are not subject to enforcement action ...[by] adopting and successfully implementing a delay/bleeping system for live broadcasts.").

¶n157. Speak Out to the Senate on Indecency, supra note 118.