



To All Broadcast Clients

March 29, 2004

FCC DRAMATICALLY EXPANDS SCOPE OF PROHIBITED BROADCAST CONTENT

The FCC has reversed its well-publicized October 2003 decision in which the FCC's Enforcement Bureau had concluded that a specific remark by Irish rocker Bono on the 2003 Golden Globe Awards broadcast by NBC was not indecent. When accepting the award for "Best Original Song," Bono had exclaimed: "This is really, really f--king brilliant ... Really, really great." The reversal came in response to an Application for Review filed by the Parents' Television Council. The effect of the FCC's decision is to dramatically expand the scope of government review of the content of broadcast programming and to inhibit the airing of live, non-news broadcasts without delays sufficient to permit editing of possible "indecent" or "profane" language.

Because the FCC's decision represents a change in its interpretation of statutory terms "indecent" and "profane," the FCC did not impose a fine on NBC or any of the stations that broadcast the program. This was not a unanimous view; as the Commissioners were split three to two, and Commissioners Cops and Martin would have fined NBC and the stations notwithstanding past contradictory rulings.

FCC Decides that the "F-Word" Is Always Indecent

The Commission explicitly overruled not only the October 2003 Bureau decision, but also a long line of FCC cases involving live sport-

ing events (the Super Bowl and baseball playoff games), which held that variations of the word "f--k" are not indecent when used in a "fleeting" or isolated manner, or in a non-sexual context, as either an adjective or interjection. The Commission found that "given the core meaning of the 'F-word,' any use of that word or a variation, in any context, inherently has a sexual connotation and therefore falls within the first prong of our indecency definition" (emphasis added).

In addition, the FCC held that the use of the "F-word" is always offensive. The FCC said, "The 'F-word' is one of the most vulgar, graphic and explicit descriptions of sexual activity in the English language. Its use invariably invokes a coarse sexual image. The use of the 'F-word' here, on a nationally telecast awards ceremony, was shocking and gratuitous."

The FCC's actions establish, as a matter of policy, that virtually all uses of the "F-word", even if fleeting or isolated, are *per se* violations of the indecency standard. The lone exception would be utterances that appear in a news context in which airing of the word is crucial to the story.

FCC Also Prohibits the Broadcast of Profanity

The FCC also found, for the first time, that the statutory prohibition on "profane" speech applies to the word "f--k," and indeed, more

generally to “personally reviling epithets naturally tending to provoke violent resentment” or “language so grossly offensive to members of the public who actually hear it as to amount to a nuisance.” A “nuisance,” the FCC further explained, includes “a condition of things which is prejudicial to the ... sense of decency or morals of the citizens at large....”

The Commission noted that it has previously limited the scope of the definition of profane to “blasphemy” and “divine imprecation.” Its decision, however, makes clear that in the future, it “will also consider under the definition of ‘profanity’ the ‘F-word,’ and those words (or variants thereof) that are as highly offensive as the ‘F-word’ to the extent that such language is broadcast between 6 a.m. and 10 p.m.” The Commission said that it will decide whether particular words are profane on a case-by-case basis. Despite (or perhaps intentionally to advance the effect of) its definition of profanity as “personally reviling epithets ... provok[ing] resentment,” the Commission offered no clear guidance to the industry concerning any words other than “f--k” that would be considered profane.

The FCC’s Ruling Expands the List of Prohibited Broadcasts

The Bono decision dramatically expands the scope of FCC content regulation, potentially reaching all manner of non-sexual and non-excretory epithets, words and phrases that may be offensive to some. The scope of speech prohibited (except during the 10 p.m. to 6 a.m. “safe harbor”) can be said to include, in addition to indecent descriptive material:

- the fleeting or isolated use of expletives (except possibly in a breaking news context), even if uttered in a non-sexual, non-excretory context;
- “personally reviling epithets tending to provoke violent resentment” (which would seem to embrace racial epithets such as the “n word”);
- language that amounts to a verbal “nuisance,” encompassing language grossly offensive to members of the public due to its affront to a “sense of decency or morals” of the average listener; and
- offensive words and phrases that contain “an element of blasphemy or divine imprecation.”

The Bono decision is intended by the FCC to put broadcasters on notice that, given the existence of technological means to prevent the airing of objectionable language -- through the use of delays and editing -- licensees are responsible for any language used in such broadcasts that is found to be “obscene, indecent, or profane,” no matter how fleeting or unexpected. This threatens to discourage the broadcasting of any live event, other than breaking news, without having a delay and editing capability in place.

Leventhal Senter & Lerman PLLC

This memorandum is intended only as a general discussion of these issues and should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired. To discuss any of the issues presented here, please contact Dennis Corbett (202-416-6780) or David Keir (202-416-6742) or any other attorney in our office.