

Comments

I. THE GOVERNMENT'S INDECENCY POLICIES REGARDING VIDEO PROGRAMMING ARE OVERBROAD, VAGUE AND IMPOSSIBLE TO APPLY IN A NARROW OR CONSISTENT MANNER

A. “Vague, ambiguous interpretations of the public interest standard create a slippery slope from which we should stay as far away as possible.” 22/

The First Amendment requires that restrictions on speech be well-defined and unambiguous. Laws that inhibit free speech are subject to the most stringent standards of precision. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982); *Cramp v. Board of Pub. Instruction*, 368 U.S. 278, 287 (1961); *see Hynes v. Mayor & Council of Oradell*, 425 U.S. 610, 620 (1976) (“general test of vagueness applies with particular force in review of laws dealing with speech”); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975) (condemning denial of access to a municipal theater where “the exercise of such authority was not bounded by precise and clear standards”); *Smith v. Goguen*, 415 U.S. 566, 574-75 (1974); *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)

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505 is based on insufficient congressional findings, unconstitutionally discriminates against Playboy, is both under- and over-inclusive, and fails to employ the least restrictive means of regulation.

22/ Chairman Reed E. Hundt, Chairman, Federal Communications Commission, Reading the First Amendment in Favor of Children: Implementing the Children’s Television Act of 1990. Speech at Brooklyn Law School (as prepared for delivery), Dec. 4, 1995.

(vague laws fail to “give the person of ordinary intelligence a reasonable opportunity to know that is prohibited, so that he may act accordingly”); *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1051 (1991).

Vague laws attempting to regulate or suppress non-obscene speech have been repeatedly struck down, 23/ even when enacted to protect minors. 24/ In *Interstate Circuit, Inc., v. City of Dallas*, 390 U.S. 676 (1968), the Supreme Court invalidated an ordinance requiring film classification and prohibiting attendance by youths under 16 at films classified “not suitable for young persons.” Although the “not suitable” standard was fleshed out -- defined as “describing or portraying nudity beyond the customary limits of candor in the community, or sexual promiscuity or extra-marital or abnormal sexual relations in such a manner as to be, in the judgment of the Board, likely to incite or encourage delinquency or sexual promiscuity on the part of young persons or to appeal to their prurient interest,” *id.* at 681 -- eight members of the Court concluded that, in the end, “[t]he only limits

23/ *E.g.*, *Winters v. New York*, 333 U.S. 507 (1948) (statutory standard interpreted by state court to be “criminal news or stories of deeds of bloodshed or lust, so massed as to become vehicles for inciting violent and depraved crimes”); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952) (“sacrilegious” as a licensing standard); *Gelling v. Texas*, 343 U.S. 960 (1952) (*per curiam*) (“prejudicial to the best interests of the people of said City”); *Superior Films Inc. v. Department of Educ.*, 346 U.S. 587 (1954) (*per curiam*) (“moral, educational, or amusing and harmless”); *Holmby Prods., Inc. v. Vaughn*, 350 U.S. 870 (1955) (*per curiam*) (“cruel, obscene, indecent or immoral, or such as tend to debase or corrupt morals”).

24/ *E.g.*, *Bantam Books, Inc., v. Sullivan*, 372 U.S. 58, 59 (1963) (condemning a commission that was charged with reviewing material “manifestly tending to the corruption of the youth”).

on the censor's discretion is his understanding of what is included within the term "desirable, acceptable or proper." This is nothing less than a roving commission."

Id. at 688 (citation omitted).

Interstate Circuit rejected the argument that a vague standard was permissible so long as "it was adopted for the salutary purpose of protecting children." *Id.* at 689. "The permissible extent of vagueness is not directly proportional to, or a function of, the extent of the power to regulate or control expression with respect to children." *Id.* Rather, it depends on the harm to free expression, regardless of an assertedly narrow interest in protecting children. See also *Rushia v. Ashburnham*, 582 F. Supp. 900, 905 (D. Mass. 1983) ("The fact that a regulation is adopted for the purpose of protecting children does not cure vagueness.").

The vagueness inherent in the indecency restriction is likely to cause cable operators to "steer far wider of the unlawful zone" than if the boundaries were clearly marked. *Bella Lewitsky Dance Found. v. Frohnmayer*, 754 F. Supp. 774, 783 (C.D. Cal. 1991) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)). The likely effect will be for operators to restrict their programming decisions "to that which is unquestionably safe." *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964). The First Amendment does not permit the government to create such a chilling effect. *Id.*; see also *Cramp v. Board of Public Instruction*, 368 U.S. 278 (1961).

1. The Government's Increased Use of Indecency Regulation in Section 505 Highlights the Illusory Nature of Constitutional Protection for Such Speech and Focuses on the Need for Clarity

The First Amendment permits the government to regulate sexually oriented speech, but only within carefully prescribed limits. It may ban obscene speech, a category of expression that is considered beyond the protection of the First Amendment. The government also may regulate -- but not ban -- indecent speech in certain limited circumstances, based upon the means of transmission. Although both categories of speech may include sexually-oriented material, the courts tolerate less government intrusion into indecency because of the fact that “[s]exual expression which is indecent but not obscene is protected by the First Amendment.” *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). As explained below, however, indecency actually may receive less constitutional protection than obscenity, as a practical matter. This First Amendment paradox should oblige the FCC to be exceptionally clear in its indecency policies.

The Supreme Court has held that obscenity is limited “to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which . . . do not have serious literary, artistic, political, or scientific value.” *Miller v. California*, 413 U.S. 15, 24 (1973). The Court also requires the government to follow strict due process guidelines so that regulation does not chill the exercise of protected speech. *See, e.g., Vance v. Universal Amusement Co.*, 445 U.S. 308, 316-317 (1980); *Freedman v. Maryland*, 380 U.S. 51, 57-58 (1965). Even when the government asserts a need to protect

minors from exposure to sexually oriented materials under a variable obscenity standard, the First Amendment prescribes strict limits. 25/

The First Amendment strictures that apply to obscenity replaced the more lax *Hicklin* rule that applied in the days of Anthony Comstock, when the law was used to censor a great deal of literature and information regarding birth control. 26/ Under that standard, material could be judged obscene based upon a review only of brief excerpts of a publication and by assessing the likely effect of the material on particularly susceptible persons. This approach was rejected by American courts in the early 20th century. *E.g.*, *United States v. One Book Entitled Ulysses*, 72 F.2d 705 (2d Cir. 1934). And in 1957, the Supreme Court held that the First Amendment requires that works must be judged as a whole in their entire context, considering their effect on the average member of the community -- not the most vulnerable. Moreover, a work could not be considered obscene if it possessed serious value. *Roth v. United States*, 354 U.S. 476, 490 (1957).

25/ Even where the government has demonstrated a compelling interest in protecting minors, traditional First Amendment doctrine requires that material be "virtually obscene" before the government may adopt limited restrictions. *Virginia v. American Booksellers Assn.*, 484 U.S. 383, 394 (1988); *see American Booksellers v. Webb*, 919 F.2d 1493, 1504-05 (11th Cir. 1990), *cert. denied*, 500 U.S. 942 (1991); *American Booksellers Ass'n. v. McAuliffe*, 533 F. Supp. 50 (N.D. Ga. 1981) (statute prohibiting sale or display to minors of material containing nude figures held overbroad); *American Booksellers Ass'n. v. Superior Court*, 181 Cal. Rptr. 33 (Ct. App. 1982) (photographs with a primary purpose of causing sexual arousal held not to be harmful to minors). Moreover, government must employ the least restrictive means of serving its interest.

26/ *Regina v. Hicklin*, L.R. 3, Q.B. 360 (1868).

Indecency, on the other hand, is regulated under a standard strikingly similar to the *Hicklin* rule that was rejected over six decades ago. In *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), the Supreme Court held that the government may constitutionally regulate “indecent” but not obscene radio broadcasts. But the definition of indecency is far less strict than the standard that governs obscenity, so that the category necessarily includes constitutionally protected speech. ^{27/} Notably, literary merit may not protect a work from being indecent. The FCC, for example, has ruled that “the merit of a work is ‘simply one of many variables’ that make up a work’s context,” and that material may be found indecent for broadcast even where the information is presented “in the news” and is presented “in a serious, newsworthy manner.” It has expressly declined to hold that “if a work has merit it is per se not indecent.” ^{28/}

^{27/} *Sable Communications of California, Inc. v. FCC*, 492 U.S. 105, 126 (1989). The *Pacifica* Court defined “indecent” as “language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs at times of the day when there is a reasonable risk that children may be in the audience.” 438 U.S. at 731-732.

^{28/} *Letter to Merrill Hansen*, 6 FCC Rcd. at 3689 (citation omitted). See also *KLOL(FM)*, 8 FCC Rcd. 3228 (1993); *WVIC-FM*, 6 FCC Rcd. 7484 (1991). As Judge Patricia Wald has noted, “[i]ndecency’ is not confined merely to material that borders on obscenity -- ‘obscenity lite.’” *Alliance for Community Media v. FCC*, 56 F.3d 105, 130 (D.C. Cir.) (Wald, J., dissenting), cert. granted sub nom. *Denver Area Educ. Telecomms. Consortium v. FCC*, 116 S. Ct. 471 (1995). Rather, indecency seeks to cast a larger net encompassing other, less offensive protected speech regardless of its merit. But in many instances, “the programming’s very merit will be inseparable from its seminal ‘offensiveness.’” *Id.*

The Commission has acknowledged that, because serious merit does not save material from an indecency finding, there is a “broad range of sexually-oriented material that has been or could be considered indecent” that does “not [include] obscene speech.” 29/ Moreover, in applying the indecency standard, the Commission is not required to consider the suspect material as a whole. 30/ And, like the discredited *Hicklin* rule, the focus of indecency regulation is the effect of sexually-oriented material on a vulnerable population -- children -- and not average members of a community. 31/

The following table summarizes the respective regulatory regimes of obscenity and indecency:

29/ *Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464*, 5 FCC Rcd. 5297, 5300 (1990), *rev'd*, *Action for Children's Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991), *cert. denied*, 503 U.S. 913 (1992) (“*ACT II*”).

30/ *Illinois Citizens Committee for Broadcasting v. FCC*, 515 F.2d 397, 406 (D.C. Cir. 1975); *Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992*, 8 FCC Rcd. at 1004 (“We do not agree that any determination of indecency [on the cable medium] is required to take into account the work as a whole.”); *WIOD(AM)*, 6 FCC Rcd. 3704, 3705 (1989) (less than 5 percent of a program devoted to sexually-oriented material supports an indecency finding “[w]hether or not the context of the entire Neil Rogers Show dwelt on sexual themes”).

31/ *Pacifica*, 438 U.S. at 749-750.

Obscenity	Indecency
1. Proscribes a very limited range of material by subject matter that is unprotected by the First Amendment;	1. Permits regulation of a broad range of constitutionally protected speech;
2. Work must be judged as a whole, in complete context, and not by reference to detached and separate portions;	2. Indecency determination may be based on a "brief condensation of offensive material," and not a review of the work as a whole;
3. Patent offensiveness of a work is assessed by its impact on the average community member;	3. Patent offensiveness of a work is determined by its effect on children;
4. Serious literary, artistic, political or scientific value is a complete defense.	4. Merit is only one of a "host of variables" to be considered, and is not dispositive.
5. Determination of "patent offensiveness" is based on a local assessment of community standards.	5. Determination of "patent offensiveness" is made in Washington by political appointees.

As this chart demonstrates, it would be a legal fiction to state that indecent speech is "protected" by the First Amendment while obscenity it not, unless the indecency doctrine is strictly limited in some meaningful way. Measures such as Section 505, however, stretch those limits beyond what has been permitted by the courts. It is no answer to suggest that, unlike indecency, obscenity may be banned, if indecent speech may nevertheless be inhibited by government fiat. It is a bedrock First Amendment principle that restraints on free expression that act as a

“deterrent” but that are short of “total suppression” are unconstitutional. *Erznoznik*, 422 U.S. at 212 n.8; *Speiser v. Randall*, 357 U.S. 513, 518-519 (1958).

This comparison between obscenity and indecency bears directly on how the Commission should interpret Section 505. Because of the conceptual imprecision of the indecency standard, and because it so broadly implicates protected speech, courts have applied the indecency doctrine sparingly and only in specialized situations, depending on the technology employed by the speaker. Accordingly, the government has acknowledged that indecency rules restrict constitutionally protected speech, but concluded that such restrictions were not excessive in prior cases because the same speech remained available via other media. For example, the Commission claimed that it could ban indecent programming on free broadcasting because “adults can obtain indecent material through cable television, wireless cable, home satellite dishes, or satellite master antenna television systems (SMATV) and . . . DBS.” 32/ The Commission reaffirmed this conclusion in 1993, noting that “indecent material is available on media that are largely indistinguishable, from the viewer’s perspective, from broadcast television, although their characteristics facilitate limiting access only to consenting adults.” 33/

32/ *Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464*, 5 FCC Rcd. at 5308.

33/ *Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464*, 8 FCC Rcd. 704, 710 (1993), *aff’d*, *Action for Children’s Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995) (*en banc*) (“ACT III”).

Now, however, as the Telecommunications Act seeks to expand the scope of indecency regulation to cover additional technologies, such as cable television and online communications, the government must be consistent, and has a greater obligation to avoid vagueness and overbreadth. Where previously it could assert that any imprecision did not excessively burden speech because the rule's reach was restricted to a particular medium that lacked parental control technology, it may no longer make such a claim. Whatever measure of generality might have been permissible in the past cannot be tolerated as the Commission's jurisdiction expands to include indecency on pay television channels.

2. Previous Rulings Have Not Resolved the Vagueness and Overbreadth Problems Inherent in the Indecency Standard

Except in the limited context of *Pacifica*, indecency-type regulations have frequently been struck down as unconstitutionally vague and overbroad. The Supreme Court has held, for example, that government schemes designed to protect children from "indecent or impure language" are "vague and uninformative." ^{34/} Similarly, courts have invalidated efforts to use civil nuisance laws to curtail sales of "sexually explicit" magazines. ^{35/} Most relevant to this proceeding, however, is the fact that courts have invalidated laws designed to restrict transmission of

^{34/} *Bantam Books*, 372 U.S. at 59-60, 71.

^{35/} *Council for Periodical Distributors Assn. v. Evans*, 642 F. Supp. at 556, 564, 568.

“indecent material . . . over any cable television system or pay-for-viewing television programming” as being overbroad and void for vagueness. 36/

To be sure, it has often been asserted that any regulation of sexually-oriented speech suffers from being vague. “Constitutionally protected expression ‘is often separated from obscenity only by a dim and uncertain line.’” *Council for Periodical Distributors Assn. v. Evans*, 642 F. Supp. at 558, quoting *Bantam Books v. Sullivan*, 372 U.S. at 66. Accordingly, Justice Potter Stewart’s famous statement that he might not be able to define obscenity, but “I know it when I see it,” probably is guaranteed immortality. See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

What in the past has saved the legal definition of “obscenity” from constitutional vagueness and overbreadth problems, however, are the First Amendment limits imposed by *Miller* and its progeny. Thus, obscenity must be proscribed by statutes “specifically defining the sexual conduct the depiction or description of which is forbidden,” and determinations of obscenity are not issued in policy statements by administrative agencies that are free to change their minds. *Bella Lewitzky Dance Found.*, 754 F. Supp. at 782. Additionally, with respect to films, “[s]cenes of nudity in a movie, like pictures of nude persons in a book, must be

36/ *Community Television of Utah, Inc. v. Wilkinson*, 611 F. Supp. 1099, 1117 (D.C. Utah 1985), *aff’d sub nom. Jones v. Wilkinson*, 800 F.2d 989 (10th Cir. 1986), *aff’d mem.* 480 U.S. 926 (1987).

considered as part of the whole work.” *Erznoznik*, 422 U.S. at 211-212 n.7. Moreover, obscenity is gauged by the effect of a work on the average member of the community, not the most vulnerable. In short, the factors that courts have developed to significantly narrow obscenity laws are precisely what distinguish indecency from obscenity.

Moreover, even within the context of radio and broadcast television, when courts have been called upon to address vagueness questions surrounding the indecency standard, they have not endorsed the constitutional precision of indecency rules *per se*. In fact, the judicial analyses of the vagueness of the FCC indecency rules have been quite limited. And even if the analyses had been more expansive, they would not extend to cover Section 505.

In *Pacifica*, for example, the Supreme Court rejected a vagueness challenge in the context of a specific enforcement action against a radio station. 438 U.S. at 742-744. After the FCC in 1987 broadened its indecency policy to encompass the “generic” definition of the term, another vagueness claim was raised at the D.C. Circuit. That court, however, declined to address the issue, noting that “if acceptance of the FCC’s generic definition of ‘indecent’ as capable of surviving a vagueness challenge is not implicit in *Pacifica*, we have misunderstood Higher Authority and welcome correction.” *Action for Children’s Television v. FCC*, 852

F.2d 1332, 1338-39 (D.C. Cir. 1988) (“*ACT I*”). Subsequent decisions simply cited these prior cases without further scrutiny of the vagueness question. 37/

These decisions, however, relying as they do on the *Pacifica* holding, do not foreclose examination of the vagueness question in the appropriate context. To conclude otherwise is to read *Pacifica* as a constitutional blank check. Nothing could be further from the truth, since the scope of the Court’s holding was quite limited. First, the discussion of vagueness in *Pacifica* was not endorsed by a majority of the Court. 38/ Second, both the plurality opinions in *Pacifica*, as well as subsequent decisions, have characterized it as “an emphatically narrow holding.” 39/ Indeed, the Court emphasized that its review was “limited to the

37/ *E.g.*, *ACT II*, 932 F.2d at 1508 (“Our holding in *ACT I* precludes us now finding the Commission’s generic definition of indecency to be unconstitutionally vague.”); *Information Providers’ Coalition v. FCC*, 928 F.2d 866, 874 (9th Cir. 1991) (indecency definition “received the imprimatur of the Court” in *Pacifica*); *Alliance for Community Media*, 56 F.3d at 129 (“the Supreme Court’s *Pacifica* decision foreclosed the question whether this definition of indecency was unconstitutionally vague”); *ACT III*, 58 F.3d at 659 (dismissing without discussion vagueness claims based on *ACT I* and *ACT II* decisions).

38/ *See Pacifica*, 438 U.S. at 743.

39/ *Id.* at 744 (“[w]hen the issue is narrowed to the facts of this case . . .”), 750 (“[i]t is appropriate . . . to emphasize the narrowness of our holding”), 755-56 (Powell, J., concurring) (“[t]he Court today reviews only the Commission’s holding that Carlin’s monologue was indecent ‘as broadcast’ at two o’clock in the afternoon, and not the broad sweep of the Commission’s opinion”); *see also Sable*, 492 U.S. at 127; *Bolger*, 463 U.S. at 73-75; *Fabulous Assocs., Inc. v. Pennsylvania Pub. Util. Comm’n*, 896 F.2d 780, 783-84 (3d Cir. 1990); *Cruz v. Ferre*, 755 F.2d 1415, 1421 (11th Cir. 1985) (“[r]ecent decisions of the Court have largely limited *Pacifica* to its facts”).

question whether the Commission has the authority to proscribe this particular broadcast” and that the underlying FCC order was “issued in a specific factual context.” *Pacifica*, 438 U.S. at 742. *See id.* at 761 n.4 (Powell, J., concurring) (“the Commission’s order was limited to the facts of this case”). It was noted recently that “the Supreme Court has never actually passed on the FCC’s broad definition of ‘indecent.’” ^{40/} Thus, the relative vagueness of the FCC’s indecency regulations presents a constitutional question that is far from settled.

This is particularly true in the context of television programming, since the Commission has issued so little guidance in that area. And, unfortunately, the few pronouncements and decisions that exist are at best inconsistent. Accordingly, the Commission must address the vagueness issue as it relates to Section 505 notwithstanding any previous decisions.

3. The Telecommunications Act, Section 505 and the Commission Have Injected New Vagueness and Overbreadth Problems into the Indecency Regulations

Even if all of the FCC’s prior indecency decisions could fairly be characterized as crystal clear and flawlessly consistent, the new law and the government’s shifting interpretations throw existing precedent into disarray. In the past, entities under the FCC’s jurisdiction only had to grapple with the definition of

^{40/} *Alliance for Community Media*, 56 F.3d at 130 n.2 (Wald, J., dissenting). *See also Information Providers’ Coalition for Defense of the First Amendment*, 928 F.2d at 875 (“We note that the *Sable* opinion did not describe the Commission’s definition of indecency in *ipsissimis verbis*. No question was presented there, and none here, of the contents of the Commission’s definition discussed in *Pacifica*.”).

“indecent.” Now, the Telecommunications Act and Section 505 changed the situation by adding new statutory terms that purport to distinguish between acceptable and unacceptable depictions of sex.

Legal obligations under Section 505 are triggered only if programming is presented on channels “primarily dedicated to sexually-oriented programming,” a statutory term never previously defined by Congress or the Commission. The Commission has claimed that the meaning of this term is clear, and needs no further elaboration. 41/ Additionally, the government has taken the position in *Playboy Entertainment Group, Inc.* that “the terms ‘primarily dedicated’ and ‘sexually oriented programming’ . . . do not require definitions beyond their plain meaning.” 42/

Playboy disputes these conclusions, as noted more fully below. But the Commission’s position raises an additional question, since it interprets Section 505 “as not requiring the scrambling of programming that is not indecent even if provided on a channel primarily dedicated to sexually-oriented programming.” 43/

41/ Notice at ¶¶ 6, 9.

42/ See Answer to Interrogatory No. 4 in Defendants’ Responses to Plaintiff Playboy Entertainment Group, Inc.’s First Requests for Admissions and Interrogatories, *Playboy Entertainment Group, Inc. v. United States*, Civil Action No. 96-94. The government acknowledged that these statutory terms have not been defined.

43/ Notice at ¶ 6. The Commission’s conclusion that “sexually oriented” speech is not necessarily indecent is constitutionally compelled. See, e.g., *United States v. P.H.E., Inc.* 965 F.2d 848, 851 (government scheme of using multiple prosecutions to deter distribution of “sexually oriented materials” found to be unconstitutional);

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In other words, the FCC assumes that cable operators who provide channels “primarily dedicated” to sexual material would be able to chart a course between that which is merely “sexually oriented” and that which is indecent. *See Bella Lewitzky Dance Found.*, 754 F. Supp. at 781 (“because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly”). Unfortunately, the new legal terms only make the operator’s choices more difficult and confusing.

Section 505 also broadens the focus of indecency rules by targeting the presentation of “sexually explicit adult programming or other programming that is indecent.” This new statutory phrase on its face expands the category of proscribed speech beyond just indecency. But in an effort to interpret this expanded definition narrowly, the Commission asserted that “it is clear that the term ‘sexually explicit adult programming’ in Section [505(a)] is merely a subset of the term ‘programming that is indecent.’”

In fact, this facile conclusion is not so “clear.” The Commission’s interpretation of Section 505 contradicts its previous efforts at statutory

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United States v. Keller, 259 F.2d 54, 58 (3d Cir. 1958) (“sex and obscenity are not synonymous and the depiction or portrayal of sex per se is not sufficient to deny the protection of the guarantees of the First Amendment”); *Johnson*, 865 F. Supp. at 1438 (“Plaintiff’s First Amendment right is not diminished by the fact that the prohibition is of ‘sexually oriented’ material.”).

construction regarding what might be considered indecent as to cable access channels. In that proceeding the FCC claimed that legislative terms placed in the disjunctive are intended to have separate meanings. ^{44/} Here, in sharp contrast, the Commission construes the statutory terms “sexually explicit adult programming or other programming that is indecent” as having a single meaning. The government’s practices are suspect when it shifts between rules of statutory construction to suit the desired outcome in each case.

But worse, the Commission has adopted utterly inconsistent positions on the meaning of the term “sexually explicit.” For example, in establishing rules regarding “sexually explicit conduct” on public access programming, channels,” the Commission expressly adopted the examples of indecency proffered by the congressional sponsor, Senator Helms, which included scenes of “men and women stripping completely nude.” *See Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992*, 8 FCC Rcd. at 2640; 138 Cong. Rec. S646 (daily ed. Jan. 30, 1992) (Statement of Sen. Helms).

^{44/} For example, the Commission interpreted Section 10(c) of the 1992 Cable Act (which permitted cable operators to prohibit the use of public access channels for the transmission of “programming which contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct”) as proscribing distinctly different programming. The Commission emphasized that “Congress did not intend the three categories of materials to be construed as either synonymous or interchangeable with each other.” *Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992*, 8 FCC Rcd. 2638, 2640 (1993). *See also id.* at 2640 n.10, citing *Pacifica*, 438 U.S. at 739-740 (words “obscene, indecent, or profane” in 18 U.S.C. § 1464, written in disjunctive, meant to have separate meanings).

Notwithstanding Senator Helms' belief to the contrary, nudity is not the same thing as "explicit sex." 45/ The Commission has made this exact same point in other proceedings described below. Additionally, the Commission has never previously defined sexual explicitness as synonymous with indecency. In one of the very few cases dealing with indecency and television programming, the Commission held that a program that contained an "explicit method of teaching sex education" was not indecent. 46/ Thus, whatever touchstone the Commission may use to separate sexually oriented but decent programming from that it considers indecent, "explicitness" has not been it. 47/

45/ Nor is nudity "indecent," or even remotely "obscene." *Erznoznik*, 422 U.S. at 213 & n. 10 (depictions of nudity in publicly displayed R-rated films are not obscene for minors); *Jenkins v. Georgia*, 418 U.S. 153 (1974) (film *Carnal Knowledge* is not obscene); *McAuliffe*, 610 F.2d at 1365 ("nudity alone is not obscene"); *Rushia*, 582 F. Supp. at 904.

46/ *Application for Review of the Dismissal of an Indecency Complaint Against King Broadcasting Co.*, 5 FCC Rcd. 2971 (1990). The program included the use of "sex organ models to simulate the use of various birth control devices." *Id.* at 2971 n.2.

47/ *Id.* See generally *Letter to Gloria Georges re: WTVW-TV* (October 26, 1989) (material aired on the "Geraldo" show concerning dial-a-porn was not actionably indecent), attached as Exhibit 3; *Letter to C.L. Holliday re: WAAV-AM* (October 26, 1989) (a sex-therapy discussion broadcast at 11:40 a.m. in which the therapist explains how the vagina stretches to accommodate a man's penis was not actionably indecent), attached as Exhibit 4; *Letter to Gerald P. McAtee re: KTVI-TV* (October 26, 1989) ("Geraldo" show was entitled, "Unlocking the Mysteries of Great Sex" was not actionably indecent), attached as Exhibit 5; *Letter to Mrs. H. Hilstrom re: WLS-AM* (October 26, 1989) (advice by a sex-therapist broadcast about how a man can have oral sex with his wife was not actionably indecent), attached as Exhibit 6; *Letter to Anne Nelson Stommel re: WCBS-TV* (February 23, 1990) ("Geraldo" show concerning faked orgasms was not actionably indecent), attached as Exhibit 7; *Letter to Linda Beams re: KDFW-TV* (October 4, 1990) (the following "Geraldo"

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In addition to Section 505, other provisions of the Telecommunications Act further confused the concept of indecency and the Commission's approach to statutory interpretation. ^{48/} For example, in Section 506, which defines the indecent programming that cable operators may remove from public or leased access channels, Congress added specific language to state that the law encompasses any "program or portion of a . . . program" that "contains obscenity,

[Footnote continued]

shows, aired at 4 p.m. were not actionably indecent: "Prostitutes Anonymous," "Sexually Active or Sexually Addicted," "Transsexuals," "Hermaphrodites -- the Sexually Unfinished," "Lies Lovers Tell in Bed" and "When Men Want to Become Women"), attached as Exhibit 8; *Letter to Mary Anne Klingel re: Complaint Against WCBS-TV, New York* (June 13, 1991) ("Entertainment Tonight" segment on strippers was not actionably indecent.), attached as Exhibit 9; *Letter to Cullen M. Miculek, President of American Family Association of Birmingham re: WBRC(TV) and WVTM(TV)* (August 3, 1992) (episode of Sally Jessey Rafael in which a woman discusses "giving head" was not actionably indecent), attached as Exhibit 10. See also *Rushia*, 582 F. Supp. at 904 ("a broad range of sexually explicit materials . . . may have serious educational, artistic or scientific value for minors . . . which under prevailing community standards would be regarded as harmless"); Cf. *Council for Periodical Distributors Assn.*, 642 F. Supp. at 556 ("the decree improperly equates obscenity with sexual explicitness -- that is, obscenity is again defined solely as the depiction of 'sexual conduct'").

^{48/} Congress and the Commission have employed essentially the same generic definition of indecency in all the different sections of the Telecommunications Act. Compare §§ 502(d)(1)(B), 505 and 506. Moreover, the canons of statutory construction hold that when Congress contemporaneously uses the same terms, they should be presumed to have the same meanings. See *Sutherland Statutes and Statutory Construction* § 49.03 (5th ed.).

indecent, or nudity.” 49/ Before Section 506 was adopted, the statute permitted cable operators to remove from access channels “programming that . . . describes or depicts sexual or excretory activities or organs in a patently offensive manner,” language which covers indecency and obscenity. 47 U.S.C. § 532(h), (i).

On April 9, 1996, the Commission released an Order and Notice of Proposed Rulemaking to incorporate this statutory change. *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, FCC 96-154, ¶¶ 61-67, 110-111 (released April 9, 1996). In that proceeding, the Commission proposed to define the term “nudity,” as it pertains to leased access cable programming under Section 506(a) of the Act, as encompassing only “sexually explicit nudity,” only “nudity that is obscene or indecent.” 50/

This attempt to limit the statute, while laudable, only underscores the First Amendment infirmities of the indecency provisions of the Telecommunications Act, including Section 505. The Commission has previously held that “the very words of the statute” indicate that Congress intended to define the concept of indecency to be broader; otherwise their inclusion in the law “would be mere

49/ See 47 U.S.C. §§ 532 (emphasis added). This amendment suggests a congressional assumption that nudity is a synonym for indecency, and that the concept of indecency does not take into account works as a whole.

50/ *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, FCC 96-154, at ¶ 111. The Commission cited *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975), to support its limiting construction on the understanding that the First Amendment prohibits making nudity indecent per se.

surplusage.” ^{51/} According to the FCC’s previous analyses, it is without authority to change the law. *See id.* Yet its current interpretation of Section 506 excises the only statutory term added to this section by the Telecommunications Act (“nudity”), and its interpretation of Section 505(a) ignores the fact that the terms “indecent” and “sexually explicit” were written in the disjunctive. The Commission’s continually shifting positions are confusing.

Playboy believes the indecency standard has inherent overbreadth and vagueness problems. But if the Commission has indeed changed its position, and now asserts that it is empowered to interpret the statute in an attempt to make it fit within constitutional limits, then it should define Section 505 as covering only obscenity, as proposed below.

The confusion over the statutory terms is magnified by the fact that Congress also enacted the Communications Decency Act as an amendment to the Telecommunications Act, which restricts indecency on interactive computer services. That section of the Act is currently being challenged in various courts, most notably in the consolidated cases of *ACLU v. Reno*, Civ. A. No. 96-0963 (E.D. Pa.) and *American Library Assn. v. Reno*, Civ. A. No. 96-1458 (E.D. Pa.). The government recently presented sworn testimony to that court that operationally defined the government’s understanding of the terms “sexually explicit” and

^{51/} *Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992*, 8 FCC Rcd. at 2640.

“indecent.” In this testimony, the government described images of nudity or partial nudity as being “sexually explicit” even where no sexual conduct was depicted. See Testimony of Howard Schmidt at ¶¶ 7 - 39 (Attached as Exhibit 11). For example, the government’s expert witness described “sexually explicit” sites that were located by reference to an article published in the April 1996 issue of *Playboy Magazine*. *Id.* at ¶ 46. However, none of the images referenced in that article depict sexual conduct.

From the above, it is clear that the government is taking inconsistent positions as to whether nudity is necessarily indecent, or what the term “sexually explicit” means. Summing up the government’s understanding of the Telecommunications Act *vis a vis* §§ 502, 505 and 506, it appears that “nudity” may not be indecent, 52/ but that that “sexually explicit” programming is indecent per se, 53/ and that simple nudity is “sexually explicit.” 54/ The circularity of the government’s position is self evident.

52/ *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, FCC 96-154, at ¶ 111.

53/ *Notice* at ¶ ¶ 6, 9.

54/ Testimony of Howard Schmidt at ¶ 46.

B. “[The FCC has] an obligation to tell [operators] in clear, specific language what is required to comply with the law.” ^{55/}

Where the legal standard is opaque or confusing it is sometimes possible for clarity to emerge through adjudication. Unfortunately, FCC decisions on indecency are not an example of this phenomenon. Contrary to what might be expected in most areas of law, the more one knows about what the FCC has said about indecency, the less it is possible to understand what the Commission means.

The FCC has revealed its understanding of the indecency standard through an amalgam of policy statements, directives, published decisions that (typically) assess forfeitures and unpublished decisions that dismiss complaints. But as noted below, such sources are far from a useful guide. In addition, Section 1.2 of the Commission’s rules empowers the agency to issue declaratory rulings to “terminat[e] a controversy or remove uncertainty.” 47 C.F.R. § 1.2, but the FCC generally has declined to provide such guidance on indecency questions.

For example, when Pacifica radio sought to broadcast its annual *Bloomsday* reading from James Joyce’s *Ulysses*, the Commission declined to clarify that the material was not indecent. The Mass Media Bureau stated that it “is neither practical nor desirable from an administrative perspective, as it involves the

^{55/} Speech by Chairman Reed E. Hundt, *supra* note 22

Commission intimately in the editorial judgments of broadcasters,” and invited the licensee to take its chances with the broadcast. 56/

The Commission’s statements over the years have suggested an indirect “rule of thumb” that R-rated movies or above are indecent. For example, in claiming that the broadcast indecency standards do not excessively burden free speech, the FCC has pointed out that “adults can obtain indecent material through cable television” because “a significant number of R-rated movies are shown on cable.” 57/

Although reliance on the MPAA “R” rating may provide some idea of how the Commission interprets its generic indecency definition, 58/ such a

56/ *William J. Byrnes, Esq.*, 63 R.R.2d 216 (Mass Media Bureau 1987). Ironically, it was a judicial decision on the book *Ulysses* that eliminated the *Hicklin* rule for obscenity in the United States over 60 years ago. *United States v. One Book Entitled Ulysses*, 72 F.2d 705 (2d Cir. 1934). If the Commission could not bring itself to issue a ruling on the importance of “merit” to an indecency determination on such a well-travelled road, it is little wonder that those subject to the Commission’s jurisdiction would feel lost and without a map.

57/ *Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464*, 5 FCC Rcd. at 5308-09. See also *Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464*, 4 FCC Rcd. at 8364 (“We also note that indecent movies are available to adults. In 1988, the MPAA rated 63% of the 555 films it reviewed as “R” or “X.” [B]oth the total number and the percentage of “R” rated movies has steadily increased since 1985.”).

58/ According to MPAA an R rating designates an “adult” film in its treatment of “language, violence, or nudity, sexuality or other content.” See Jack Valenti, *The Movie Ratings System*, reprinted as an appendix to *Swope v. Lubbers*, 560 F. Supp. 1328, 1339 (W.D. Mich. 1983). A film designated X (or currently NC-17) “is patently an adult film and no children are allowed to attend.” *Id.* at 1340. Nevertheless,

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blunderbuss approach does not constitute legal guidance. Ratings classifications devised by private sector organizations do not correspond to the government's limited constitutional authority over programming content. Accordingly, courts uniformly disapprove attempts by the government to "adopt" such private ratings. *See, e.g., Swope v. Lubbers*, 560 F. Supp. at 1334 ("it is well-established that Motion Picture ratings may not be used as a standard for a determination of constitutional status"); *Engdahl v. City of Kenosha*, 317 F Supp. 1133, 1135 (E.D. Wisc. 1970); *MPAA v. Specter*, 315 F. Supp. 824 (E.D. Pa. 1970).

In line with this reasoning, the District Court for the District of Columbia struck down a provision of the 1992 Cable Act that required prior notice to cable subscribers of any free preview of a movie channel that contained films with R, X or NC-17 ratings. *Daniels Cablevision, Inc. v. United States*, 835 F. Supp. 1, 9 (D.D.C. 1993), *appeal pending sub nom. Time Warner Entertainment Co. v. FCC*, No. 93-5349. The court found that use of the MPAA rating system to regulate cable programming was both under- and over-inclusive for First Amendment purposes and that it imposed an impermissible burden on speech. It noted that:

Congress has simply incorporated the Motion Picture Association's rating system as the measure of indecency; its failure to define indecency for itself, abdicating that responsibility to a trade

[Footnote continued]

such ratings have never been approved as a constitutional guideline by which governments may restrict access to films.