The Government Should Not Strictly Regulate Indecency on Television

Television, 2011

"The good news is that the free speech zone outside the FCC's dominion keeps growing."

Jesse Walker is the managing editor of Reason magazine and Reason.com. In the following viewpoint, he maintains that the Federal Communications Commission (FCC) is fighting a futile battle over indecency; while cable television or Internet programming can broadcast indecent language and behaviors, network television is subject to draconian fines. Walker argues that the FCC would be well served by relaxing the indecency regulations and fines.

As you read, consider the following questions:

1. According to the author, what curse did Bono utter at the Golden Globes in 2003, which was broadcast on network television?
2. According to Walker, how did the FCC treat indecency on network television in the 1990s?
3. According to the author, what was Supreme Court justice Clarence Thomas's concurring opinion on a recent FCC case?

On December 9, 2002, Cher received a lifetime achievement trophy at the Billboard Music Awards. Overcome with emotion, the Armenian-American singer noted that she had faced "critics for the last 40 years saying that I was on my way out every year." Then she added, "F—- 'em." Fox broadcast the scene live, f-bomb and all.

So began an epidemic of unexpected expletives at award shows. A month later, as NBC transmitted the Golden Globes, the singer/lobbyist Bono announced that his Best Song prize was "really, really f—-ing brilliant." And in December 2003, when the Billboard Music Awards came on Fox again, the reality TV star Nicole Richie asked the audience, "Have you ever tried to get cow shit out of a Prada purse? It's not so f—-ing simple."

The FCC Reacts

Before the contagion could spread, the Federal Communications Commission [FCC] stepped in. After initially announcing that Bono's comment was acceptable—his phrase "may be crude and offensive," the regulators had declared, "but, in the context presented here, did not describe sexual or excretory organs or activities"—the agency reversed itself, ruling that broadcasters could be fined for airing even fleeting, unplanned cussing at live events. The f-word, it explained, was "one of the most vulgar, graphic, and explicit words for sexual activity in the English language," and there was no place for it on television.

No place, that is, except the hundreds of channels that the content cops weren't allowed to regulate. When it came to "indecent" images and language, the [George W.] Bush-era FCC toughened its rules, increased its fines, and stepped up its enforcement, but the commission's grip on mass communications wasn't as complete
as it used to be; as cable and then the Internet exploded, the area outside the indecency police's grasp was growing. Like the sheriff of a dry county surrounded by rowdy biker bars, the FCC could make life miserable for the people under its jurisdiction but it couldn't do a thing about what was going on right next door.

The crackdown was bipartisan—the noisiest censor at the commission, Michael Copps, is a Democrat—but it was a post-[Bill] Clinton development. In the '90s the networks had started to behave as though they had the same liberties as their cable competitors: You could hear the word "piss" on Northern Exposure, see Dennis Franz's bare butt on NYPD Blue, watch Schindler's List—naked bodies and all—prime time on NBC. In 1997, when then-congressman Tom Coburn complained about the latter program's "full-frontal nudity, violence, and profanity," he was roundly mocked for treating an earnest Holocaust drama like it was Ilsa, She-Wolf of the SS. In 2004, by contrast, after the clampdown was underway, several ABC affiliates refused to air an equally earnest Spielberg picture, the World War II drama Saving Private Ryan. In a model example of a chilling effect, the stations feared the government would fine them for the film's rough language.

Viewers Find Alternatives

Yet while the FCC was reasserting control of its corner of the media, audiences were exiting in ever-greater numbers for non-network news and entertainment. If you wanted to see a singing turd on South Park, or Tony Soprano [from The Sopranos] screwing a stripper in a back room at the Bing, or a bestiality film on a fetish site—well, there wasn't anything the commission could do about that. But a fleeting expletive at an awards show: That was fair game.

Whether it stays fair game is another matter. After the commission declared that Cher-style vulgarity was verboten [forbidden], the major broadcast networks jointly filed a suit to stop the policy. Their case has been bopping up and down the courts for several years now. This week [May 1, 2009,] the U.S. Supreme Court refused to accept a procedural argument against the FCC's orders, but the justices left the door open to later declaring the rules an unconstitutional infringement on speech. For now the legal battle will return to the 2nd U.S. Circuit Court of Appeals in New York, from where it will probably crawl back up to the Supremes.

Emphasizing Free Speech

When the justices wrote their reactions to the case, some of the sharpest comments came in Clarence Thomas's concurring opinion. While siding with the commission on the technical legal question immediately at hand, Thomas signaled his sympathy with the argument that the rules violate the First Amendment. The two precedents that supported the FCC's authority—1969's Red Lion decision, which upheld the Fairness Doctrine, and 1978's Pacifica decision, which upheld the government's right to restrict indecent language—"were unconvincing when they were issued," Thomas wrote, "and the passage of time has only increased doubt regarding their continued validity." He continued:

Broadcast spectrum is significantly less scarce than it was 40 years ago.... Moreover, traditional broadcast television and radio are no longer the "uniquely pervasive" media forms they once were. For most consumers, traditional broadcast media programming is now bundled with cable or satellite services.... Broadcast and other video programming is also widely available over the Internet.... And like radio and television broadcasts, Internet access is now often freely available over the airwaves and can be accessed by portable computer, cell phones, and other wireless devices.... The extant facts that drove this Court to subject broadcasters to unique disfavor under the First Amendment simply do not exist today.
There is no credible reason we shouldn't have the same right to free expression on the FM and VHF bands that we have when using WiFi or cable. Now, there are those in the commission, the courts, and the Congress who would resolve the contradiction by extending the indecency rules’ reach to cable and cyberspace. But if the courts respect the language of the First Amendment, they’ll extend the reach of free speech instead.

In the meantime, the FCC is simultaneously empowered and impotent, an agency reduced to chasing passing curse words on network TV while cable subscribers enjoy unhindered access to Spice and the Playboy Channel. The bad news is that the courts might tell the commission it’s within its rights when it censors the networks. The good news is that the free speech zone outside the FCC’s dominion keeps growing.

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**Further Readings**

**Books**


• Kate Schuster *Is Television a Bad Influence*? Chicago: Heinemann, 2008.


**Periodicals**


• Nick Summers "Now Can I Say $*%!#& on Television?" *Newsweek*, July 26, 2010.


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