[US] FCC's New Indecency Rule

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On 18 March 2004, the Federal Communications Commission (FCC) adopted a new ban on "indecent" material on broadcast television. Its action came after political outrage over a mid-January "Super Bowl" broadcast the most viewed US football game which included singer/actress Janet Jackson's baring a breast for about 5 seconds. The Commission's actions followed the House of Representatives' adoption of a severe anti-indecency bill.

In Golden Globe Awards Program , the Commission established new definitions of "indecency" and "profanity" on broadcast television. At issue were wellknown singer Bono's remarks on an NBC televison network program, after he received the 2003 Foreign Press Association's Golden Globe award for Best Popular Song: "This is fucking brilliant."

In an opinion by Chairman Michael Powell, the Commission reiterated its traditional two-part test for indecency: (1) a description of "sexual or excretory organs or activities" which (2) is "patently offensive... by [broadcast] community standards."

The majority opinion held that Bono's words were a "depiction," because they had a "sexual connotation." It found them "patently offensive" for several reasons. First, "fucking" was "one of the most vulgar, graphic and explicit descriptions of sexual activities in the English language." Second, "children were expected to be in the audience." Third, NBC was "on notice" of Bono's proclivity for indecency based upon quotations from 1994 found on an entertainment news web-site. The Chairman also relied upon a web-site's reports that Cher, another popular singer, had said "fucking" in a different context the Billboard Awards Ceremony of 2002. Recognizing that the Commission previously had refused to impose liability upon "isolated or fleeting" uses of indecency, Powell overruled this entire line of cases dating back more than 15 years. The agency did not make clear what words were within the new ban, referring only to "the F-word and those words (or variants)." This leaves unclear the status of language such as: "shit, piss, cunt, cock."

The majority also announced a new interpretation of the statutory prohibition on "profane" broadcasting which had not been enforced in more than fifty years. Powell held that "fucking" was profane because it was "vulgar and coarse material."

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In the end, the Commission did not fine NBC for the broadcast, on the ground that it had not had sufficient notice of the change in the law. But Commissioners Copps and Martin would have imposed a fine, on the grounds that NBC should have known the material's indecency and did not make sufficient efforts to censor it eg, by means of a five-minute delay if need be. They were not concerned that the technology necessary to establish this long a delay costs hundreds of thousand of dollars per station.

In overruling more than 15 years of prior administrative decisions, the FCC took a very strong position presumably because of not only private pressure, but also severe interrogation in appearances before Congressional committees. Moreover, the passage of the House indecency bill and the possibility of Senate approval no matter how small may be a major influence.

Golden Globe Awards Program, FCC 04-43,18 March 2004

http://www.fcc.gov/eb/Orders/2004/FCC-04-43A1.html

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