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A CHILLY WAIT IN RADIOLAND: THE FCC FORCES "INDECENT" RADIO BROADCASTERS TO CENSOR THEMSELVES OR FACE THE MUSIC

*Steven Nudelman**

I. INTRODUCTION

A growing number of radio stations around the country are finding that love and sex talk shows are luring more listeners to their stations.¹ In Philadelphia, the show is called "Between the Sheets," in New York City, it is "Love Phones," and in Kansas City, it is known as "Let's Talk About Sex."² Listeners are flocking to these programs like prospectors at the California gold rush. Over 109,000 listeners tune in nightly to Los Angeles's sex-advice talk show.³ Not far behind the listeners are advertisers, who quickly buy out the time slots on these types of programs.⁴ This portrait of broadcast media seems almost too good to be true; because love shows appeal to listeners, broadcasters and advertisers are satisfied with the success of the programs. However, the Federal Communications Commission ("FCC") has yet to respond to these shows. If its past practices are any indication, these

* BLS Class of 1995. The author wishes to thank BLS Professor Michael P. Madow for assisting in the preparation of this article.

¹ Carrie Borzillo, *More & More Stations Talking About Sex; New Shows Entertain As Well As Inform Listeners*, BILLBOARD, Apr. 3, 1993, at 84.

² Catherine Hinman, *Relationship Shows Heating Up Airwaves*, ORLANDO SENTINEL TRIB., Feb. 20, 1993, at E2.

³ Renee Tawa, *The Doctor's in the House; Radio: On 'Loveline,' Scholarly Dr. Drew Dispenses Advice on Sex, Drugs and Heartache to Teen-agers, and Tolerates his Crass Disc Jockey Pal*, L.A. TIMES, Aug. 22, 1993, at J8.

⁴ Borzillo, *supra* note 1, at 84.

broadcasters and advertisers may not remain satisfied much longer.

Indecency has caused quite a stir in the nineties, ranging from the publication of naked bodies on magazine covers⁵ and Sharon Stone's leg crossing in the motion picture "Basic Instinct"⁶ to Madonna's flag-straddling antics⁷ and Cindy Crawford's provocative poses.⁸ In a landmark ruling in 1978, the Supreme Court confirmed that indecent speech, unlike obscenity, is entitled to constitutional protection under the First Amendment.⁹ Less than a decade later, the FCC, under the auspices of the Communications Act of 1934, cracked down on indecent speech broadcast over the

⁵ Retail stores, including Wal-Mart Stores, Inc., pulled an issue of Life magazine from its shelves because the cover showed a nude woman breast-feeding her baby. Harry Berkowitz, *Some Stores Ban Breast-feeding Cover*, NEWSDAY, Nov. 22, 1993, at 33. A number of Texas retailers reacted similarly, yanking Discover magazine from their newsracks after the Disney publication's cover featured an anatomically correct, naked ape. Barbara Kessler, *They Just Can't Bare It; Grocery Chain Pulls Magazine Depicting Unclothed Prehistoric Figures*, DALLAS MORNING NEWS, Nov. 18, 1993, at A21.

⁶ Sharon Stone's controversial scene, in which she teasingly crossed her legs while being interrogated by police investigators, helped establish the actress as a "supersex-star." Paul Morley, *Aiming Thigh-high*, SUNDAY TIMES, Mar. 21, 1993.

⁷ After rubbing her genitals with the Puerto Rican flag and subsequently wrapping herself in the Brazilian flag while performing in concert, pop star Madonna bowed to public outcry and judicial threats by abandoning her controversial habits midway through her "Girlie Show" tour. *Chastised Madonna Keeps Flag Out of Her Act in Brazil*, REUTERS, LTD., Nov. 6, 1993.

⁸ Supermodel Cindy Crawford suggestively posed with avowed lesbian pop star k.d. lang on the cover of Vanity Fair magazine in July, 1993. The cover photo shows an undressed and "very leggy" Crawford shaving lang, who is dressed as a man, seated in a barber's chair. In a photo inside the magazine, the pair appear as though they are about to kiss while lang strokes Crawford's bare hip. Anthony Scaduto, *Lang Shave Too Close for Cindy?*, NEWSDAY, July 7, 1993, at 22.

⁹ Federal Communications Comm'n v. Pacifica Found., 438 U.S. 726 (1978); see also Sable Communications v. Federal Communications Comm'n, 492 U.S. 115, 126 (1989).

radio, leaving the industry "in a quandary over what language is safe to broadcast and whether the government is trampling on the medium's freedom of expression."¹⁰ In a 1987 interview, then-FCC chairman Dennis Patrick told the *Los Angeles Times*, "[the FCC] has no interest in chilling protected speech, and broadcasters do have a legitimate concern about and interest in as much certainty as can be provided."¹¹ The FCC's actions during the next six years, including levying over one million dollars in statutory fines against radio stations that broadcast the Howard Stern Show,¹² certainly seem to have had a chilling effect.

The Stern show airs in fourteen markets and draws three million listeners every weekday morning. "We would have been fully national now if it hadn't been for the likes of Jesse Helms and the FCC slowing us down," asserts Stern,¹³ "The FCC has decided that what I do is disgusting and horrible for the morality of this country, which I don't agree with."¹⁴ What does Stern do to raise the ire of the FCC? He spends about five hours each morning filling the radio airwaves with salacious talk about his callers' breast sizes,¹⁵ lesbian stories,¹⁶ racial epithets from a southern

¹⁰ Dennis McDougal, *Radio Daze: FCC Moves Indecency Issue to Front Burner; Commission Caught in a Cross Fire Between First Amendment Champions and a 'Growing Public Outcry' for Action*, L.A. TIMES, Aug. 17, 1987, at 6-1.

¹¹ *Id.*

¹² Brooks Boliek, *Infinity Fined Again for Stern*, HOLLYWOOD REPORTER, Feb. 2, 1994.

¹³ Bruce Fretts, *Blow Hard: Is Howard Stern Hot Stuff -- Or Is He Just Full of Hot Air?*, ENT. WEEKLY, Oct. 15, 1993, at 24.

¹⁴ *Id.* at 26.

¹⁵ One listener complained about Stern's antics in an early letter to the FCC: "Between 6:45 and 7:00 a.m. on August 12, radio station WWDC-FM in Washington, D.C., released a transmission in which the on-air personality named Howard Stern encouraged a female caller to take nude pictures of herself and send them to him As I write this mildly vitriolic missive I hear the same Stern singing doggerel about passing gas and large-breasted Cubans I can't passively accept the fact that the license to broadcast includes the right to solicit

Ku Klux Klan leader,¹⁷ and parodies about Magic Johnson's sexual exploits.¹⁸

After Stern's 1988 Christmas radio broadcast, the FCC began to take action against him, issuing his employers \$1.8 million in indecency fines as of February, 1994.¹⁹ The FCC's tactics have had a chilling effect on the 14 stations that broadcast Stern across the country. Some of these stations have resorted to self-censorship by either editing the Stern show²⁰ or canceling it altogether.²¹ Even Stern himself has self-censored by toning down his broadcast. Nevertheless, the FCC continually tries the financial patience of Stern's employer, Infinity Broadcasting Corp. ("Infinity").²²

Under the current statutory framework for enforcing indecency rules, radio broadcasters often must wait years to resolve indecency charges leveled against them by the FCC.²³ This delay, coupled

nude photos. I can't even make the distinction between that and Dan Rather asking for a blowjob on the late news." HOWARD STERN, *PRIVATE PARTS* 417-18 (1993).

¹⁶ *Id.* at 19-33.

¹⁷ *Id.* at 266.

¹⁸ *Id.* at 349-52. In a song parody about Magic Johnson, Stern sang, "Oh, that Magic, when he banged you good. He didn't wear rubbers though he knew he should." *Nightline* (ABC News television broadcast, Dec. 17, 1992).

¹⁹ Boliek, *supra* note 12.

²⁰ Claudia Puig, *Stern Editing Elicits a New Kind of Shock; Radio: KLSX Owner Greater Media's Actions Draw Criticism From Legal Experts, Listeners and Even People who Oppose the 'Shock Jock's' Show*, L.A. TIMES, Mar. 17, 1993, at F1.

²¹ Eric Boehlert & Carrie Borzillo, *Mail Carrier Gets Stamp of Disapproval; Sklar Aftermath; Stern Out in Chicago*, BILLBOARD, Sept. 4, 1993, at 80.

²² Paul Farhi, *Stern Gets Some Shock Treatment; Fined Again; Company Reins in Disc Jockey*, WASH. POST, Aug. 13, 1993, at D1.

²³ Once a listener files a complaint with the FCC, the broadcaster becomes entangled with the agency in a process that can drag on for months or

with the expense of defending against indecency charges, has forced broadcasters to self-censor. The reason for such self-censorship is simple: broadcasters are uncertain which programming the FCC will deem "indecent." Presently, the FCC utilizes a standard for indecent programming that is arguably vague. Furthermore, the FCC inconsistently applies this standard to some radio broadcasts and not others. Consequently, radio broadcasters, under pressure from station ownership, have self-censored by toning down their programs rather than risk garnering additional statutory penalties or their current status of employment. Such self-censorship deprives the listening audience of any choice in radio programming. This lack of choice in radio programming was acknowledged by Justice Brennan in his stinging *Pacifica* dissent. He peered into the future and discussed the ramifications of the plurality's decision to ban indecent language from the radio airwaves during hours when children are likely to be listening:

Today's decision will . . . have its greatest impact on broadcasters desiring to reach, and listening audiences composed of, persons who do not share the Court's view as to which words or expressions are acceptable The Court's decision may be seen for what, in the broader perspective, it really is: another of the dominant culture's inevitable efforts to force those groups who do not share its mores to conform to its way of thinking, acting and speaking.²⁴

This Note will address how the procedural aspects of the FCC's enforcement of indecency rules encourage the self-censorship that has plagued present-day radio broadcasters. To reduce the radio broadcaster's urge to self-censor, this Note proposes that the FCC (1) speed up its statutory enforcement of indecency rules and (2)

even years. See *infra* notes 55, 57, 73, 75-81.

²⁴ Federal Communications Comm'n v. *Pacifica Found.*, 438 U.S. 726, 776-77 (1978).

uniformly enforce these rules against all offending radio broadcasters. By accomplishing these goals, the FCC will help broadcasters to "preserve [their] right to send, and the right of those interested to receive, a message entitled to full First Amendment protection"²⁵ that remains untainted by self-censorship.

II. CONSTITUTIONAL BACKGROUND

A. *The First Amendment and Broadcast Media*

One of the earliest scuffles between radio broadcasters and the United States Government centered on the issue of the Fairness Doctrine and its implications when personal attacks and political editorials are broadcast on the radio.²⁶ The Supreme Court held in *Red Lion Broadcasting v. FCC*²⁷ that the Fairness Doctrine requires broadcasters to give individuals the right to reply to personal attacks or political editorials on the radio. In reaching this conclusion, the Court acknowledged that although radio broadcasters do have First Amendment rights, these rights are not absolute because the Communications Act of 1934 requires broadcasters to operate in the public interest and under license by the government.²⁸

[D]ifferences in the characteristics of news media justify differences in the First Amendment standards applied to them. . . . Just as the Government may limit the use of sound amplifying equipment potentially so noisy that it drowns out civilized private speech, so may the Government limit the use of

²⁵ *Id.* at 766.

²⁶ *Red Lion Broadcasting v. Federal Communications Comm'n*, 395 U.S. 367 (1969).

²⁷ *Id.*

²⁸ Mark Conrad, *Violence on Television: What Congress is Doing*, N.Y. L.J., Aug. 27, 1993, at 7.

broadcast equipment.²⁹

The Court reasoned that because of the limited number of radio frequencies available, there is no unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.³⁰

However, the Court hastened to add that radio broadcasters still have some level of First Amendment protections. The anti-censorship provision of the Communications Act of 1934 forbids FCC interference with "the right of free speech by means of radio communication."³¹ Although, the Court has liberally construed the anti-censorship provision in cases of prior restraint³² involving editorial advertisements³³ and FCC-promulgated cable television rules,³⁴ it has refused to extend the provision to cover indecency or

²⁹ *Red Lion*, 395 U.S. at 386-87.

³⁰ *Id.* at 388.

³¹ 47 U.S.C. § 326 (1948); *Red Lion*, 395 U.S. at 389-90.

³² "The prohibition against censorship unequivocally denies the [FCC] any power to edit proposed broadcasts in advance and to excise material considered inappropriate for the airwaves. The prohibition, however, has never been construed to deny the [FCC] the power to review the content of completed broadcasts in the performance of its regulatory duties." *Federal Communications Comm'n v. Pacifica Found.*, 438 U.S. 726, 735 (1978).

³³ *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973). In holding that the Communications Act of 1934 does not require broadcasters to accept editorial advertisements, the Court noted that the anti-censorship provision of the Act reflects congressional intent "to permit private broadcasting to develop with the widest journalistic freedom consistent with its public obligations." *Id.* at 110.

³⁴ *Federal Communications Comm'n v. Midwest Video Corp.*, 440 U.S. 689, 704 (1979) (holding that the FCC exceeded its statutory authority when it promulgated rules requiring cable systems to develop a 20-channel minimum capacity by 1996, to make available channels for access by third parties and to furnish equipment and facilities for this access).

obscenity.³⁵

B. Offensive Conduct after Red Lion Broadcasting

Two years after *Red Lion Broadcasting*, the Supreme Court considered individuals' First Amendment rights to express themselves in ways that others might consider offensive or vulgar. The defendant in *Cohen v. California*³⁶ was arrested for violating a state statute that prohibited disturbing the peace after he was seen wearing a jacket bearing profane language in a public courthouse corridor.³⁷ After acknowledging that the First Amendment has "never been thought to give absolute protection to every individual to speak whenever or wherever he pleases, or to use any form of address in any circumstances that he chooses,"³⁸ the Court reversed the conviction:

The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be

³⁵ *Pacific*, 438 U.S. at 737 ("[The anti-censorship provision's legislative] history makes it perfectly clear that it was not intended to limit the [FCC's] power to regulate the broadcast of obscene, indecent, or profane language.").

³⁶ *Cohen v. California*, 403 U.S. 15 (1971).

³⁷ *Id.* at 16. Cohen was wearing a jacket that bore the words, "Fuck the Draft." Women and children were present in the corridor where Cohen wore the jacket. He was subsequently convicted of violating a California law which prohibits "maliciously and willfully disturb[ing] the peace or quite of any neighborhood or person [by] offensive conduct." *Id.* The defendant testified that he wore the jacket in an effort to inform the public of his strong feelings against the Vietnam War and the draft, in particular. The Court noted that Cohen did not threaten anyone, nor, for that matter, did anyone threaten or commit violence as a result of his conduct. *Id.* at 17-18.

³⁸ *Id.* at 19.

voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.³⁹

Cohen was the first case in which the high court directly addressed content regulation of free speech. The majority expressed its opposition to the regulation of the manner of speech by noting that "one man's vulgarity is another's lyric."⁴⁰

Following the *Cohen* rationale, the Court later held that the First Amendment protects speech against content-based regulation.⁴¹ In one case, the Court struck down a city ordinance that prohibited drive-in theaters from showing films with nudity. The Court went one step further than it did in *Cohen* by suggesting that "offensive" speech may be prohibited "only when the speaker intrudes on the privacy of the home . . . or the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure."⁴² This burden to avoid exposure or "avert [one's] eyes" falls upon the viewer, not the speaker, according to the Court.⁴³

C. *First Amendment Concerns of Indecent Speech in Broadcast Media*

Three years later, the Court re-examined the listener's burden to avoid exposure to "offensive speech" when radio was the

³⁹ *Id.* at 24.

⁴⁰ *Id.* at 25.

⁴¹ *Erznoznik v. Jacksonville*, 422 U.S. 205 (1975).

⁴² *Id.* at 209.

⁴³ *Id.* at 210-11.

medium used to channel it. In *FCC v. Pacifica*,⁴⁴ a three-justice plurality of the Court suggested that when the medium involved is radio, the burden shifts to the speaker, or more specifically, to the radio broadcaster using the public airwaves. The Court supported the FCC's determination that a radio broadcast by humorist George Carlin was indecent within the meaning of 18 U.S.C. Section 1464.⁴⁵ After finding that the broadcast that contained the infamous seven dirty words was made up of "obnoxious, gutter language," the plurality acknowledged that broadcasting receives the most limited First Amendment protection of all forms of communication. Justice Brennan dissented, questioning the ramifications of the Court's exercise of content-based regulation of a radio broadcast. Unconvinced by the argument that children may be in the listening audience, Justice Brennan argued that if anyone was to regulate the content of a radio broadcast, it should be the listener, rather than the United States Government. He stated:

Whatever the minimal discomfort suffered by a listener who inadvertently tunes into a program he finds offensive during the brief interval before he can simply extend his arm and switch stations or flick the 'off' button, it is surely worth the candle to preserve the broadcaster's right to send, and the right of those interested to receive, a message entitled to full First Amendment protection. To reach a contrary balance, as does the Court, is to clearly follow Mr. Justice Stevens' reliance on

⁴⁴ 438 U.S. 726 (1978).

⁴⁵ *Id.* The 12-minute Carlin monologue, entitled "Filthy Words," was broadcast in the afternoon over WBAI, a New York, listener-supported radio station. Carlin's satiric monologue was part of a WBAI program on contemporary society's attitudes toward language. Carlin began by referring to his thoughts about "the words you couldn't say on the public, ah, airwaves, um, the ones you definitely wouldn't say, ever." He proceeded to list those words and repeat them over and over again in a variety of colloquialisms. A few weeks after the broadcast, a man who allegedly heard the monologue while driving with his young son filed a complaint with the FCC. *Id.* at 729-30.

animal metaphors, 'to burn the house to roast the pig.'⁴⁶

Justice Brennan concluded, "I find the reasoning by which my Brethren conclude that the FCC censorship they approve will not significantly infringe on First Amendment values both disingenuous as to reality and wrong as a matter of law."⁴⁷

Although the Court has suggested that its *Pacifica* decision was narrowly tailored to the specific facts, the decision has bolstered the power of the FCC to enforce indecency and obscenity rules. In the past few years, the Supreme Court has reviewed indecent speech broadcast over other media,⁴⁸ but it has never revisited the issue of indecency on the radio. Even though it has not issued a recent ruling with respect to indecent radio broadcasts, the Court has reaffirmed its position that the First Amendment protects some forms of offensive conduct.

D. *The Present Status of The First Amendment and Offensive Conduct*

The Court continues to subscribe to the proposition that the First Amendment prohibits content regulation of speech by the government.⁴⁹ Appellate courts have sustained this view in other

⁴⁶ *Id.* at 765-66 (citations omitted).

⁴⁷ *Id.* at 772-73.

⁴⁸ See, e.g., *Sable Communications, Inc. v. Federal Communications Comm'n*, 492 U.S. 115 (1989). In *Sable*, the Court addressed the constitutionality of a 1988 congressional amendment to the Communications Act of 1934, devised to regulate the pay-per-call "sexually-oriented pre-recorded telephone messages." The amendment criminally prohibited indecent or obscene phone messages. In striking down the indecency prohibition, the Court held that "[s]exual expression which is indecent but not obscene is protected by the First Amendment." *Id.* at 126.

⁴⁹ See, e.g., *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992). Several teenagers were prosecuted under a city "Bias Motivated Crime Ordinance" after they allegedly burned a cross in a black family's yard. Although the Court unanimously agreed that the ordinance violated the First Amendment, the justices

contexts, such as a university fraternity's "ugly woman contest"⁵⁰ and a student protest against strikebreaking teachers.⁵¹ Since the *Pacifica* decision, however, neither the Supreme Court nor the appellate courts have addressed indecent speech on the radio by arguing that the FCC has forced radio stations to engage in self-censorship.⁵² The issue did surface recently in the District Court in *Action for Children's Television v. Federal Communications Comm'n* ("ACT III").⁵³

The ACT III plaintiffs⁵⁴ challenged the constitutionality of the

differed in their reasoning, resulting in a 5-4 vote. Justice Scalia, who wrote the opinion of the Court, struck down the law as content-based, "prohibit[ing] otherwise permitted speech solely on the basis of the subjects the speech addresses." *Id.* at 2542.

⁵⁰ *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386 (4th Cir. 1993) (holding that live, non-obscene entertainment entitled to First Amendment protection).

⁵¹ *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524 (9th Cir. 1992) (stating that student's "scab" button not inherently disruptive for purposes of First Amendment).

⁵² The D.C. Circuit Court of Appeals has examined the FCC's regulation of indecent radio broadcasts by setting up "safe harbor" hours during which indecent speech may not be aired. *Action for Children's Television v. Federal Communications Comm'n*, 852 F.2d 1332 (D.C. Cir. 1988) [hereinafter ACT I], *vacated*, 932 F.2d 1504 (D.C. Cir. 1991) [hereinafter ACT II], *reh'g denied*, 1991 U.S. App. LEXIS 25425 (D.C. Cir. Aug. 28, 1991), *cert. denied*, 112 S. Ct. 1281 (1992), *aff'g on remand*, 11 F.3d 170 (D.C. Cir. 1993) [hereinafter ACT IV]. See also *Action for Children's Television v. Federal Communications Comm'n*, 827 F. Supp. 4 (D. D.C. 1993) [hereinafter ACT III]. See *infra* text accompanying note 75.

⁵³ 827 F. Supp. at 4.

⁵⁴ Initially, plaintiffs consisted of a group of broadcasters and interested listeners and viewers. 827 F. Supp. at 5. However, the district court dismissed all of the plaintiff's except for Infinity Broadcasting Corp., the owner of the Howard Stern Show, due to lack of standing and ripeness. *Id.* at 12-17. The court finally reached the merits only with respect to Infinity's claim.

procedures that the FCC uses to regulate indecent radio broadcasts.⁵⁵ The broadcasters sought declaratory and injunctive relief

⁵⁵ Specifically, Infinity challenged the constitutionality of the forfeiture provisions of 47 U.S.C. § 503(b)(4):

(b) Activities constituting violations authorizing imposition of forfeiture penalty; amount of penalty; procedures applicable; persons subject to penalty; liability exemption period

(4) Except as provided in paragraph (3) of this subsection, no forfeiture penalty shall be imposed under this subsection against any person unless and until --

(A) the Commission issues a notice of apparent liability, in writing, with respect to such person;

(B) such notice has been received by such person, or until the Commission has sent such notice to the last known address of such person, by registered or certified mail; and

(C) such person is granted an opportunity to show, in writing, within such reasonable period of time as the Commission prescribes by rule or regulation, why no such forfeiture penalty should be imposed.

Such a notice shall (i) identify each specific provision, term, and condition of any Act, rule, regulation, order, treaty, convention, or other agreement, license, permit, certificate, instrument, or authorization which such person apparently violated or with which such person apparently failed to comply; (ii) set forth the nature of the act or omission charged against such person and the facts upon which such charge is based; and (iii) state the date on which such conduct occurred. Any forfeiture penalty determined under this paragraph shall be recoverable pursuant to section 504(a) of this title.

to prevent the FCC from using the forfeiture provisions of the Communications Act of 1934⁵⁶ to enforce the prohibition against indecent programming until those provisions are modified. They argued that without modification to afford real procedural protections required by the Constitution, the use of forfeiture proceedings is unconstitutional.⁵⁷ The broadcasters further contended that the FCC frequently uses forfeiture orders to announce new indecency standards and threatens broadcasters with monetary sanctions or license revocation if they refuse to comply. In addition, they contended that the FCC uses its Notice of Apparent Liability ("NAL")⁵⁸ to provide binding standards for indecency. In effect, these FCC procedures, combined with a lack of prompt judicial review of an indecency forfeiture order, compel broadcasters to self-censor. Broadcasters would rather censor their own broadcasts than risk the wrath of the FCC and its commissioners, especially because the broadcasters believe that they have no hope of prompt judicial review.⁵⁹ The plaintiffs argued that the FCC uses "pending fines and the threat of additional penalties to browbeat broadcasters into self-censorship."⁶⁰

The district court found that 47 U.S.C. Section 503(b)(4) could not be declared unconstitutional because plaintiff Infinity Broadcasting Corp., the owner of the Howard Stern Show, failed to meet

⁵⁶ Issued pursuant to 47 U.S.C. § 503(b). Forfeiture orders are issued by the FCC or its Mass Media Bureau after the FCC has reviewed the broadcaster's response to its Notice of Apparent Liability. If the broadcaster fails to appeal the forfeiture order, it represents the final agency determination that the broadcaster has violated 18 U.S.C. § 1464. *ACT III*, 827 F. Supp. at 5, discussed *infra* note 58.

⁵⁷ Jeffrey P. Cunard, *F.C.C. Watch*, ENT. LAW & FIN., Mar. 1993, at 2.

⁵⁸ The NAL is "preliminary notice issued by the Commission, or by Bureaus/Offices under delegated authority, alleging the violation of the Commission's rules and requesting payment from the alleged violator." *ACT III*, 827 F. Supp. at 7 (citations omitted).

⁵⁹ *Id.* at 9.

⁶⁰ *A Stern Ruling*, NAT'L L.J., May 31, 1993, at 55.

its "heavy burden."⁶¹ The court reaffirmed the *Pacifica* plurality's distinction between radio and other media, finding that radio broadcasts receive limited First Amendment protection as compared with publications because broadcast frequencies are a limited resource. Therefore, they must serve the public interest.⁶² In addition, the court noted that Infinity can avoid the risk of forfeiture as long as it broadcasts its indecent material during the safe harbor of the evening and early morning hours.⁶³ As the court phrased it, "This court will not construe the FCC forfeiture scheme as a system of censorship when that system operates for two-thirds of the broadcasting day."⁶⁴

In granting the government's cross-motion for summary judgment, the district court stated, "Plaintiff may feel a chill because of the FCC's forfeiture scheme, but that chill is temporal

⁶¹ *ACT III*, 827 F. Supp. at 16. Infinity argued that 47 U.S.C. § 503(b)(4) is "facially invalid because it creates a system of prior restraint and censorship without providing for prompt judicial review of these censorship decisions." *Id.* The district court pointed out that a facial challenge to a legislative act is the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exist under which the Act would be invalid. In the instant case, the court concluded that Infinity failed to meet this "high standard." *Id.*

⁶² *ACT III*, 827 F. Supp. at 17. In addition, the court did not construe the FCC's forfeiture scheme as one of prior restraint and censorship. "The FCC is enforcing a court-approved definition of indecency through a system that provides for notice and judicial review. This is the FCC's regulation of an industry that serves at the pleasure of the public interest." *Id.* at 19. The district court summarily addressed three issues: the definition of indecency, notice and judicial review. However, it failed to analyze how these issues contribute to the self-censorship by radio broadcasters.

⁶³ *ACT I*, 852 F.2d 1332 (D.C. Cir. 1988); *ACT II*, 932 F.2d 1504 (D.C. Cir. 1991). The *ACT III* court's reliance on the *ACT I* and *ACT II* decisions has been jeopardized by the D.C. Circuit's latest holding in *ACT IV*, which effectively eliminated the safe harbor. *ACT IV*, 11 F.3d 170, 182 (D.C. Cir. 1993). See *infra* text accompanying note 75.

⁶⁴ *ACT III*, 827 F. Supp. at 19. See *supra* text accompanying note 62.

only and has not been unconstitutionally inflicted.¹⁶⁵ The *ACT III* district court relied on two previous decisions: *Pacifica*⁶⁶ and *ACT I*.⁶⁷ This Note attempts to do what the *ACT III* district court failed to do: address the validity of Infinity's arguments, emphasizing that the lengthy statutory enforcement mechanism for indecency rules induces self-censorship and that these rules are not consistently applied to radio broadcasters.

III. THE SELF-CENSORSHIP PROBLEM IN RADIO BROADCASTING

A. *Enforcement of Indecency Rules Leads to Self-Censorship by Broadcasters*

The FCC has the authority to take action when radio broadcasters air "obscene, indecent, or profane" utterances in violation of 18 U.S.C. Section 1464.⁶⁸ It may impose sanctions, such as forfeitures,⁶⁹ cease and desist orders⁷⁰ and license revocations.⁷¹ The FCC has also delayed renewal of broadcast licenses and approval of transfer applications in order to investigate indecency complaints against broadcasters.⁷² Under the current statutory framework, the FCC unfairly imposes forfeitures upon radio broadcasters for allegedly airing indecent speech. After a broadcaster has been cited by the FCC for airing what the FCC deems to be indecent speech,

⁶⁵ *Id.*

⁶⁶ 438 U.S. 726 (1978).

⁶⁷ 852 F.2d 1332. *See supra* text accompanying note 52.

⁶⁸ *See, e.g.*, 47 U.S.C. § 503(b)(1)(D) (1992).

⁶⁹ *Id.*

⁷⁰ 47 U.S.C. § 312(b)(2) (1982).

⁷¹ 47 U.S.C. § 312(a)(6) (1982).

⁷² *ACT III*, 827 F. Supp. 4, 6 (D. D.C. 1993) (citation omitted).

the offender must persist through a lengthy adjudication process -- remaining in limbo, on the air, in the interim. It is during this interim stage that the broadcaster self-censors for fear of racking up additional FCC citations.

B. Procedural Remedies to Eliminate Self-Censorship

Since it is likely that the broadcaster does not share the FCC's notions and ideas about how "indecent" is defined, the FCC must speed up its statutory enforcement process and issue a quick ruling that may serve as a guidepost for the broadcaster.⁷³ Once the FCC speeds up its enforcement mechanism, it must even-handedly apply its indecency rules to all radio broadcasters. To reduce the radio broadcaster's urge to self-censor, the FCC needs to implement two procedural remedies that demonstrate the government's respect for the First Amendment rights of radio broadcasters. The FCC could make significant progress in acknowledging the broadcaster's freedom of speech as well as the audience's freedom to listen by speeding up its enforcement of indecency rules and applying these rules even-handedly to all radio broadcasters.

1. Faster Statutory Enforcement Mechanism

The FCC's current enforcement system begins when the agency receives a complaint from a listener that a licensee has aired indecent speech.⁷⁴ After it gets the complaint, which may be accompanied by either written transcripts or audio tapes of the offending speech, FCC staff members determine whether the broadcast is indecent pursuant to the existing definition and if so,

⁷³ According to Timothy Dyk, attorney for Action for Children's Television, "One can look through all the various FCC rulings that say 'indecent' has been violated, and there is no consistent, coherent pattern which would permit a station to know in the future whether it has broken the rule or not." Nat Hentoff, *Censors of the Airwaves*, WASH. POST, Mar. 6, 1993, at A21.

⁷⁴ ACT III, 827 F. Supp. at 6.

whether it was aired outside of the safe harbor time period.⁷⁵ The FCC Complaints and Investigations Branch, Enforcement Division,

⁷⁵ The "safe harbor" is a restricted period of time, during which radio broadcasters may not air indecent material. The restriction was developed to minimize the risk of children in the listening audience when indecent speech is aired. *ACT II*, 932 F.2d 1504, 1506 (D.C. Cir. 1991). During the hours of 6:00 a.m. to 8:00 p.m., radio broadcasters cannot air indecent, though constitutionally protected material without incurring the wrath of the FCC. After denying the FCC's imposition of a 24-hour ban on indecent material, the D.C. Circuit Court of Appeals stayed the FCC's enforcement of the midnight to 6:00 a.m. safe harbor. On September 14, 1993, the *ACT II* parties returned to the Court of Appeals for a hearing on the safe harbor. See *Lawyers Questioned Closely in 3rd Appeals Court Review of FCC Indecency Rules*, PUB. BROADCASTING REP., Sept. 24, 1993; Brooks Boliek, *FCC Policies on Indecency Run Into Static*, HOLLYWOOD REPORTER, Sept. 17, 1993; Bill Holland, *Court Negotiates Safe Harbor; FCC Waives Market Rule*, BILLBOARD, Aug. 7, 1993, at 67.

In a sharply-worded opinion, the D.C. Circuit Court of Appeals struck down the FCC's 1993 Order, imposing the 6:00 a.m. to midnight safe harbor, as unconstitutional. *ACT IV*, 11 F.3d 170, 182 (D.C. Cir. 1993). Although the court recognized "the compelling nature of the government's interest in helping parents supervise their children and in independently protecting the well-being of its youth, . . . restrictions on First Amendment rights, even when imposed in the best interest of children, must still be narrowly tailored and no more burdensome than necessary to advance the protective goal." *Id.* The court found that the 6:00 a.m. to midnight safe harbor was arrived at solely on the basis of a judgment that fewer children are in the broadcast audience around those hours. *Id.* "[N]o such one-dimensional analysis takes account of the First Amendment interests of older minors and adult viewers in receiving constitutionally protected material. Our system of government demands more precision when rights protected by the First Amendment are curtailed." *Id.*

Notwithstanding the D.C. Circuit's *ACT IV* decision, the FCC will continue to enforce regulations against broadcast indecency using a narrower safe harbor -- from 6:00 a.m. until 8:00 p.m. Dennis Wharton, *FCC to Reduce Hours for Indecency Regs*, VARIETY, Dec. 6, 1993, at 24. Interim FCC Chairman James Quello made this announcement one day after the *ACT IV* decision. Newly-appointed FCC Chairman Reed Hundt will ultimately decide whether his agency will appeal the *ACT IV* decision to the U.S. Supreme Court. *Id.* Hundt, an attorney formerly with Latham & Watkins, has declined interviews and not made his views on the indecency issue known. Doug Halonen, *Clinton Makes His FCC Pick*, ELECTRONIC MEDIA, July 5, 1993, at 1. However, he recently represented Evergreen Media in its indecency battle with the FCC. *United States v. Evergreen Media Corp.*, 832 F. Supp. 1183 (N.D. Ill. 1993).

Mass Media Bureau ("MMB"), in consultation with the General Counsel's office, decides whether to investigate the complaint. If the MMB decides not to investigate, the complaint is dismissed. Otherwise, the FCC issues a Letter of Inquiry ("LOI") to the broadcaster. Since the complainant generally does not serve a complaint upon the radio station, the LOI serves as the first notice to a broadcaster that there has been a potential indecency violation. The broadcaster has its first opportunity to respond to the charges contained in the LOI, which also serves as a request by the FCC for additional information. The LOI does not represent the final determination of an indecency violation.⁷⁶

Upon receiving the broadcaster's LOI response, which is generally in the form of a letter, the FCC decides whether an indecency violation has occurred. The FCC currently defines broadcast 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."⁷⁷ If the FCC concludes that the broadcaster violated indecency rules, it sends the offender a Notice of Apparent Liability ("NAL"), "a preliminary notice issued by the Commission . . . alleging the violation of the . . . rules and requesting payment from the alleged violator."⁷⁸ Again, the broadcaster has an opportunity to respond to the FCC -- or it

⁷⁶ ACT III, 827 F. Supp. at 6.

⁷⁷ ACT IV, 11 F.3d at 172, citing 1993 Order, 8 F.C.C.R. at 704-5 ¶4 n. 10. This is the first time that a court has adopted the FCC's introduction of "context" into the definition of indecency. Context was never formally adopted by the U.S. Supreme Court in *Federal Communications Comm'n v. Pacifica Found.*, 438 U.S. 726, 731-32 (1978). See also ACT III, 827 F. Supp. at 6.

⁷⁸ See, e.g., Notice of Apparent Liability to Sagittarius Broadcasting Corp., 5 F.C.C.R. 7291, 1990 FCC LEXIS 6522 (Dec. 7, 1990); Notice of Apparent Liability to Sagittarius Broadcasting Corp., Infinity Broadcasting Corp. of Pennsylvania and Infinity Broadcasting Corp. of Washington, D.C., 8 F.C.C.R. 2688, 1992 FCC LEXIS 6932 (Dec. 18, 1992).

can simply acquiesce and pay the forfeiture fine.⁷⁹ Broadcasters or their attorneys often make oral and written presentations to the FCC commissioners or staff members in an effort to persuade the agency not to issue a forfeiture order. In reaching a final decision, the FCC considers "the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."⁸⁰ If the FCC finds against the broadcaster, it issues a forfeiture order.⁸¹ The broadcaster may petition the FCC for reconsideration of the order. In the event that the broadcaster fails to pay the forfeiture, the FCC may institute a collection action in the United States District Court.⁸²

This indecency enforcement process can be quite lengthy, as evidenced by four specific complaints received by the FCC over the past two years.⁸³ San Francisco radio station KMEL-FM was

⁷⁹ The forfeiture fine, determined by statute, "shall not exceed \$25,000 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of \$250,000 for any single act or failure to act [described in §503(b)(1)]." 47 U.S.C. § 503(b)(2)(A). The FCC may aggregate these fines in one NAL. Thus, the agency may fine Howard Stern's employers \$600,000 for broadcasting indecent speech over a dozen days on three radio stations. Mass Media Bureau, *FCC Fines Infinity Broadcasting \$600,000 for Indecent Broadcasts*, FCC Report No. MM-684, 1992 FCC LEXIS 6906 (Dec. 18, 1992).

⁸⁰ See 47 U.S.C. § 503(b)(2)(D); 47 C.F.R. § 1.80(b)(4).

⁸¹ See, e.g., *In Re Liability of Sagittarius Broadcasting Corp.*, 7 F.C.C.R. 6873, 1992 FCC LEXIS 6042 (Oct. 23, 1992); *In Re Sagittarius Broadcasting Corp.*, 8 F.C.C.R. 3600, 1993 FCC LEXIS 2504 (May 20, 1993).

⁸² FCC Directive 1157.1, at 4-5.

⁸³ *In Re Liability of San Francisco Century Broadcasting, L.P.*, 8 F.C.C.R. 498, 1993 FCC LEXIS 76 (Jan. 7, 1993); Notice of Apparent Liability to Sagittarius Broadcasting Corp., Infinity Broadcasting Corp. of Pennsylvania and Infinity Broadcasting Corp. of Washington, D.C., 8 F.C.C.R. 2688, 1992 FCC LEXIS 6932 (Dec. 18, 1992); *In Re Liability of Sagittarius Broadcasting Corp.*, 7 F.C.C.R. 6873, 1992 FCC LEXIS 6042 (Oct. 23, 1992); *In Re Liability of Evergreen Media Corp.*, 6 F.C.C.R. 502, 1991 FCC LEXIS 380 (Jan. 28, 1991).

cited by the FCC for an indecent broadcast that aired between August 20 and September 16, 1991.⁸⁴ The FCC issued an NAL to San Francisco Century Broadcasting, L.P., KMEL's parent company, on July 29, 1992 -- over ten months after the latest alleged infraction.⁸⁵ Nearly six months later, the FCC issued a forfeiture order.⁸⁶ Therefore, KMEL-FM had to wait almost *a year and a half* until the FCC conclusively found it to be in violation of indecency rules. In the second and more publicized example, Infinity Broadcasting was issued an NAL on December 18, 1992 for a Howard Stern broadcast that had aired *over a year* earlier.⁸⁷ In the third case, three Infinity radio stations were again cited by the FCC for an indecent Howard Stern Christmas broadcast that aired on December 16, 1988.⁸⁸ The FCC issued Infinity an NAL over 23 months later,⁸⁹ followed by a forfeiture order in

⁸⁴ The complaint alleged that KMEL aired indecent material on the Rick Chase Show between the hours of 2:00 p.m. and 6:00 p.m. The radio segment was called "Dinner Across America," and featured a host calling people to ask them "what was the last thing you had in your mouth?" *FCC Upholds Fine Against KMEL-FM \$25,000 Levied for Indecency on 'Rick Chase Show'*, S.F. CHRON., Jan. 9, 1993, at C3.

⁸⁵ Notice of Apparent Liability to San Francisco Century Broadcasting, L.P., 7 F.C.C.R. 4857, 1992 FCC LEXIS 4165 at *2 (Jul. 29, 1992).

⁸⁶ *In Re Liability of San Francisco Century Broadcasting, L.P.*, 8 F.C.C.R. 498.

⁸⁷ Notice of Apparent Liability to Sagittarius Broadcasting Corp., Infinity Broadcasting Corp. of Pennsylvania and Infinity Broadcasting Corp. of Washington, D.C., 8 F.C.C.R. 2688, 1992 FCC LEXIS 6932 at *3. The broadcast in question aired between October and December, 1992, during the hours of 6:00 a.m. and 10:00 a.m., on three Infinity stations: WXRK-FM (New York), WYSP-FM (Philadelphia) and WJFK-FM (Washington, D.C.).

⁸⁸ The broadcast at issue aired during the hours of 6:00 a.m. and 10:00 a.m., on three Infinity stations: WXRK-FM (New York), WYSP-FM (Philadelphia) and WJFK-FM (Washington, D.C.).

⁸⁹ Notice of Apparent Liability to Sagittarius Broadcasting Corp., 5 F.C.C.R. 7291, 1990 FCC LEXIS 6522 (Dec. 7, 1990).

October, 1992.⁹⁰ One month after the order, Infinity requested a stay and filed a petition for reconsideration. The FCC denied the petition in another order issued May 20, 1993.⁹¹ Thus, Infinity waited *more than 4 years* for a final resolution of its complaint by the FCC. In the fourth and final example, which recently concluded in federal court, WLUP-AM was issued an NAL on November 30, 1989 for allegedly indecent broadcasts that aired in March, 1989 and August, 1987.⁹² The FCC issued a forfeiture order on January 28, 1991,⁹³ over a year later, and denied the broadcaster's motion to reconsider on October 18, 1991.⁹⁴ The FCC subsequently commenced an action in the Northern District of Illinois to collect its indecency fine from the broadcaster. The court found in the FCC's favor in its opinion of August 24, 1993.⁹⁵ In this final example, anywhere from *4 years and 5 months* (for the 1989 broadcast) to *6 years* (for the 1987 broadcast) elapsed before the broadcaster's indecency violation was resolved.

Timothy Dyk, attorney for Action for Children's Television, argued to District Judge Royce Lamberth in *ACT III*, that "[e]ven the worst pornographers in the country . . . have the right to prompt judicial review. There is no reason these proceedings could not be concluded promptly."⁹⁶ Judge Lamberth acknowledged the lack of expedition that broadcasters subject to the FCC's forfeiture

⁹⁰ *In Re Liability of Sagittarius Broadcasting Corp.*, 7 F.C.C.R. 6873.

⁹¹ *In Re Sagittarius Broadcasting Corp.*, 8 F.C.C.R. 3600, 1993 FCC LEXIS 2504 (May 20, 1993).

⁹² Notice of Apparent Liability to Evergreen Media Corp., 6 F.C.C.R. 3708, 1989 FCC LEXIS 3264 (Nov. 30, 1989).

⁹³ *In Re Liability of Evergreen Media Corp.*, 6 F.C.C.R. 502.

⁹⁴ *In Re Petition for Reconsideration Concerning Liability of Evergreen Media Corp.*, 6 F.C.C.R. 5950, 1991 FCC LEXIS 5465 (Oct. 18, 1991).

⁹⁵ *United States v. Evergreen Media Corp.*, 832 F. Supp. 1183 (N.D. Ill. 1993).

⁹⁶ Dennis Wharton, *B'Casters Decry 'Indecent' Procedures*, DAILY VARIETY, May 11, 1993, at 8.

process must endure:

There are few if any checks on the duration of a forfeiture proceeding. There is no statute or regulation that (1) imposes time limits on the FCC's processing of indecency complaints; (2) requires expedition in such processing; (3) imposes time limits on the United States Attorney's filing of forfeiture actions; or (4) requires expeditious filing of forfeiture actions. Once a forfeiture action ultimately is filed in federal court, no statute requires the District Court to decide the action within a specified period of time, and there is no requirement of expedition.⁹⁷

These time concerns may be easily remedied by incorporating strict time limitations into the forfeiture statute. These limitations should be applied at two stages of the FCC's enforcement process: the issuance of an NAL and the commencement of an enforcement action in U.S. District Court. By imposing a limitation at the "front end" of the process, the FCC will be required to quickly inform a broadcaster about an alleged indecency violation by issuing an NAL within six months after the broadcast in question.⁹⁸ Once the broadcaster is informed by the NAL, a time limitation at the "back end" of the process forces the FCC to promptly file an enforcement action in federal court within six months after the forfeiture order

⁹⁷ *ACT III*, 827 F. Supp. 4, 8 (D. D.C. 1993).

⁹⁸ The forfeiture statute, as amended in 1992, provides that "[n]o forfeiture penalty shall be determined or imposed against any person under this subsection if -- (A) such person holds a broadcast station license issued under subchapter III of this chapter and if the violation charged occurred -- (i) more than 1 year prior to the date of the issuance of the required notice or notice of apparent liability." 47 U.S.C. § 503(b)(6)(A)(i). By changing subsection (i) to read, "more than 6 months prior to the date of the issuance of the required notice or notice of apparent liability," broadcasters will learn of their violations faster and will be able to respond accordingly.

has been issued.⁹⁹ These statutory time limitations are required so that any indecency complaints against the broadcaster can be resolved quickly. Fast resolution means less uncertainty for broadcasters as to what the FCC considers indecent. As a result, there is less time for broadcasters to self-censor.

On average, it takes the FCC 14 months to respond to an indecency complaint with an NAL.¹⁰⁰ It takes another 11 months for a notice of liability (or forfeiture order) to be issued and another 15 months for the FCC to turn the matter over to the Justice Department if the broadcaster refuses to pay.¹⁰¹ After that time, it can take up to three years for the case to reach the courts.¹⁰² This delay, coupled with the legal expense of challenging the FCC,¹⁰³ encourages broadcaster self-censorship.¹⁰⁴ According to Jeff Cole, media ethicist at UCLA, "It makes a broadcaster ask, 'Why bother?' in the face of listener complaints,

⁹⁹ The forfeiture statute presently provides that "[i]f any person fails to pay an assessment of a forfeiture penalty . . . after it has become a final and unappealable order . . . the Commission shall refer the matter to the Attorney General of the United States, who shall recover the amount assessed in any appropriate district court of the United States." 47 U.S.C. § 503(b)(3)(B). To compel quicker enforcement in the district court, this Note proposes amending the statute to read, "the Commission *has six months* to refer the matter to the Attorney General of the United States."

¹⁰⁰ Joe Flint, *Broadcasters Argue Indecency Enforcement Takes Too Long*, BROADCASTING & CABLE, May 17, 1993, at 45.

¹⁰¹ *Id.*

¹⁰² *Id.* See also Wharton, *supra* note 96, at 8.

¹⁰³ Broadcasting companies, such as Infinity, that decide not to pay the FCC's forfeiture fine face legal costs in the millions. Bill Holland, *Infinity to Fight FCC Over \$6,000 Fine; Also, Supporters Push for Acceptance of C-Quam*, BILLBOARD, Nov. 13, 1993, at 95. Infinity refuses to remit the \$6,000 fine that the FCC levied against it for the Howard Stern Christmas Show in part because payment of a forfeiture fine "is like a conviction, and the FCC can use it against you anywhere, at renewal, anytime." *Id.*

¹⁰⁴ Wharton, *supra* note 96, at 8.

government intervention and endless legal fees."¹⁰⁵

Stations that broadcast The Howard Stern Show, which is simulcast in 14 major markets throughout the United States, have been asking, "why bother?" The Stern show used to be available to listeners in Chicago, the country's third-largest radio market -- until station officials at Chicago's WLUP-AM yanked the show from the air. Station General Manager Larry Wert said that the wave of FCC fines levied against Stern were "critical" to the station's decision to drop him.¹⁰⁶ Wert added that executives of Evergreen Media Corp., WLUP's owner, considered the Stern show an "unacceptable risk" to the station's license.¹⁰⁷ Jeff Pollack, head of Pollack Media Group, a Los Angeles consulting firm for MTV and 100 radio stations, thinks that the FCC's actions "will have an impact in markets where Howard is not in yet, as stations assess the liability of adding his show. It certainly will have a chilling effect in terms of the eagerness to pick up Howard Stern in other markets."¹⁰⁸ Other station owners that simulcast the Stern show have resorted to systematically editing the broadcasts. In what Cole termed, "a textbook example of the chilling effect," Stern's Los Angeles affiliate, KLSX-FM, cut an hour-long segment of the show in which Jessica Hahn was promoting her new Playboy video in early March, 1993.¹⁰⁹ The self-censoring actions by WLUP-AM and KLSX-FM are a direct result of FCC activity. These stations were unsure of the FCC's stance on indecency and decided to take precautions. Even Howard Stern's parent company, Infinity, has decided to institute self-censorship measures.¹¹⁰ Infinity openly

¹⁰⁵ Puig, *supra* note 20, at F1.

¹⁰⁶ Boehlert, *supra* note 21, at 80.

¹⁰⁷ Bohlert, *supra* note 21, at 80.

¹⁰⁸ Daniel Cerone & Claudia Puig, *FCC Probes Three More Stern Outlets*, L.A. TIMES, Oct. 30, 1992, at F1.

¹⁰⁹ Puig, *supra* note 20, at F1.

¹¹⁰ In a July 23, 1993 letter to the FCC, Infinity indicated that "the Howard Stern Show (the 'Show') has been continuously reviewed and modified in an effort to achieve compliance with the indecency statute." Infinity instituted

admitted to the FCC that it intends to maintain such measures until such time as more definitive guidance in this area is available from the FCC or the courts.¹¹¹ Apparently, these actions temporarily mollified the FCC, which has taken notice of Howard Stern's compliance with indecency rules.¹¹²

Such self-censorship has evoked grave concerns from one First Amendment attorney:

To the extent that this technique is successful with someone like Stern without the commission staff having to justify its proceedings even to the full commission or take it all the way through the court, it redefines the relationship between the commission and broadcasters in a way that is potentially ominous for other types of material which someday may evoke the commission's displeasure.¹¹³

self-censorship measures to ensure compliance, including multiple delay mechanisms, continuous monitoring of the show by management-level personnel and regular consultations by management with Show personnel as well as review of Show material with communications counsel. *See* Notice of Apparent Liability to Infinity Broadcasting Corp., 8 F.C.C.R. 6740, 1993 FCC LEXIS 4217 at *6 (Aug. 12, 1993).

¹¹¹ *Id.*

¹¹² "Infinity had made substantial and largely effective efforts to avoid further infractions in this area and . . . no actionable indecency complaints have been received by the commission against Infinity or Howard Stern show material in the more than six months since the last broadcast cited [in January]," according to the FCC. Judith Michaelson, *Other Stations Won't Be Fined For Airing Stern*, FCC Says, L.A. TIMES, Aug. 14, 1993, at F2.

However, one day after the D.C. Circuit's decision in *ACT IV*, 11 F.3d 170 (D.C. Cir. 1993), the FCC changed its position with respect to Stern once again as interim FCC Chairman James Quello announced that his agency will pursue two new indecency complaints against the radio jock. Paul Farhi, *FCC to Still Enforce Curbs on 'Indecency'; Broadcast Ban Hours Cut After Court Ruling*, WASH. POST, Nov. 25, 1993, at D1.

¹¹³ Robert O'Neil, law professor and director of the Thomas Jefferson Center for the Protection of the Freedom of the Speech at the University of

Speeding up statutory enforcement of indecency rules is not a panacea for self-censorship. Such a change, however, would only help broadcasters gain an early understanding of how the FCC will enforce its indecency rules with respect to certain types of programming. Instead of resorting to such mechanisms as multiple delays and reviews by communications counsel, stations will be able to program with more confidence that they are not violating standards for indecent programming.

2. Uniform Enforcement of Indecency Rules

Once the FCC speeds up its statutory enforcement mechanism for indecency rules, it must apply them in an even-handed fashion. Only then can broadcasters ascertain which conduct is actionable as indecent. One glaring outgrowth of the vague indecency definition used by the FCC is the lack of uniform enforcement of the rules.¹¹⁴ Certain radio broadcasts, such as the Howard Stern

Virginia, in an interview with Claudia Puig, *supra* note 20, at F1.

¹¹⁴ The earliest definition of indecency developed with respect to radio broadcasts was offered by the FCC in its declaratory order issued to Pacifica Foundation. *In Re Citizen's Complaint Against Pacifica Found. Station WBAI (FM)*, New York, NY, 566 F.C.C.2d 94 (1975). This FCC memorandum opinion and order was the precursor to the *Pacifica* case heard by the U.S. Supreme Court. Indecent language, according to the FCC, "describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs." *Id.* This definition was also adopted by the U.S. Supreme Court in *Federal Communications Comm'n v. Pacifica Found.*, 438 U.S. 726, 731-32 (1978). This Note does not attempt to redefine the term "indecency," a source of frequent controversy and litigation in itself. *See Dial Info. Services Corp. v. Thornburgh*, 938 F.2d 1535 (2d Cir. 1991), *cert. denied sub nom. Dial Info. Services Corp. v. Barr*, 112 S. Ct. 966 (1992) (holding statute regulating indecent telephone communications not unconstitutionally vague); *Information Providers' Coalition For Defense of the First Amendment v. Federal Communications Comm'n*, 928 F.2d 866 (9th Cir. 1991) (term "indecent" in dial-a-porn regulation statute not unconstitutionally vague); *ACT I*, 852 F.2d 1332 (D.C. Cir. 1988); *ACT III*, 827 F. Supp. 4 (D. D.C. 1993); *Finley v. National Endowment for Arts*, 795 F. Supp. 1457 (C.D. Cal. 1992); *In Re Citizen's Complaint Against Pacifica Found. Station WBAI (FM)*, New York, NY, 566 F.C.C.2d 94 (1975). The FCC's definition of "indecency" has undergone subtle changes over the years, with the introduction

Show¹¹⁵ and the Steve & Garry Show,¹¹⁶ are being targeted by the FCC for their indecent programming, while others, such as Love Phones¹¹⁷ and Loveline¹¹⁸ radio shows (collectively, the "Love Shows"), continue to broadcast indecent programming contrary to the provisions of the Communications Act of 1934. The only readily apparent distinction between the Love Shows and those targeted by the FCC is that the former shows arguably

of "context." See *supra* text accompanying note 77.

For more information about the substantive aspects of indecency in broadcast media and attempts to re-define the term, see generally Lili Levi, *The Hard Case of Broadcast Indecency*, 20 N.Y.U. REV. L. & SOC. CHANGE 49 (1992); William Banks Wilhelm, Jr., Note, *In the Interest of Children: Action for Children's Television v. FCC Improperly Delineating the Constitutional Limits of Broadcast Indecency Regulation*, 42 CATH. U. L. REV. 215 (1992); R. G. Passler, Comment, *Regulation of Indecent Radio Broadcasts: George Carlin Revisited -- What Does the Future Hold for the Seven Dirty Words*, 65 TUL. L. REV. 131 (1990); Paul J. Feldman, Comment, *The FCC and Regulation of Broadcast Indecency: Is There a National Broadcast Standard in the Audience?*, 41 FED. COMM. L. J. 369 (1989).

¹¹⁵ The Howard Stern Show is owned by Infinity Broadcasting Corp., which has continually refused to pay the fines leveled against it by the FCC. Business Wire, *Federal Communications Commission Approves Infinity's Acquisition of Los Angeles Radio Station KRTH-FM*, Feb. 2, 1994. See *supra* text accompanying note 103.

¹¹⁶ Steve and Garry are WLUP-Chicago disc jockeys accused of violating indecency rules and airing material that implies sexual or excretory functions through double meaning and innuendo. *ACLU Calls FCC Indecency Standards Unconstitutional*, UNITED PRESS INTERNATIONAL, Regional News - Chicago, April 9, 1993. WLUP-Chicago is owned by Evergreen Media Corp., which refused to pay the FCC forfeiture of \$4,000 levied in 1987 and 1989. The District Court for the Northern District of Illinois recently ruled that Evergreen must pay the fine. *United States v. Evergreen Media Corp.*, 832 F. Supp. 1183 (N.D. Ill. 1993).

¹¹⁷ Love Phones has been broadcast in New York on WHTZ-FM, 100.3 from 10:00 p.m. to midnight, Mondays through Thursdays, since November, 1992.

¹¹⁸ KROQ-FM broadcasts Loveline in Los Angeles, from 10:00 p.m. to midnight, Sundays through Thursdays.

involve an educational component, as listeners call in to discuss their sexual concerns with sex therapists or psychologists. However, this difference in context is superficial because each of the Love Shows has a disc jockey who often mocks the callers, using sexual or excretory language in a manner for which Howard Stern and Steve and Garry have been fined. Therefore, if the FCC is to be consistent in its enforcement of the indecency rules, *all* of the Love Shows should receive the same sanctions as Howard Stern and Steve and Garry.

As a broadcaster, Howard Stern acknowledges that he is treated differently from other broadcasters. "I see the Oprah show, the Geraldo show, the Donahue show. . . . I see soap operas. A lot of these shows are dealing with issues that I've been fined over. In fact, they go a lot further."¹¹⁹ The FCC sees it differently, noting that "[i]n the indecency area, whether material is patently offensive is a factual determination, based on careful consideration of context, such as whether the words in context are vulgar or shocking, the manner in which they are portrayed, whether they are isolated or fleeting, and the work's relative merit."¹²⁰ FCC Commissioner James Quello said, "It depends on what kind of a claim [the broadcaster] can make that it has a redeeming social value in some cases." Howard Stern still disagrees: "What have I been fined over? Asking a lesbian about her lifestyle. Oprah does that everyday. I just don't sit there and give you the phony baloney crap about the psychiatrist telling her she might need to go see a shrink because she's not comfortable with her sexuality. The First Amendment doesn't say, 'You have a right to free speech as long as you do it in a serious way.'"¹²¹ *Pacifica* supports Stern's argument that the First Amendment protects him against content

¹¹⁹ *Dateline NBC* (NBC television broadcast, Oct. 12, 1993).

¹²⁰ *In Re Liability of Sagittarius Broadcasting Corp.*, 7 F.C.C.R. 6873, 1992 FCC LEXIS 6042 at *7, *citing* *Infinity Broadcasting Corp. (Recon.)*, 3 F.C.C.R. 930, 931-32, 1987 FCC LEXIS 2416 at *17 (1987).

¹²¹ *Dateline NBC*, *supra* note 119.

regulation.¹²² However, the FCC disagrees, arguing that the humorous nature of Stern's broadcast is "ancillary" to its patent offensiveness.¹²³ The FCC can decorate its description of Stern using whatever terms it chooses, but the fact remains that the agency is attempting to regulate the content of Stern's broadcasts.

Howard Stern is saying what many radio broadcasters seem to be thinking. He openly compares his show to Geraldo, whose broadcast entitled, "Unlocking the Great Mysteries of Sex," survived the FCC's indecency scrutiny.¹²⁴ The FCC, hiding behind the "context" portion of its indecency definition, reasoned, "[W]hile [Geraldo] discussed sexual techniques in frank terms, it was not intended to pander or titillate and was not otherwise vulgar or lewd."¹²⁵ Such a hair-splitting distinction is disingenuous.¹²⁶ While Stern openly compares his show to those of Oprah Winfrey, Phil Donahue and Geraldo Rivera, he has yet to compare his treatment with that of the Love Shows. Since parents have been known to protest against the content of the Love Shows, the argument that they meet "contemporary standards for the broadcast

¹²² In *Pacifica*, the Court acknowledged that if the FCC's characterization of Carlin's monologue could be linked to its political content, Carlin might be afforded First Amendment protection. 438 U.S. at 746. The FCC has dismissed this argument in Stern's situation on tenuous grounds, arguing that the humorous nature of Stern's broadcast is "ancillary to its patent offensiveness." *In Re Liability of Sagittarius Broadcasting Corp.*, 1992 FCC LEXIS 6042 at *11.

¹²³ "What we do consider in examining context, however, is the relative merit of the work, of which seriousness may be one element." *In Re Liability of Sagittarius Broadcasting Corp.*, 1992 FCC LEXIS 6042 at *11.

¹²⁴ *In Re Liability of Sagittarius Broadcasting Corp.*, 7 F.C.C.R. 6873 (1992) at ¶7.

¹²⁵ *Id.*

¹²⁶ The FCC made yet another inconsistent ruling when it found a broadcast of excerpts from a play that seriously addressed the topic of AIDS to be indecent. "The public value of the subject matter," according to the FCC, "would not save [the broadcast] from an indecency finding." *Id.* at ¶10. In this instance, one would think that "context" would spare the broadcast from being labeled indecent.

medium" has no merit. Yet the FCC has taken no action against the Love Shows. This lack of uniform enforcement is puzzling to the radio broadcaster, who is entitled to a clear explanation of why the FCC finds one show to be indecent and other shows, that seem to violate indecency rules, to be decent. This proposition of treating similarly-situated broadcasters similarly was espoused by the D.C. Circuit in *Melody Music, Inc. v. Federal Communications Comm'n.*¹²⁷

The [FCC] has not explained its decision 'with the simplicity and clearness through which a halting impression ripens into reasonable certitude. In the end we are left to spell out, to argue, to choose between conflicting inferences. . . . We must know what a decision means before the duty becomes ours to say whether it is right or wrong.' . . . The [FCC] should reconsider [the broadcaster's] application Whatever action the [FCC] takes . . . *it must explain its reasons and do more than enumerate factual differences, if any, between [the broadcaster] and the other cases*; it must explain the relevance of those differences to the purposes of the Federal Communications Act.¹²⁸

¹²⁷ 345 F.2d 730 (D.C. Cir. 1965) (holding that similarly situated broadcasters are entitled to similar treatment by FCC in license renewal decisions.)

¹²⁸ *Melody Music*, 345 F.2d at 733 (emphasis added). Infinity raised the *Melody Music* argument to the FCC, which unrealistically limited its holding: "[T]wo parties would not be similarly-situated for purposes of analysis under *Melody Music*, unless both the substance of the material they aired and the context in which it was broadcast were substantially similar." *In Re Liability of Sagittarius Broadcasting Corp.*, 7 F.C.C.R. 6873 at ¶8. Under the FCC's interpretation of *Melody Music*, the only shows that would surely fit the criteria for similar enforcement are identical shows aired by identical radio broadcasters at identical times. In all other cases, the FCC is likely to distinguish programs based on vague subtleties of "substance of the material aired" and "context." The *Melody Music* court's holding is not as restrictive as the FCC would like it to be.

The FCC claims that the difference between Stern's show and other broadcasts is "context," yet the FCC has failed to adequately distinguish them.¹²⁹ Should Howard Stern, in a unique form of self-censorship, take on a sex therapist as a sidekick to curry the FCC's favor? Would this action provide the redeeming social value that the FCC commissioners are looking for? It is difficult to answer these questions definitively because the FCC has not provided broadcasters with enough guidance as to what is indecent and what is not. The FCC relies on the fact-sensitive definition of indecency to enforce the statutes selectively against certain broadcasters. Until the FCC begins to enforce the indecency rules uniformly, looking beyond context as a distinction, broadcasters including Stern will be inclined to self-censor to avoid the imposition of fines and other penalties.

C. *Policy Considerations*

Self-censorship presently exists on the radio airwaves.¹³⁰ By speeding up its statutory enforcement mechanism and uniformly enforcing indecency rules, the FCC will diminish self-censorship and go a long way toward acknowledging the First Amendment rights of broadcasters. More importantly, however, the rights of radio listeners would be restored as well. As the Supreme Court said in *Red Lion*, "It is the right of the . . . listeners, not the right of the broadcasters, which is paramount. It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail."¹³¹ This is the same principle that Justice Brennan espoused in his *Pacifica* dissent: "I would place the responsibility and the right to weed worthless and offensive communications from the public airways where it belongs and where, until today, it resided; in a public free to choose those

¹²⁹ See *supra* text accompanying note 126.

¹³⁰ Boehlert, *supra* note 21, at 80; Michaelson, *supra* note 112, at F2; Farhi, *supra* note 22, at D1; Puig, *supra* note 20, at F1.

¹³¹ *Red Lion Broadcasting v. Federal Communications Comm'n*, 395 U.S. 367, 390 (1969) (citations omitted).

communications worthy of its attention from a marketplace unsullied by the censor's hand."¹³² Listeners presently lack the ability to fulfill this "responsibility," for the marketplace is "sullied" by the self-censor's hand.

A speedier, uniform statutory enforcement mechanism will allow radio broadcasters the latitude to unsully the marketplace and present programming within defined constitutional boundaries enforced by the FCC. The radio listener will have a greater choice of programming and broadcasters will not have to self-censor to avoid incurring statutory fines from the FCC. The slow FCC forfeiture process, which the *ACT III* district judge conceded is a problem, is relatively easy to remedy through statutory amendments.¹³³ The FCC must examine the process and keep in mind that the longer it continues, the greater likelihood that broadcasters will be forced to self-censor.

Uniform enforcement of indecency rules is another concern. While there is absolutely no justification, with respect to content, for the FCC to pursue Howard Stern and Steve and Garry and leave the Love Shows unscathed, there may be other policy reasons at work. Typically, someone has to report a broadcast to the FCC (e.g., lodge an indecency complaint) before any administrative action is taken. Perhaps society appreciates the redeeming sex education service provided by Loveline and Love Phones. A more likely rationale is that the shows are too new and future complainants have yet to tune in.¹³⁴

¹³² Federal Communications Comm'n v. Pacifica Found., 438 U.S. 726, 772 (1978).

¹³³ *ACT III*, 827 F. Supp. 4, 8 (D. D.C. 1993). See *supra* notes 98-99.

¹³⁴ Although the FCC's recent statement that it plans to enforce a 6:00 a.m. to 8:00 p.m. safe harbor spares some Love Shows (e.g., Love Phones and Loveline) that broadcast after 8:00 p.m., Wharton, *supra* note 95, the FCC's enforcement of a 6:00 a.m. to 8:00 p.m. safe harbor is still subject to scrutiny by the courts. Until a final decision is made, perhaps by the U.S. Supreme Court, no Love Show is totally safe from the FCC's indecency rules.

IV. CONCLUSION

The FCC may regulate indecent material, as long as it does so with "due respect for the high value our Constitution places on freedom and choice in what the people say and hear."¹³⁵ Presently, such "freedom and choice" is lacking on the radio airwaves. Broadcasters self-censor for fear of being labeled "indecent" by the FCC and incurring statutory penalties. The FCC, as the government's caretaker of the radio airwaves, can take two steps to eliminate this self-censorship: (1) Speed up its statutory enforcement mechanism; and (2) uniformly enforce indecency rules. Only by taking steps to eliminate self-censorship can the FCC regulate radio airwaves that, in addition to satisfying advertisers, continue to satisfy broadcasters and, most importantly, listeners.

¹³⁵ *Gillett Communications v. Becker*, 807 F. Supp. 757, 764 (N.D. Ga. 1992) ("Television broadcasters permitted to air indecent paid political advertisement during 'safe harbor' hours."), *dismissed without opinion and remanded*, 1993 U.S. App. LEXIS 24905 (11th Cir. Sept. 28, 1993) quoting *ACT I*, 852 F.2d 1332, 1344 (D.C. Cir. 1988).