

FCC Broadcast Regulation Obscenity, Indecency & Profanity

Media & Entertainment Law

Eric E. Johnson

ericejohnson.com



Konomark - Most rights sharable.

Basics

Obscenity, Indecency,
& Profanity

- Filthy content - bad words, gross stuff
- Enforcement based on complaints from public.
- Context is key in deciding what counts as obscenity, indecency, or profanity.
- Obscenity, indecency, and profanity are each separate concepts.

Obscenity

Obscene material is prohibited from broadcast at all times.

Obscene material receives no First Amendment protection.

Obscenity

What is obscenity?

Apply the three-pronged test (*Miller, Luke Records*):

1. An average person, applying contemporary community standards, must find that the material, as a whole, appeals to the prurient interest;
2. The material must depict or describe, in a patently offensive way, sexual conduct specifically defined by applicable law; and
3. The material, taken as a whole, must lack serious literary, artistic, political, or scientific value.

Note: must be sexual, as opposed to violent, etc.

Indecency

The FCC's definition of broadcast indecency is “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 organs or activities.”

Note: Indecency, as opposed to obscenity, includes excretory subject matter.

Indecency

What counts as indecent?

Three factors analysis:

1. The explicitness of the description of the sexual or excretory activity
2. Whether the material dwells on or repeats these descriptions
3. Whether the material appears to pander or is presented for shock value

Indecency

What counts as indecent?

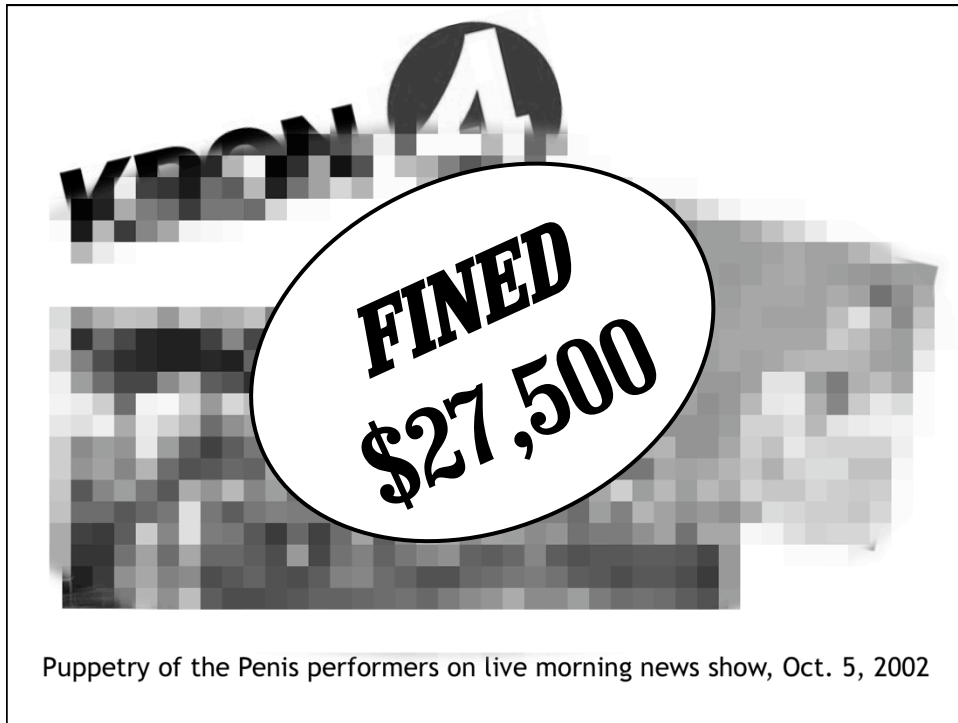
The analysis is meant to take into account context, i.e., "the manner and purpose" of the material.

Material "primarily used to educate or inform the audience" is meant to be treated differently from material that panders, titillates, or shocks.

Indecency

Indecent material receives First Amendment protection, but time-of-day restrictions for broadcast survive scrutiny.

Indecent material may not be broadcast on radio or TV between 6 a.m. and 10 p.m.



Profanity

Obscenity, Indecency,
& Profanity

Bad words.

Not much enforced by FCC until
2004.

Profanity

The FCC's definition of profanity is “language so grossly offensive to members of the public who actually hear it as to amount to a nuisance.”

Note: Does not require an element of sacrilege.

Profanity

The FCC provides no list of banned words.

Recent decisions apparently require some relation to sexual or excretory function for a word to qualify as profane.

(This would remove racial epithets from profanity.)

Profanity

Prior decisions provide some guidance.

Presumptively profane: “fuck” and “shit”

The word “bullshit,” as a derivative of “shit,” was held presumptively indecent.

The word “dick” and its derivatives were not indecent in the context of an NYPD Blue episode.



Golden Globe Awards 2003

