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Don't Shoot the Speaker: Why Forfeiture Liability for Indecency Violations over Broadcast Media Cannot be Expanded to Cover the Speaker

*Kevin Bennardo**

The specter of censorship is once again taking form in Congress, but this time is set to materialize in a unique and unprecedented way. Congress is seriously considering new legislation that would allow the Federal Communications Commission ("FCC") to levy fines for indecent broadcasts not only against the broadcasters, but also against the speakers themselves. Such action would not only be unprecedented,¹ but unconstitutional as well.

Currently, Section 503(b)(5) of the Communications Act of 1934 restricts forfeiture liability to broadcast licensees, except for a few specified circumstances.² Therefore, to be subject to a fine for an indecency violation, one must generally be the licensee of a broadcast station. A nonlicensee may be subject to forfeiture liability if the FCC sends him a citation, gives him reasonable time for an interview with an FCC official, and the nonlicensee subsequently makes the same sort of violation again.³

Currently, the only exceptions to this notice and subsequent breach requirement for forfeiture liability under indecency violations are (1) if the nonlicensee is improperly engaging in a broadcast for which a license is required; or (2) if the nonlicensee is transmitting on a radio station authorized by the FCC for transmission without a

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1. Edward Epstein, *Panel OKs Fines on Performers for Indecency*, S.F. CHRON., Mar. 4, 2004, at A3.

2. 47 U.S.C. § 503(b)(5) (2000).

3. *Id.* § 503(b)(5)(A)-(C).

license⁴ (which includes the citizens' band radio service, the radio control service, and radio service on domestic aircraft and ships⁵). The reasoning behind these two exceptions is easily grasped. The first exists because a nonlicensee is improperly broadcasting without a license, and therefore should be held to the same standards as if he had obtained a license. The second exists because the nonlicensee is authorized to broadcast, even though he does not need to seek individual licenses for the sake of convenience, on the condition that he still accepts the obligation of abiding by all the same regulations as licensees.⁶

The Broadcast Decency Enforcement Act of 2005 passed through the House of Representatives by a margin of 389-38 on February 16, 2005 and was placed on the Senate calendar two days later.⁷ This bill amended Section 503(b)(5) of the Communications Act of 1934 to include another exception to the notice requirement:

[I]n the case of a determination that a person uttered obscene, indecent, or profane material that was broadcast by a broadcast station licensee or permittee, if the person is determined to have willfully and intentionally made the utterance, knowing or having reason to know that the utterance would be broadcast.⁸

In conjunction with this new exception, the Broadcast Decency Enforcement Act of 2005 also amended Section 503(b)(2) of the Communications Act of 1934⁹ to raise the maximum forfeiture liability for entities that are neither a broadcast licensee nor a common carrier from \$10,000 per violation to \$500,000.¹⁰ In short, under the Broadcast Decency Enforcement Act of 2005, the newly established liability for performers or individuals who intentionally utter indecent remarks over the airwaves can be as high as \$500,000 for a single violation.

Congress undoubtedly has more constitutional leeway to regulate speech that is broadcast than that which is not. However, a survey of the reasons that the First Amendment bends (but does not break) when it comes to broadcasters illustrates why Congress's ability to punish the broadcaster should not extend to a power to punish the speaker (whose words are broadcast).

In *Red Lion Broadcasting Co. v. Federal Communications Commission*, the United States Supreme Court upheld the so-called

4. *Id.* § 503(b)(5).
5. *Id.* § 307(e)(1).
6. *Id.* § 307(e)(2).
7. H.R. 310, 109th Cong. (2005). The Senate has taken no action on the bill.
8. H.R. 310 § 4.
9. *Id.* § 503(b)(2).
10. H.R. 310 § 2.

FCC “Fairness Doctrine.”¹¹ The Fairness Doctrine “imposed on radio and television broadcasters the requirement that discussion of public issues be presented on broadcast stations, and that each side of those issues must be given fair coverage.”¹² This doctrine required broadcasters that endorsed a political candidate to notify that candidate’s opponent and provide a reasonable opportunity for her to respond over that broadcaster’s airwaves;¹³ and also to provide such an opportunity to respond to any person or group which was personally attacked “during the presentation of views on a controversial issue of public importance.”¹⁴

However, five years later the Supreme Court found a similar compelled “right of reply” Florida statute to be unconstitutional when applied to newspapers in *Miami Herald Publishing Co. v. Tornillo*.¹⁵ The Court stated that the statute, which was first enacted in 1913, long before the FCC or the Fairness Doctrine even existed, violated the First Amendment by compelling the newspapers “to publish that which ‘reason’ tells them should not be published” and exacting “a penalty on the basis of the content of a newspaper.”¹⁶

The disparity between these two cases clearly illustrates that the First Amendment affords less protection to broadcasters than to other media. The Court on several occasions has endeavored to explain the basis for these differences.

In *Red Lion*, the Court found that since licensees were given the privilege to broadcast over the “scarce” spectrum frequencies, that privilege could also be subject to conditions.¹⁷ One such permissible condition is to force broadcasters to allot a “right of reply” in certain circumstances, to prevent a few licensees from holding monopoly control over the content of messages sent out over the airwaves.¹⁸ So the Court’s first early reason for granting less First Amendment protection to broadcasters was scarcity of the spectrum, a condition not present in other media like newspapers (although it could be argued that other scarcity, most notably economic scarcity, similarly limits that medium).

11. 395 U.S. 367 (1969). Since it was found no longer to serve the public interest, the FCC has since repealed the Fairness Doctrine. In the Matter of Inquiry into Section 73.1910 of the Commission’s Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C.2d 145 (1985).

12. *Red Lion*, 395 U.S. at 369.

13. *Id.* at 374-75.

14. *Id.* at 373-74.

15. 418 U.S. 241, 258 (1974).

16. *Id.* at 256.

17. *Red Lion*, 395 U.S. at 394.

18. *Id.* at 391-92.

The Court took another look at content regulation of broadcast media in *Federal Communications Commission v. Pacifica Foundation*.¹⁹ In *Pacifica*, the Court held that the FCC could punish licensees for broadcasting speech that was not obscene, but was merely “profane” or “indecent” (which was prohibited by 18 U.S.C. § 1464),²⁰ noting that “of all forms of communication, it is broadcasting that has received the most limited First Amendment protection.”²¹ In other media, such as print, the government cannot regulate or censor merely indecent or profane material, but only that which is obscene under the *Miller* standard.²²

The Court points to two distinct reasons for broadcasters’ more limited First Amendment protection in *Pacifica*. The Court’s first reason is that “the broadcast media have established a uniquely pervasive presence in the lives of all Americans.”²³ The Court goes on to note that broadcast media “confront” people in the privacy of their homes, and the nature of the media makes prior warnings ineffective because people just tuning in may have missed such warnings.²⁴

The second major reason for the disparate treatment of broadcasters from other media is that “broadcasting is uniquely accessible to children, even those too young to read.”²⁵ The Court found that since broadcast media cannot be regulated as effectively as other media, such as movie theaters (which can deny minors entrance to films with indecent content), the potential negative impact of children receiving indecent broadcasts justified greater regulation of broadcast content.²⁶ The Court therefore upheld the FCC’s restriction of broadcasts of indecent material to “times of the day when there is a reasonable risk that children may be in the audience.”²⁷

In *Pacifica* the Court did not recognize spectrum scarcity, the reasoning of *Red Lion*, as a basis for greater regulation of broadcast media, even though the FCC explicitly raised the scarcity justification in its brief.²⁸ Justice Brennan, in dissent, noted the majority’s omission of the spectrum scarcity rationale.²⁹ He stated that scarcity

19. Fed. Commc’n Comm’n v. *Pacifica Found.*, 438 U.S. 726 (1978).

20. *Id.* at 738.

21. *Id.* at 748.

22. *Miller v. California*, 413 U.S. 15, 23-24 (1973).

23. *Pacifica*, 438 U.S. at 748.

24. *Id.* at 748-49.

25. *Id.* at 749.

26. *Id.* at 749-50.

27. *Pacifica*, 438 U.S. at 732.

28. *Id.* at 731 n.2.

29. *Id.* at 770 n.4 (Brennan, J., dissenting).

was an applicable justification where, as in *Red Lion*, the FCC was attempting to increase the diversity of speakers, but not in *Pacifica*, where the FCC was censoring speech, and thus decreasing the marketplace of ideas.³⁰

Red Lion's spectrum scarcity rationale should, however, apply regardless of whether the regulation is increasing the diversity of speakers or decreasing the amount of content in the marketplace of ideas through censorship. The essence of the spectrum scarcity rationale is that the "people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."³¹ Since broadcasters hold the valuable airwaves in trust for the public at large, the same scarcity rationale that applied in *Red Lion* should also give the government the power to punish licensees from using those valuable airwaves for the broadcast of indecency.

Regardless of whether the spectrum scarcity rationale applies to content restrictions (or at all anymore), neither it, nor the other two rationales (pervasiveness and accessibility to children) offered by the Court for lesser First Amendment protection of broadcast media explain how that lesser First Amendment protection can be extended to the individual speakers or performers whose words and actions are broadcast. The reasons listed above may justify fining broadcast licensees for broadcasting indecent or profane (but non-obscene) speech, but those reasons do not justify the same fines to be levied against the individual speakers and performers themselves, as is proposed by H.R. 310.

First, spectrum scarcity, as noted above, places a greater responsibility on broadcasters than on speakers in other media because not everyone who wants a voice can have one over the broadcast media. Only so many broadcast television and radio stations can be licensed without interference among each other, so those individuals and entities that do secure a license owe a public debt to use their allotted spectrum for the public good.

The same rationale does not apply to individual speakers who know that their message will be carried on broadcast stations. A speaker who willfully makes indecent (but non-obscene) utterances, knowing those utterances will be broadcast, has not been conferred the same benefit that a broadcast licensee has been, and therefore

30. *Id.*

31. *Red Lion Broad. Co. v. Fed. Comm'n Comm'n*, 395 U.S. 367, 390 (1969).

does not owe the same public debt. The speaker has been given no special public trust at the expense of other speakers. It is the licensee that chose to send this speaker's message out over the airwaves at the exclusion of other speakers, and therefore it is the licensee that should be held accountable if the content of that chosen message is indecent.

The second rationale embraced by the Court is the pervasive presence of the broadcast media in the lives of the American public.³² Broadcast media come into people's homes, the most private of places, and no warnings can effectively shield the audience from unwanted content.

While individual speakers or performers with indecent messages may know, and even intend, that their indecent (but non-obscene) message be disseminated directly into the living rooms and bedrooms of every person in America, those speakers are powerless to effectuate that plan. It is the broadcasters that do the transmitting, and determine what is sent out over those airwaves.

The licensee decides which radio personality gets the microphone and which band's performance is broadcast live. Those personalities and performers may very well know that they are being broadcast live and every word and gesture they make will be transmitted into millions of Americans homes, but it is not their responsibility to make sure those transmissions meet the decency standards of the FCC. It is the responsibility of the licensees who apply for and receive the licenses from the FCC to abide by its rules.

The final rationale, that broadcast media are uniquely accessible to children,³³ similarly does not hold up when attempting to justify extending liability to individual speakers and performers. The individual speaker, sitting in his soundproof booth, is not uniquely accessible to children; nor is the singer whose indecent performance is being aired live (proper measures can be taken to ensure that children are not in the live audience). It is the broadcaster that takes that message and makes it accessible to children, not the speaker or performer. As discussed under the pervasiveness rationale, it is the broadcaster that must control the content of its medium; it is not the duty of free citizens to censor their own behavior whenever they know a camera or microphone is being pointed at them. It is the broadcaster, not the speaker, that sends the indecent message out to the public and into their homes. Therefore, it is the broadcaster, not the speaker, that should be held accountable for the content of the broadcast.

32. *Pacifica*, 438 U.S. at 748.

33. *Id.* at 749.

If H.R. 310 is enacted into law, some broadcasters may be more willing to put some performers on the air, knowing that the performers may face penalties personally for indecent speech. However, it will undeniably lead to self-censorship by individuals and performers. Such performers will no longer be able to express their message to the fullest extent of their First Amendment freedoms if they know that a television camera (or radio microphone) is pointed in their direction.

H.R. 310, if enacted, or any statute that punishes individual speakers directly for broadcasters' content, is simply unconstitutional and will restrain free speech. Considering a recent FCC indecency action clearly illustrates the unjustness of extending liability beyond the broadcaster to the speaker as well.

The FCC found the broadcast of Bono's use of the "F-word" during the live telecast of the 2002 Golden Globe Award ceremonies violated 18 U.S.C. § 1464.³⁴ Taking for granted that Bono willfully and intentionally uttered the offending word (which could never truly be known—a definite shortcoming of H.R. 310) and the fact that he knew it was being broadcast, he could be fined up to \$500,000 under H.R. 310. However, such a result would punish Bono, a private speaker, for merely stating his joy at winning the "Best Song" Golden Globe in a way that is perfectly legal to those present at the International Ballroom of the Beverly Hilton. It was NBC and its affiliates that broadcast that message to millions of homes across the country. Even though Bono might have known that would be the final destination of his speech, he was merely speaking to a roomful of people. It was the broadcasters who took that message where it was not permitted.

Bono's exclamation was not an isolated incident, as the FCC noted that he had reportedly used the "F-word" during broadcast of the 1994 Grammy Awards, and Cher had reportedly used the same word during the 2002 Billboard Awards broadcast.³⁵ Under statutes like H.R. 310, performers could arguably be fined if a radio station chose to play their indecent or profane song unedited and the performer knew at the time of recording that the song would be broadcast.

34. In the Matter of Complaints Against Various Broadcast Licensees Regarding their Airing of the "Golden Globe Awards" Program, 19 F.C.C.R. 4975, 4982 (2004). The Commission declined to levy any fines for the violations, finding that the licensees were not on sufficient notice that their broadcasts constituted a violation, but noted that forfeiture orders could issue for similar broadcasts in the future. *Id.* at 4981.

35. *Id.* at 4979.

The majority in *Pacifica* stated that indecent broadcasts during times of the day when children were likely to be in the audience was "like a pig in a parlor instead of the barnyard;" that is, something that is not inherently bad, but can be bad depending on the context.³⁶ The same is true of statements like Bono's, which may be perfectly at home in the Beverly Hilton, but may not belong in the parlors (or living rooms) of millions of American homes. Analogously, the First Amendment protects the production and possession of obscene films,³⁷ but not the public circulation of the same films.³⁸ The same is true of indecent speech: the producer of the speech (the individual speaker) should not be punished, even though the mass dissemination of it (by the broadcast licensee) may be. The speaker merely created the pig, but it is the broadcaster alone that improperly put it in the parlor.

36. *Pacifica*, 438 U.S. at 750.

37. *Stanley v. Georgia*, 394 U.S. 557, 568 (1969).

38. *See, e.g., Miller v. California*, 413 U.S. 15, 18-19 (1973) ("This Court has recognized that the States have a legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles.").