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Indecency Regulation of the FCC and censorship law in Republic Korea:
comparison and contrasts

Min-soo (Minee) Roh

Abstract

Regulating music on radio or television is not a straightforward process, as the music is comprised of lyrics of words. On top of the lyrics, any music performance has an additional layer of choreography and dress code. If any individual elements or combined elements is obscene or indecent, the government attempts to regulate broadcasting both music and performance. This leads to regulating general speech on communications and it requires this paper to look into regulation of broadcasting in general and specific examples of music broadcasting regulation on radio and television, particularly, in the United States (“States”) and in Republic of Korea (“South Korea” or “Korea”).

First, this paper compares how different governmental Acts created each country’s governmental institution solely dedicated to regulating materials on radio or television. Second, it examined different types of law to narrow down the scope of authority of these institutions and contrasts different provisions by referring to certain historical background which influenced including those provisions. In this section, only provisions with similar contents will be discussed. Third, it extensively explores how each institution applied its own regulations by discussing significant cases in chronological order. Fourth, it comes with recommendations for both agencies.

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I. Origin of establishment of governmental institution

In the States, Congress created the independent agency, Federal Communications Commission (“FCC” or “Commission”) by passing the Communications Act of 1934 (“Communications Act”) for the purpose of “national defense ... promoting safety of life and property through the use of wire and radio communication, ... securing a more effective execution of this policy by centralizing authority.”¹ It is important to notice the States’ unique purpose of national defense.

In Korea, combining the former Korean Broadcast Commission and the Ministry of Information and Communication, the Korean Communication Commission (“KCC”) was created under the Act on the Establishment and Operation of KCC.² KCC has taken charge of enforcing Broadcasting Act (“Korean Broadcasting Act”) which states its purpose as:

“to promote the protection of the rights and interests of the viewers, the formation of the democratic public opinion and the improvement of national culture, and to contribute to the development of broadcasting and advancement of public welfare by guaranteeing the freedom and independence of broadcasting and by enhancing the public responsibility of broadcasting.”³

There is no purpose related to national defense in the Korea’s Broadcasting Act. Nonetheless, its focus on democratic values and public culture sounds very nationalistic, and the fact that the Act itself specifically advocates sculpting democratic values within people seems very politicalized.

¹ Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064 (codified as amended at 47 C.F.R. §§ 151 et seq. (2000)) (LexisNexis, Lexis Advance through PL 115-277, approved 11/3/18).

² Act on the Establishment and Operation of KCC, Act No. 9708, May 22, 2009, *amended by* Act No. 13580, Jun. 23, 2016, art. 3, (S. Kor), *translated in* the National Law Information Center, <http://www.law.go.kr/eng/engLsSc.do?menuId=1&query=broadcast+act&x=0&y=0#liBgcolor0>.

³ Broadcasting Act, Act No. 6139, Jan. 12, 2000, *amended by* Act No. 9280, Dec. 31, 2008, art. 1, (S. Kor), *translated in* the National Law Information Center, <http://www.law.go.kr/eng/engLsSc.do?menuId=1&query=broadcast+act&x=0&y=0#liBgcolor3>.

The analysis of why Korea's Broadcasting Act has drafted with certain political tones will be discussed in the next section in depth by tackling down important provisions within the Act.

In the States, other than FCC, there is no federal agency regulating movie industry, but the industry regulated itself. In 1922, motion picture studios and distributing companies voluntarily formed the Motion Picture Producers and Distributors of America, which becomes Motion Picture Association of America ("MPAA").⁴ In 1968, the MPAA, the International Film Importers and Distributors of America ("IFIDA") and the National Association of Theater Owners (NATO) established the voluntary film rating system with the purpose of providing information and guidance to parents so that they can make responsible decisions for their children.⁵

In comparison, Korea used to have two agencies for censoring music: The Broadcasting Ethics Commission ("BEC") was established since 1962 to generally monitor popular music for broadcasting; and the Arts Ethics Commission ("AEC") was established since 1965 to censor music, but its performances were mostly active only in 1968 and 1975.⁶ Two agencies had different standards of censorship and did not have active communication between them.⁷ In 1976, the AEC was disbanded and the Korean Ethics Committee of Public Performance ("KECPP") was established for better and more consistent censorship.⁸ Decisions made by KECPP would be forwarded to BEC.⁹ KECPP was once again disbanded due to the

⁴ Aloma H. Park, *Regulation of Music Videos: Should the FCC "Beat it?"*, 8 Computer L.J. 287, 303 (1988).

⁵ *Id.* at 304.

⁶ Chung-goo Gwon, *Study on the Difference between Plagiarism and Japanese Style in Popular Music Forbidden Songs: Focusing in the Original Review Data*, 39 Music & Culture 61, 62 (2018).

⁷ *Id.*

⁸ *Id.* at 63.

⁹ *Id.*

Constitutional Court's holding of censorship procedure as unconstitutional.¹⁰ Since then, each broadcasting station has its own viewers committee for self-censorship, following the guidelines from the Korean Broadcasting Act.¹¹ While the Commission on Youth Protection post-monitors harmfulness of each record album,¹² the Korea Media Rating Board ("Board") assigned different rating levels to record albums and movies, including motion pictures and music videos.¹³

II. Text of the law on the face

In order to examine both government's general regulation of the broadcast, it is crucial for this paper to analyze texts of different types of laws. The first type of law to look into is the Constitutions to find out where in the Constitutions the freedom of speech is embedded. The second type of law is the Statutes, themselves.

i. Constitutions

In the United States Constitution, the First Amendment states that: "Congress shall make no law ... abridging the freedom of speech, or of the press...."¹⁴ The scope of abridgement can be inferred from *Joseph Burstyn v. Wilson*, where the Supreme Court clarified that the First Amendment's main purpose in freedom of speech is to prevent prior restraints on any significant medium for the communications of ideas.¹⁵

In the Korean Constitution, Article 21 asserts:

(1) All citizens shall enjoy freedom of speech and the press ... (2) Licensing or censorship of speech and the press ... shall not be recognized. (3) The standards of news service and broadcast facilities and matters necessary to ensure the

¹⁰ *Id.* at 66.

¹¹ Korean Broadcasting Act, *supra* note 3 at art. 86-89.

¹² Chung-goo Gwon, *supra* note 6 at 66.

¹³ *Id.* at 66.

¹⁴ U.S. Const. amend. I.

¹⁵ 343 U.S. 495, 503, 506 (1952) (holding that a state may not ban a film due to its sacrilegious content).

functions of newspapers shall be determined by Act. (4) Neither speech nor the press shall violate the honor or rights of other persons nor undermine public morals or social ethics. Should speech or the press violate the honor or rights of other persons, claims may be made for the damage resulting therefrom.¹⁶

It does not recognize censorship of speech and does not protect all kinds of speech. Along with Article 21, Article 66(2) states, “The President shall have the responsibility and duty to safeguard the independence, territorial integrity and continuity of the State and the Constitution.”¹⁷ This article gives authority to the President to issue Presidential Decree to enforce certain Acts. In terms of broadcasting standards, the Korean Broadcasting Act and the Enforcement Decree of the Broadcasting Act (“Broadcasting Decree”)¹⁸ both simultaneously work together to ensure the purpose of the Broadcasting Act to be practiced well.

ii. Historical development of Korean Constitution

Before examining each institution’s statutes, it is fundamental to understand historical background of the Korean Constitution because each provision of the Korean Broadcasting Act reminds not only broadcasters but also viewers and listeners of Korean political history.

After independence from Japanese colonization on the Korean peninsula and Korean War, a general election created the Constituent National Assembly which founded Constitutional Council of Korea to establish the Korean Constitution.¹⁹ The First Republic of Korea under President Seung-man Lee, despite having the Korea Constitution guaranteeing civil and social rights, changed provisions by unconstitutional and forceful ways to not lose his political

¹⁶ Daehanminkuk Hunbeob [Hunbeob] [Constitution] art. 21 (S. Kor.).

¹⁷ Daehanminkuk Hunbeob [Hunbeob] [Constitution] art. 66(2) (S. Kor.).

¹⁸ Enforcement Decree of the Broadcasting Act, Presidential Decree No. 16751, Mar. 32, 2000, *amended by* Presidential Decree No. 21236, Dec. 31, 2000, art. 1, (S. Kor.), *translated in* the National Law Information Center,

<http://www.law.go.kr/eng/engLsSc.do?menuId=1&query=broadcast+act&x=0&y=0#liBgcolor0>.

¹⁹ Seung-dae Kim, *Change of Fundamental Rights*, 9 F. Korean Contemp. Hist. 62, 65 (2017).

control.²⁰ As it was right after the War, people were too poor to care, and rights to education and employments were difficult to be achieved without national wealth or economy to support those rights.²¹ The Second Republic of Korea started, once President Lee rigged election and it quickly spread nationwide political revolution.²² The Constitutional Court appeared for a while, but it had never been utilized.²³ The domestic state was chaotic with too many demonstrations and the nation's financial status was not improved at all.²⁴

Then, a military coup d'état by Jung-hee Park initiated the Third Republic of Korea which abolished the Constitutional Court and adopted American style of judicial review.²⁵ However, due to military regime, the existing law or new judicial review were not enforced even the least to prevent human rights violations.²⁶ The Forth Republic of Korea is comprised of Park announcing constitutional emergency measure and releasing a new constitution which drastically expanded the President's authority by granting nation emergency right to himself, invalidating checks-and-balance of Congress and Judicial, and unlimiting years of the second term of the presidency.²⁷ Assassination of Park and the second military coup began the Fifth Republic of Korea under strict authoritarian regime.²⁸ In the mist of all, each leader ironically amended the Korean Constitution with more secure law for better protection of people on the face of the law. Students and young adults were frustrated with military dictatorship, so they carried out

²⁰ *Id.* at 67.

²¹ *Id.*

²² *Id.* at 68.

²³ *Id.* at 68-69.

²⁴ *Id.* at 69.

²⁵ *Id.* at 70.

²⁶ *Id.* at 70.

²⁷ *Id.* at 70-71.

²⁸ *Id.* at 72.

nationwide democracy movement, which later was known as the June Struggle (or Democracy or Democratic movement).²⁹

After adopting direct presidential elections in 1987, the current Constitution was approved in a plebiscite and it revived the Constitutional Court.³⁰ The term of the President of the Constitutional Court is six years, and it has been thirty years with five presidents. Overall, the Korean Broadcasting Act is comprised of very detailed provisions, including guidelines for broadcasters in programming in terms of materials and determinative factors for imposition of penalty surcharges. This is because of these political historic moments when authoritarian dictators still managed to perpetrate and ignore the existing law which looked clear and unambiguous on the face. The Constitutional Court has worked on declaring national laws or local ordinances as unconstitutional to get rid of people's perception of government as deceptive and manipulative. Over thirty years, the Constitutional Court placed itself to be a watchdog of both Congress and the President and gained people's trust. The work of Constitutional Court's cases regarding to censorship in music will be discussed in later section.

iii. Statutes

In the States, the FCC is not permitted to censor the content of the broadcast program,³¹ as a state may not regulate the content of the communicative medium.³² Section 326 of the Communications Act states that: “[N]othing in this act shall be understood or construed to give the Commission the power of censorship over the radio communications ... and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right

²⁹ *Id.* at 73.

³⁰ *Id.*

³¹ Communications Act, *supra* note 1 at § 326.

³² *Joseph Burstyn*, 343 U.S. 495, 506 (1952).

of free speech by means of radio communication.”³³ This statutory protection cover all mediums of radio, television, cable television, and motion pictures.³⁴ In addition, the legislative history of the Communications Act shows a strong unlikeness to censorship by the FCC and by a licensee.³⁵

However, Section 201(b) of the Communication Acts, asserting “The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act,”³⁶ provides the FCC the authority to promulgate binding legal rules. Thus, the scope of authority of the FCC is that the Communications Act can be construed within the FCC’s discretionary authority so as to not sacrificing the First Amendment protections for speculative gain, so the rights of viewers and listeners, rather than rights of broadcasters, are of prime importance. As the Communications Act is to serve the public interests in the broadcasting activities, there is no private right of action.³⁷ Similar to the promotion of public interest, the Korean Broadcasting Act protects rights and interest of viewers by allowing them to participate in decision-making proceeded by a viewer committee of broadcasting operators and make a statement of opinion through viewers evaluation program.³⁸ While the Korean Broadcasting Act sets out duties and authority of the viewers committee, the Broadcasting Decree fills in the organization and operation of the committee.³⁹

Indeed, Korean Broadcasting Act has very detailed articles regarding to public responsibility of broadcasting under Article 5:

³³ Communications Act, *supra* note 1 at § 326.

³⁴ *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948).

³⁵ *ARMERS Educ. & Coop. UNION OF Am., N.D. Div. v. WDAY*, 360 U.S. 525, 528 (1959).

³⁶ Communications Act, *supra* note 1 at § 201.

³⁷ *Nelson v. Leighton*, 82 F. Supp. 661, 662 (N.D.N.Y. 1949).

³⁸ Korean Broadcasting Act, *supra* note 3 at art. 3.

³⁹ Broadcasting Decree, *supra* note 1 at art. 64.

(1) A broadcast shall respect the dignity and value of human beings as well as the fundamental democratic order. (2) A broadcast shall contribute to the unity of the people to a harmonious development of the State and a democratic formation of the public opinion, and shall not promote any discords among regions, generations, classes, and sexes. (3) A broadcast shall not injure other's reputation or infringe on other's rights. (4) A broadcast shall not promote crimes, immoral conducts or a speculative spirit. (5) A broadcast shall not promote lewdness, decadence or violence which has a negative influence on a sound family life and on a guidance of children and juveniles.⁴⁰

Along with Article 5, Article 6 elaborates public interest nature of broadcasting:

“(2) A broadcast shall not be discriminative in broadcast programming on account of sex, age, occupation, religion, belief, class, region, race, etc. ... (3) A broadcast shall respect the ethical and emotional sentiments of the people, ... and contribute to ... the advancement of international friendship. (8) A broadcast shall contribute to the propagation of standard language, and endeavor to refine and purify the language.”⁴¹

Both articles are beyond public interest and aim to create unity within people in terms of opinion, idea, and order without violence or any negative influences and to promote the standard Korean language. These two articles give foundations of guidelines that the broadcasters follow for music and movie censorship in Korea.

Based on the promotion of public interest, Congress indirectly allowed the FCC to influence the content of broadcast programs, as the FCC can decide license renewal or revocation.⁴² Even though the FCC has never revoked a broadcast license for transmitting obscene or indecent materials over the airwaves, it has imposed fines.⁴³ This provision is parallel to the federal criminal code, 18 U.S.C. Section 1464, which states that “[w]hoever utters any obscene, indecent or profane language by means of radio communication shall be fined not more

⁴⁰ Korean Broadcasting Act, *supra* note 3 at art. 5.

⁴¹ Korean Broadcasting Act, *supra* note 3 at art. 6.

⁴² Communications Act, *supra* note 1 at § 207.

⁴³ See *In re Sonderling Broadcasting Corp.*, 41 F.C.C. 2d 777 (1973) *aff'd sub nom* Illinois Citizens Comm. For Broadcasting v. FCC, 515 F.2d 397 (D.C. Cir. 1974); *In re WUHY-FM* (Eastern Educ. Radio), 24 F.C.C. 2d 408 (1970).

than \$10,000 or imprisoned not more than two years, or both,”⁴⁴ and is extended to the Cable Communications Policy Act of 1984, which states that “[w]hoever transmits over any cable system any matter which is obscene or otherwise unprotected by the Constitution of the United States shall be fined not more than \$10,000 or imprisoned not more than two years, or both.”⁴⁵ Similarly, the KCC may impose fines for a penalty surcharge, disciplinary measures, and negligence.⁴⁶ Each article has various amount of fine. Under Article 109, there are factors that the KCC look into to determine whether to impose penalty surcharge or not: contents and extent of the offense; duration and frequency of the offense; scale, etc. of gains acquired from the offense.⁴⁷

The FCC delegates its functions to various employees, staffs, offices, and bureaus within the agency. Under Section 155(d) of the Communications Act, the FCC delegates its investigative authority to the the Field Operations Bureau which investigates violations of the rules of FCC by citizens band licensees⁴⁸ Under Section 5(c)(1), the FCC delegates its authority to Chief Administrative Law Judge, who can designate a Commission Administrative Law Judge to exercise the authority and to require witnesses to testify and produce evidence, to issue subpoenas, to administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence; and to perform any necessary or appropriate actions to compile a complete record concerning the subject matter.⁴⁹ Unlike the FCC’s delegation of its functions to people and offices within the agency, the KCC delegates its function of reviewing program content to a

⁴⁴ 18 U.S.C.S. § 1464 (LexisNexis, Lexis Advance through PL 115-277, approved 11/3/18).

⁴⁵ Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 1984 U.S. Code Cong. & Ad. News (98 Stat.) 2779 (to be codified at 47 U.S.C. §§ 601-639).

⁴⁶ Korean Broadcasting Act, *supra* note 3 at art. 19, 100(3), 105, 106, 108, 109.

⁴⁷ Korean Broadcasting Act, *supra* note 3 at art. 109.

⁴⁸ *In re* Theodore E. Sousa, 71 F.C.C.2d 1330, 1333 (1979).

⁴⁹ *In re* Station Kroq-Fm Pasadena, California, 6 F.C.C. Rcd. 5956, 5956 (1991).

private organization, the Korean Communications Standards Commission (“KOCSC”).⁵⁰ Under Article 33(2), the KOCSC follows deliberation rules when reviewing broadcasts and these rules are quite parallel to Article 5 and 6 of responsibilities.⁵¹

III. Application of broadcasting regulations

Before diving into a specific medium of broadcasting, it is important to overview how the Court defined the scope of the First Amendment protection. The First Amendment protects almost all kinds of speech or communications, except obscene or indecent ones. In other words, if the government finds some speech or communications as obscene or indecent, they fall outside of the First Amendment protection, and the government can regulate, censor, and ban them.⁵² To overview historical foundation of precedents and current policies of the FCC, this section is organized by chronological order of cases.

iv. The FCC’s practice in chronological order

1) Definition of obscenity and indecency

Before creating any formal regulation, the FCC informally sent letters of strongly worded reprimand to the broadcasting stations. When NBC stations aired Mae West’s skit about Adam and Eve in the Garden of Eden in full of innuendo on the Edgar Bergen show, the FCC wrote the network a letter of condemnation and, afterwards, Ms. West did not appear on NBC stations for decades.⁵³ The FCC’s informal instructions and the National Association of Broadcasters’ codes of conduct, prohibiting the broadcasting of “offensive language vulgarity, illicit sexual relations,

⁵⁰ Korean Broadcasting Act, *supra* note 3 at art. 32.

⁵¹ Korean Broadcasting Act, *supra* note 3 at art. 33(2).

⁵² *Roth v. United States*, 354 U.S. 476, 479 (1957); *Miller v. California*, 413 U.S. 15, 16 (1973).

⁵³ Lili Levi, “*Smut and Nothing but*: The FCC, Indecency, and Regulatory Transformations in the Shadows, 65 Admin. L. Rev. 509, 521 n. 32 (2013).

sex crimes, and abnormalities during any time period when children comprised a substantial segment of the viewing audience,”⁵⁴ kept radio indecent until 1970.

In *Roth v. United States*, the Court firstly held that when the average person applying contemporary community standards takes the material’s dominant theme as a whole appealed to prurient interest and utterly without literary, artistic, political, or social value, the material is obscene.⁵⁵ Then, the Court remanded *Roth* test of materials to be “utterly” without value, and developed a new three-part test to determine whether material is obscene and can be legally subject to government censorship in *Miller v. California*, where the Defendant was convicted for knowingly distributing obscene matter through advertising brochures which contained pictures of sexually explicit activities to individuals who had not requested the material and who notified the police:

(a) whether the average person, applying contemporary community standards [not national standards] would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, “lacks” serious literary, artistic, political, or scientific value. (citations omitted) (emphasis added in quotations)⁵⁶

Under the *Miller* test, the government can legally censor or ban obscene materials, regardless of its different types of forms, such as a movie, book, or television program.⁵⁷

Very similar to the definition of obscenity, the FCC defined indecency, in *In re WUHY-FM* (Eastern Educ. Radio), as material that is “(a) patently offensive by contemporary

⁵⁴ Lili Levi, *"Smut and Nothing but": The FCC, Indecency, and Regulatory Transformations in the Shadows*, 65 Admin. L. Rev. 509, 521 (2013).

⁵⁵ 354 U.S. 476, 481, 484-85 (1957).

⁵⁶ 413 U.S. 15, 24 (1973).

⁵⁷ Aloma H. Park, *Regulation of Music Videos: Should the FCC "Beat it?"*, 8 Computer L.J. 287, 297 (1988).

community standards; and (b) is utterly without redeeming social value.”⁵⁸ Due to the similarity between definitions of obscenity and indecency, the Court even demonstrated that there is a shared meaning between them,⁵⁹ but the Court never specified the difference unless the complainant brings both issues of obscenity and indecency.⁶⁰ Regarding to regulating indecent materials, in *Young v. Am. Mini Theatres*, the Court held that the state ordinances governing the location of adult establishments was constitutional because they were not a prior restraint on speech as people still could watch adult entertainment and because the restraint was a reasonable regulation not to create social problems around adult theaters.⁶¹ The Court further allowed state’s regulation on prohibiting the distribution of unprotected materials produced outside the state,⁶² but limited its regulation so long as it does not prevent people from receiving necessary ideas and information as a basis for exercising their rights of speech, press, and political freedom.⁶³ The FCC’s promotion of public interest of protecting children

The Court’s holdings were consistently maintained, up until when the FCC started bringing in broader and higher protection of the public or prurient interest standard of the Communications Act as a part of an analysis to affirm the FCC’s practices.⁶⁴ The FCC did not elaborate details on what consists of the public interest, but denied the renewal of license because the broadcaster’s conduct would not serve “public interest, convenience, and necessity.”⁶⁵

⁵⁸ 24 F.C.C. 2d 408, 412 (1970).

⁵⁹ *United States v. 12 200-Ft. Reels of Super 8mm Film*, 413 U.S. 123, 124 (1973).

⁶⁰ *See Ill. Citizens Comm. for Broad. v. FCC*, 515 F.2d 397, 400 (D.C. Cir. 1974).

⁶¹ 427 U.S. 50, 51 (1976).

⁶² *New York v. Ferber*, 458 U.S. 747, 749 (1982).

⁶³ *Bd. of Educ. v. Pico*, 457 U.S. 853, 855 (1982).

⁶⁴ Communications Act, *supra* note # at § 315(a).

⁶⁵ *In re Revocation of License of Mile High Stations, Inc., for Standard Broad. Station Kimn, Denver, Colo.*, 28 F.C.C. 795, 797 (1960); *In re Applications of E. G. Robinson, Jr., Tr/as Palmetto Broad. Co. (Wdkd), Kingstree, S.C.*, 33 F.C.C. 250, 258-59 (1962).

It was in *In re* WUHY-FM (Eastern Educ. Radio), where the FCC firstly mentioned what specific group of people's public interest it attempts to protect: children. A weekly program, airing at 10 p.m. to 11 p.m. at a noncommercial educational radio station, pre-recorded an interview with Jerry Garcia, leader and member of a California rock and roll musical group, called "The Grateful Dead."⁶⁶ When the interview was broadcasted, Mr. Garcia shared his views on music, philosophy, and other non-sexual topics for fifty minutes in length and used "f-word" and "s-word" as adjectives, substitutes for the phrase, and introductory expletives.⁶⁷ The FCC requested for comments, and the station stated that all personnel responsible for reviewing the program before being aired had been removed effectively and immediately, and the program had been suspended under review.⁶⁸

The FCC explained its duty to prevent the widespread practice of such expressions on broadcast outlet because such speech has no redeeming social value and is patently offensive by contemporary community standards, followed by disseminated consequences of downgrading public interest the usefulness of radio.⁶⁹ The FCC particularly emphasized how such speech can directly and frequently invade privacy of home without its content's any advance warning and harm children, so fined the station.⁷⁰ Here, the FCC's decision is based on good will to fulfill its duty and to protect children, but its argument is not based on any scientific facts or research done. Also, the FCC did not provide any suggestion on how to avoid its issuance of Notice of Liability.

⁶⁶ 24 F.C.C.2d 408 (1970) [hereinafter cited as Jerry Garcia case].

⁶⁷ *In re* WUHY-FM (Eastern Educ. Radio), 24 F.C.C.2d 408, 409 (1970).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

The FCC's argument for protection of children continued in *Ill. Citizens Comm. for Broad. v. FCC*, the Sonderling's "Femme Forum," a radio call-in show aired on Friday from 10 a.m. to 3 p.m., discussed the topic of oral sex and techniques of oral sex.⁷¹ After listening to most of episodes of sexual topics from the show, the FCC released a Notice of Inquiry to elaborate a nonpublic fact-finding proceeding of whether certain licensees had broadcast material in violation of 18 U.S.C. § 1464.⁷² Then, the FCC issued a Notice of Apparent Liability and imposed a monetary forfeiture of \$2,000 against Sonderling for broadcasting obscene or indecent matter in violation of 18 U.S.C. § 1464.⁷³ The FCC informed that Sonderling, as a licensee, has a statutory right to refuse to pay the forfeiture, and if the Sonderling chooses not to pay the forfeiture, the FCC is required to seek to recover it in a trial *de novo* before the court.⁷⁴ Due to "the tremendous financial burden involved,"⁷⁵ Sonderling paid the forfeiture and filed an Application for Remission of Forfeiture and a Petition for Reconsideration, and the FCC released the Memorandum Opinion and Order to explain its intentions in previous notices.⁷⁶

The court reviewed the FCC's notices and affirmed the FCC's denial of the relief requested because it was not improper for the FCC to review each separated, episodic commentaries, rather than an integrated presentation.⁷⁷ The court held that the broadcast was obscene because a radio call-in show aired explicit descriptions of sexual acts during daytime hours when the children could be part of the audience, even if the show did not intend to include

⁷¹ 515 F.2d 397, 401 (D.C. Cir. 1974).

⁷² *Ill. Citizens Comm. for Broad. v. FCC*, 515 F.2d 397, 400 (D.C. Cir. 1974).

⁷³ *Id.*

⁷⁴ *Ill. Citizens Comm. for Broad. v. FCC*, 515 F.2d 397, 400-01 (D.C. Cir. 1974).

⁷⁵ Letter of May 3, 1973, from Egmont Sonderling, Sonderling Broadcasting Co., to FCC (J.A. 61). *Ill. Citizens Comm. for Broad. v. FCC*, 515 F.2d 397, 401 n.7 (D.C. Cir. 1974).

⁷⁶ *Ill. Citizens Comm. for Broad. v. FCC*, 515 F.2d 397, 401 (D.C. Cir. 1974).

⁷⁷ *Id.*

them.⁷⁸ Here, when imposing a forfeiture, the FCC did not specify whether the material is obscene or indecent, but it was the court’s decision to conclude that the show was obscene. Without the FCC’s clarification of whether the material is obscene or indecent, the broadcaster definitely would not know what the course of action the FCC would bring due to different treatment of obscene and indecent materials. Also, there is no clear explanation behind the argument that why reviewing episodic commentaries is not improper, but that an integrated presentation is. The unclear ambiguity does not stop here but gets worse.

For the first time, in *FCC v. Pacifica Found.*, the Court faced to decide whether the FCC has any authority to regulate a radio broadcast that is indecent, but not obscene.⁷⁹ Pacifica Foundation broadcasted George Carlin’s recorded twelve-minute monologue entitled, “Filthy Words,” at about two o’clock in the afternoon on Tuesday.⁸⁰ A few weeks later, a man complained as he heard the broadcast when driving with his young son, and this complaint was forwarded to the station for comment.⁸¹ Pacifica responded that the monologue was not about sexual topics, that it warned about “sensitive language which might be regarded as offensive to some” right before its broadcast, and that Mr. Carlin used certain words to satirize contemporary society’s attitude toward language.⁸²

Soon, the FCC issued a declaratory order and concluded that the monologue was indecent because its usage of seven words (“fuck,” “shit,” “piss,” “motherfucker,” “cocksucker,” “cunt” and “tit”) illustrates sexual and excretory activities and organs in patently offensive manner by

⁷⁸ *Id.*

⁷⁹ 38 U.S. 726, 729 (1978) [hereinafter cited as “Filthy Words” case].

⁸⁰ *FCC v. Pacifica Found.*, 438 U.S. 726, 729 (1978).

⁸¹ *Id.*

⁸² *Id.*

contemporary community standards for the broadcast medium.⁸³ The FCC successfully applied the *Miller* test, and did not impose formal sanctions against Pacifica, as it intended the order to set an example of clarifying the applicable standards.⁸⁴ It emphasized its intention of not placing any definite ban on indecent language, but instructing stations to broadcast it to times of day when less children would be listening.⁸⁵ The United States Court of Appeals for the District of Columbia reversed the FCC's decision because the declaratory order was the functional equivalent of a rule, so it censored radio communications, which the FCC was explicitly prohibited from engaging in under Section 326 of the Communications Act.⁸⁶

Eventually, the Court reversed the appellate decision because the order did not censor broadcasting, but only restricted the monologue's obscene language to safeguard privacy of the home and children.⁸⁷ The Court defined "indecent" as "nonconformance with accepted standards of morality" in the context of the material and concluded that the monologue was not obscene.⁸⁸ The concurring judges agreed that the monologue itself was not obscene, but expressed their huge concerns on the ruling that the Court can decide a benchmark of which speech deserves most or less First Amendment protection because that decision would be based on the content of the speech and the Justices' subjective judgment.⁸⁹ The dissenting judges stated that as Congress intended the word "indecent" and "obscene" to have different meanings, "indecent" should be read as no more than "obscene" and pointed out that the Court's holding

⁸³ *In re A Citizen's Complaint Against Pacifica Found. Station Wbai (Fm), New York, N.Y. Declaratory Order*, 56 F.C.C.2d 94, 99 (1975).

⁸⁴ *FCC v. Pacifica Found.*, 438 U.S. 726, 729 (1978).

⁸⁵ *Id.*

⁸⁶ *Pacifica Order*, 56 F.C.C.2d 94, *rev'd sub nom. Pacifica Found. v. FCC*, 556 F.2d 9 (D.C. Cir. 1977).

⁸⁷ *FCC v. Pacifica Found.*, 438 U.S. 726, 729 (1978).

⁸⁸ *Id.* at 740.

⁸⁹ *Id.* at 729.

broadens the meaning of “indecent.”⁹⁰ After the “Filthy Words” case, the stations now avoided using seven particular obscene and indecent words from the monologues.

2) Different treatment between obscene and indecent materials

As technology developed and more access of television and radio communications were available to children, it was not realistic to assume that there would not be any children audience after 10 p.m. Releasing a public notice, the FCC demonstrated the government’s different actionable sanctions between obscene and indecent material: the government can prohibit obscene materials at all times, while it can impose fine or revoke licenses for indecent materials by applying the generic definition of indecency and factoring in a reasonable risk that children may be in the audience rather than allowing stations not accountable after 10 p.m.,⁹¹ If indecent broadcasts can be aired at times where there is not a reasonable risk that children may be exposed to them, only advance warnings are required.⁹² Through this public notice, the FCC restricted its sanctions to giving a warning to three broadcast stations and one amateur radio station, and stressed that obscene broadcasting programs would be handed over to the U.S. Department of Justice for possible criminal prosecution at all times in the future.⁹³ It further explained that innuendo or double entendre will be actionable only when the meaning of the entire discussion is clearly indecent and that it is not unlawful to use innuendo or double entendre.⁹⁴ It reversed a Review Board decision from not regulating indecent broadcasts on the amateur radio service to equally applying the same principle to it.⁹⁵

⁹⁰ *Id.*

⁹¹ Public Notice, *New Indecency Enforcement Standards To Be Applied to All Broadcast and Amateur Radio Licensees*, 2 FCC Rcd. 2726, 2727 (1987).

⁹² *Id.* at 2726.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

3) Safe harbor defined

After this public notice from the FCC, broadcasting stations became quite confused when the exact timeframe is safe for them to put indecent materials on air thanks to lowered reasonable risk to be exposed to children. Action for Children's Television sought judicial review on this matter and the Court of Appeals for the District of Columbia remanded the case so that the FCC could specify indecency safe harbor timeframe.⁹⁶ Then, Congress adopted a requirement for the FCC to enforce its indecency rules twenty-four hours every day,⁹⁷ but the Court of Appeals struck down this adoption and directed the FCC, after a proper full and fair hearing, to determine the safe harbor timeframe and to define "children" and "reasonable risk" for channeling purpose as well as the scope of government's interest in regulating indecent broadcasts.⁹⁸ Congress responded by enacting the Public Telecommunications Act of 1992⁹⁹, and established a safe harbor from midnight to 6 a.m. for indecency and, for public broadcasters, from 10 p.m. to 6 a.m.¹⁰⁰ The Court of Appeals, later, held that the Public Telecommunications Act's provisions directing the FCC to regulate issues under provisions were sufficiently narrowly drafted to serve government's compelling interest in protecting well-being of children under age of eighteen from exposure to indecent broadcasts.¹⁰¹ However, the court instructed the FCC to permit the

⁹⁶ *Action for Children's Television v. FCC*, 852 F.2d 1332, 1344 (D.C. Cir. 1988) [hereinafter cited as ACT I].

⁹⁷ Lili Levi, "*Smut and Nothing but*": *The FCC, Indecency, and Regulatory Transformations in the Shadows*, 65 Admin. L. Rev. 509, 524 n. 54 (2013).

⁹⁸ *Action for Children's Television v. FCC*, 932 F.2d 1504, 1510 (D.C. Cir. 1991) [hereinafter cited as ACT II]. See ACT I, 852 F.2d 1332, 1341-1344.

⁹⁹ Public Telecommunications Act of 1992, Pub. L. No. 102-356, 106 Stat. 949 (1992) (47 §§ 303 note, 303b, 391, 393, 396, 396 notes, 609 note) [hereinafter cited as Public Telecommunications Act].

¹⁰⁰ Lili Levi, "*Smut and Nothing but*": *The FCC, Indecency, and Regulatory Transformations in the Shadows*, 65 Admin. L. Rev. 509, 524 n. 54 (2013).

¹⁰¹ *Action for Children's Television v. FCC*, 58 F.3d 654, 656 (D.C. Cir. 1995) (en banc) [hereinafter cited as ACT III].

broadcasting indecent material between the hours of 10 p.m. and 6 a.m. for all stations because different timeframe for public and private stations is unconstitutional.¹⁰²

4) Indecency test

In 2001, the FCC extensively wrote down a policy guidance with examples and reorganized the analytical approach of two prongs to determine when the material is indecent subject to its sanctions.¹⁰³ The first prong is that the alleged material must depict or describe sexual or excretory organs or activities.¹⁰⁴ The second prong is that the broadcast of the full context must be patently offensive as measured by contemporary community standards for the broadcast medium.¹⁰⁵ The more explicit or graphic nature of the depiction or description is, the greater the material is likely patently offensive, but if the material is comprised of innuendo or double entendre, the sexual or excretory meaning has to be unmistakably clear and obvious.¹⁰⁶ For example, when a licensee talked about Elvis and Dick Nixon with interjections of “Power! Power! Power! Thrust! Thrust! Thrust!” the FCC elaborated that the whole material would reasonably understood as not intending sexual meaning.¹⁰⁷

¹⁰² *Id.*

¹⁰³ Policy Statement, *In re* Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C § 1464 and Enforcement Policies Regarding Broadcast Indecency, 16 FCC Rcd. 7999, 7999 P 1 (2001).

¹⁰⁴ Memorandum Opinion and Order, *WPBN/WTOM License Subsidiary, Inc. (WPBN-TV and WTOM-TV)*, 15 FCC Rcd 1838, 1840-41 (2000).

¹⁰⁵ Policy Statement, *In re* Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C § 1464 and Enforcement Policies Regarding Broadcast Indecency, 16 FCC Rcd. 7999, 8001 P 7-9 (2001).

¹⁰⁶ Policy Statement, *In re* Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C § 1464 and Enforcement Policies Regarding Broadcast Indecency, 16 FCC Rcd. 7999, 8004-05 P 10, 12, 14 (2001).

¹⁰⁷ *Mr. Carl J. Wagner Exec. Vice President-Broad. Great Am. Television & Radio Co., Inc. Licensee, Radio Stations Wfbq(Fm) & Wnde(Am) 1718 Young St. Cincinnati, Oh 45210*, 6 F.C.C. Rcd. 3692, 3693 (1990).

Also, repeating at length or dwelling on depiction or descriptions of sexual or excretory organs or activities is indecent, while making once or commenting sexual or excretory references in fleeting or passing nature is not, unless it involves referencing to sexual activities with children in graphic or explicit nature.¹⁰⁸ For instance, the FCC regarded “The hell I did, I drove mother-fucker, oh. Oh.”¹⁰⁹ or “Oops, fucked that one up”¹¹⁰ as single use of expletive in a fleeting and isolated utterance. In contrast, the FCC issued Notice of Liability to stations for broadcasting “What is the best part of screwing an eight-year-old? Hearing the pelvis crack.”,¹¹¹ “What’s the worst part of having sex with your brother? ... You got to fix the crib after it breaks and then you got to clean the blood off the diaper.”,¹¹² or “Suck my dick you fucking cunt,”¹¹³ even if the material was relatively fleeting references.

Conversely, it gets quite confusing and complicated when the FCC brings in the factor of the manner of presentation for the shock value of the language.¹¹⁴ When “Oprah Winfrey Show” aired an episode of “How to Make Romantic Relations with Your Mate Better” with a psychologist and panelists, the FCC decided that the subject matter alone does not render material indecent and is not actionably indecent, even if the context of the material may be

¹⁰⁸ Policy Statement, *In re* Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C § 1464 and Enforcement Policies Regarding Broadcast Indecency, 16 FCC Rcd. 7999, 8004-08 P 10, 17, 19 (2001).

¹⁰⁹ *L.M. Communications of South Carolina, Inc. (WYBB(FM))*, 7 FCC Rcd 1595, 1595 (MMB 1992).

¹¹⁰ *Lincoln Dellar, Renewal of License for Stations KPRL(AM) and KDDB(FM)*, 8 FCC Rcd 2582, 2585 (ASD, MMB 1993).

¹¹¹ *Tempe Radio, Inc. (KUPD-FM)*, 12 FCC Rcd 21828 (MMB 1997).

¹¹² *EZ New Orleans, Inc. (WEZB(FM))*, 12 FCC Rcd 4147 (MMB 1997).

¹¹³ *LBJS Broadcasting Company, L.P. (KLBJ(FM))*, 13 FCC Rcd 20956 (MMB 1998).

¹¹⁴ Policy Statement, *In re* Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C § 1464 and Enforcement Policies Regarding Broadcast Indecency, 16 FCC Rcd. 7999, 8002, 8010 P 10, 20 (2001).

offensive to some people.¹¹⁵ When a news reporter at the National Public Radio (“NPR”) reported a conversation with an organized crime figure who used “fuck” or “fucking” ten times in seven sentences, the FCC stated that the use of explicit language as an integral part of a bona fide news story does not fit to be “gratuitous, pandering, titillating or otherwise patently offensive.”¹¹⁶ The FCC ruled the movie, “Schindler’s List” as not indecent because the full frontal nudity is not per se indecent as the full context of the nudity should be actionably indecent.¹¹⁷ Then, the FCC elaborated that it monitors broadcasts for indecent material only when documented complaints come from the public with a full or partial tape or transcription of significant excerpts of the program.¹¹⁸

Even after writing the policy statement with many examples of its application of regulations on indecency, the FCC still struggled in applying the regulations due to slow enforcement procedure. When a live concert called, “The Last Damn Show,” was broadcasted in 1999, it generated a complaint due to lyrics of certain music which repeatedly and graphically referenced to oral sex.¹¹⁹ The FCC decided the phrase (“eating pussy”) in the lyrics has only one meaning referring to specific oral sexual activity, so it is indecent.¹²⁰ The FCC imposed a fine of \$7,000, but the dissenting statement of Commissioner Michael J. Copps heavily criticized the

¹¹⁵ Policy Statement, *In re* Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C § 1464 and Enforcement Policies Regarding Broadcast Indecency, 16 FCC Rcd. 7999, 8002, 8010 (2001) (citing from Letter from Chief, Complaints and Investigations Branch, Enforcement Division, Mass Media Bureau to Chris Giglio (July 20, 1994)).

¹¹⁶ *Mr. Peter Branton*, 6 FCC Rcd 610 (1991) [hereinafter cited as NPR case].

¹¹⁷ *WPBN/WTOM License Subsidiary, Inc. (WPBN-TV and WTOM-TV)*, 15 FCC Rcd 1838, 1841 P 11 (2000).

¹¹⁸ Policy Statement, *In re* Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C § 1464 and Enforcement Policies Regarding Broadcast Indecency, 16 FCC Rcd. 7999, 8015 P 24 (2001).

¹¹⁹ *Infinity Broad. License, Inc.*, 19 F.C.C. Rcd. 5022, 5022 (2004).

¹²⁰ *Id.* at 5023.

agency's inefficiency due to slow process and inadequate amount of fine.¹²¹ The Enforcement Bureau issued the initial Notice of Apparent Liability fifteen month after the program aired, released its Forfeiture Order three months later, and addressed the station's reconsideration petition a year and a half later.¹²² It was after another year and a half when the FCC finally handled the matter, which happened four and a half year after the broadcast of the program.¹²³ Commissioner Copps emphasized that even when the FCC finally acted, the fine of \$7,000 is so small for a multi-billion dollar broadcast station's business.¹²⁴

5) Overruling the FCC's own bureau's decision

Along with the slow process, when the FCC changed its own decision, it had to repeat issuing memorandum of its new regulations, and it confused broadcasting stations more. In 2002, Cher received an award at 2002 Billboard Music Awards program, saying in her thank-you speech, "I've also had critics for the last forty years saying that I was on my way out every year. Right. So fuck 'em."¹²⁵ In the following year, Nicole Richie, while presenting an award at 2003 Billboard Music Awards program, uttered "Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple."¹²⁶ Next, in January of 2004, an Irish rock band, U2, received an award at the Golden Globe Awards and the group's member, Bono said, "This is really, really, fucking brilliant."¹²⁷ In 2004, during the halftime entertainment show of the National

¹²¹ *Id.* at 5024.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Infinity Broad. License, Inc*, 19 F.C.C. Rcd. 5022, 5024 (2004).

¹²⁵ *In re Complaints Regarding Various Television Broadcasts Between Feb. 2, 2002 & Mar. 8, 2005*, 21 F.C.C. Rcd. 2664, 2690 (2006).

¹²⁶ *In re Complaints Regarding Various Television Broadcasts Between Feb. 2, 2002 & Mar. 8, 2005*, 21 F.C.C. Rcd. 2664, 2692 (2006).

¹²⁷ *In Re Complaints Against Various Broad. Licensees*, 18 F.C.C. Rcd. 19859, 19859 (2003).

Football League's Super Bowl XXXVIII, Justin Timberlake removed Janet Jackson's bustier and exposed one of her breast with a nipple shield attached in the duration of less than one second.¹²⁸

Initially, the Enforcement Bureau claimed that Bono use "f-word" as an adjective to highlight an exclamation, not as a depiction or description of sexual and excretory activities and organs, so it took no actions against National Broadcasting Company ("NBC").¹²⁹ Nevertheless, the FCC suddenly and quickly overruled its Bureau's treatment of single use of expletives in 2004 due to noticeable increase of public unease through complaints from fewer than fifty in 2000 to 1.4 million in 2004.¹³⁰ Upon the request of review filed by the Parents Television Council ("PTC"), it clarified that because the "f-word" automatically invokes sexual image it would now treat isolated and gratuitous uses of such language as indecent, and it highlighted the possible impact of even single use of such language to children, once again.¹³¹ It justified its change by placing blame on the broadcasting stations for knowing that such language could be used by the aware presenters or recipients due to earlier year's incidents and for not taking extra appropriate steps to ensure not to air such language when children were expected to be in the audience.¹³² It intended this overturn to be a clear notice to broadcasters and strongly suggested them to implement delay/bleeping system for live broadcasts.¹³³

¹²⁸ *In re* Complaints Against Various Television Licensees Concerning Their Feb. 1, 2004, Broad. of the Super Bowl Xxxviii Halftime Show, 19 F.C.C. Rcd. 19230, 19231 (2004).

¹²⁹ *In Re* Complaints Against Various Broad. Licensees, 18 F.C.C. Rcd. 19859, 19861 (2003).

¹³⁰ *In Re* Complaints Regarding Various Television Broadcasts Between Feb. 2, 2002 & Mar. 8, 2005, 21 F.C.C. Rcd. 2664, 2665 (2006).

¹³¹ *In Re* Complaints Against Various Broad. Licenses Regarding the Airing of the "Golden Globe Awards" Program, 19 F.C.C. Rcd. 4975, 4979 (2004).

¹³² *In Re* Complaints Against Various Broad. Licenses Regarding the Airing of the "Golden Globe Awards" Program, 19 F.C.C. Rcd. 4975, 4979 (2004).

¹³³ *In Re* Complaints Against Various Broad. Licenses Regarding the Airing of the "Golden Globe Awards" Program, 19 F.C.C. Rcd. 4975, 4982 (2004).

Due to an abrupt change in application of indecency regulation, in 2006, the FCC issued a long list of examples of how the agency applied new indecency analysis on programs aired from 2002 to 2005.¹³⁴ The FCC did not propose taking actions against Fox Television Network (“Fox”) on these two occasions which was found to be indecent because Fox was not on notice on the changed treatment of single use of “f-word” and “s-word” as a violation of 18 U.S.C. § 1464 at the time of the broadcasts.¹³⁵ Moreover, the FCC kept its position of finding CBS’s broadcast of Super Bowl half time performance as indecent because it found, after analyzing the segment’s performance, song lyrics (“gonna have you naked by the end of this song”) and choreography, that the nudity was designed to shock the viewing audience.¹³⁶ The FCC pointed out that the fact that the display of the breast was brief is not dispositive, so imposed a forfeiture of \$550,000 to CBS.¹³⁷

Nonetheless, this was not the last time where the FCC changed its own decision. The FCC changed its decision on “NYPD Blue” and “The Early Show” after reviewing the comments submitted by parties connected to the broadcasts of these two programs and dismissed complaints against them on the procedural grounds.¹³⁸ The FCC did not consider looking into or check whether the same person filed each of complaints against the show, until the licensee from

¹³⁴ *In re* Complaints Regarding Various Television Broadcasts Between Feb. 2, 2002 & Mar. 8, 2005, 21 F.C.C. Rcd. 2664, 2665 (2006).

¹³⁵ *In re* Complaints Regarding Various Television Broadcasts Between Feb. 2, 2002 & Mar. 8, 2005, 21 F.C.C. Rcd. 2664, 2690-96 (2006).

¹³⁶ *In re* Complaints Regarding Various Television Broadcasts Between Feb. 2, 2002 & Mar. 8, 2005, 21 F.C.C. Rcd. 2664, 2723 (2006); *In re* Complaints Against Various Television Licensees Concerning Their Feb. 1, 2004, Broad. of the Super Bowl Xxxviii Halftime Show, 19 F.C.C. Rcd. 19230, 19236 (2004).

¹³⁷ *In re* Complaints Regarding Various Television Broadcasts Between Feb. 2, 2002 & Mar. 8, 2005, 21 F.C.C. Rcd. 2664, 2723 (2006); *In re* Complaints Against Various Television Licensees Concerning Their Feb. 1, 2004 Broad. of the Super Bowl Xxxviii Halftime Show, 21 F.C.C. Rcd. 6653, 6653 (2006).

¹³⁸ *Id.* at 13327.

Kansas City brought up.¹³⁹ Regarding “NYPD Blue” which broadcasted several expletives (“dick,” “dickhead” and “bullshit”), the FCC found out that the same person filed complaints from Virginia where the material was aired during the safe harbor and that no complaints contained any claim from the licensee’s main local viewing area.¹⁴⁰ To narrow the scope of the First Amendment protection to the interests of local residents who are more prone to be directly affected by a station’s indecent broadcasting, the FCC dismissed the complaint against “NYPD Blue.”¹⁴¹

With regards to “The Early Show” where cast member of the Columbia Broadcasting System (“CBS”) program “Survivor: Vanuatu” described a fellow contestant (as a “bullshitter”) during a live interview, the FCC agreed with CBS’s argument that the interview was integral to a bona fide news interview.¹⁴² Reminding itself of the NPR case, the FCC admitted that it did not give appropriate evaluation to the nature of the news programming and that such language is not actionably indecent in the context of a bona fide news story.¹⁴³ The contradicting statement presented here is that the FCC stressed that there is no outright exception.¹⁴⁴ Here, the FCC agreed with CBS only after reminding it of the existing rule, and denied having an exception.

6) Fox and CBS precedents

The enforcement process became messy when it took such long time for the FCC to put out new decisions on different complaints and even messier when parties seek judicial review which impacted pending reviews and following complaints. When Fox petitioned for review,

¹³⁹ *Id.* at 13327.

¹⁴⁰ *Id.* at 13327.

¹⁴¹ *Id.* at 13327.

¹⁴² *Id.* at 13327.

¹⁴³ *Id.* at 13328.

¹⁴⁴ *Id.* at 13327.

regarding to the broadcasting of Billboard Music Awards in 2002 and 2003, to the Second Circuit Court of Appeals on the FCC's decision, the court vacated the FCC's order because its new policy is arbitrary and capricious under the 5 U.S.C.S. § 706(2)(A) of the Administrative Procedure Act ("APA").¹⁴⁵ Under the mentioned provision of the APA, the reviewing courts may not substitute its judgment for that of the agency and not provide a reasoned basis for the agency's action that the agency itself has not given.¹⁴⁶ The court found that the FCC made a completely opposite turn to the treatment of fleeting expletives without articulating a reasoned basis for its change in policy connected to the facts found, so it remanded the matter for the FCC to demonstrate a reasoned analysis of its new policy towards fleeting expletives.¹⁴⁷ As the court struck down the indecency policy on APA grounds, it declined to reach the constitutional issues in the case.¹⁴⁸

Afterwards, CBS borrowed the idea of challenging the FCC's policy on the APA grounds and sought review of FCC's orders to the Third Circuit Court of Appeals.¹⁴⁹ The Third Circuit vacated the FCC's orders due to being arbitrary and capricious under the APA, as the FCC failed to supply notice of and a reasoned explanation why it changed a well-established policy.¹⁵⁰ The court recognized that an agency's interpretation of its own precedent is within the agency's discretion and is entitled to deference only when the agency's proposed interpretation is not capricious.¹⁵¹ However, the court reiterated that even though agencies can change their rules

¹⁴⁵ *Fox TV Stations, Inc. v. FCC*, 489 F.3d 444, 467 (2d Cir. 2007).

¹⁴⁶ *Id.* at 454.

¹⁴⁷ *Id.* at 455.

¹⁴⁸ *Id.* at 462.

¹⁴⁹ *CBS Corp. v. F.C.C.*, 535 F.3d 167, 171 (3d Cir. 2008).

¹⁵⁰ *Id.* at 175.

¹⁵¹ *Id.* at 180. *See Cassell v. F.C.C.*, 154 F.3d 478, 483 (D.C. Cir. 1998); *Inland Lakes Management, Inc. v. NLRB*, 987 F.2d 799, 805 (D.C.Cir.1993).

without judicial second-guessing,¹⁵² they cannot casually ignore prior policies and standards without providing a reasoned analysis behind the change.¹⁵³ Furthermore, the court held that CBS could not be held vicariously liable under the doctrine of respondeat superior for actions of Janet Jackson and Justin Timberlake who were independent contractors, not employees, because: they were hired for only for that year's performance; they hired their own choreographers, back up dancers, and other assistants without CBS's involvement and; CBS did not pay any employment tax.¹⁵⁴

Once the Second Circuit brought in the provision of the APA, the Court's focus on the issue drastically changed from whether Fox's broadcasted material is indecent to whether the lower court's interpretation of APA was just for the courts to demand the FCC's reasoned analysis behind a change in treatment of fleeting expletives.¹⁵⁵ Looking into precedent cases, respectively, involving the rescission of a prior regulation and Court's practice of deferring to reasonable judgements of agencies in interpreting ambiguous terms,¹⁵⁶ the Court restated that every agency action representing a policy change does not need to be justified by more substantial reasons and such reasons are only required when an agency does not act in the first instance and when its new policy is based on factual findings that contradict those of its prior policy, or when its prior policy does not factor in legitimate reliance on prior policy.¹⁵⁷ The text of the statute instructs a reviewing court to "compel agency action unlawfully withheld or

¹⁵² See, e.g., *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 863 (1984).

¹⁵³ See *Ramaprakash v. FAA*, 358 U.S. App. D.C. 146, 346 F.3d 1121, 1124 (D.C. Cir. 2003).

¹⁵⁴ *CBS Corp. v. F.C.C.*, 535 F.3d 167, 197-98 (3d Cir. 2008).

¹⁵⁵ *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 514 (2009).

¹⁵⁶ See *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983); *Smiley v. Citibank (S. Dakota), N.A.*, 517 U.S. 735, 742 (1996).

¹⁵⁷ *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 514-15 (2009).

unreasonably delay,”¹⁵⁸ and to “hold unlawful and set aside agency action, findings, and conclusions found to be [among other things] ... arbitrary [or] capricious.”¹⁵⁹ However, the statute does not make distinction between initial agency action and subsequent agency action, so the Court reversed the Second Circuit’s judgment.¹⁶⁰ Moreover, this holding vacated and remanded the CBS’s actions back to the Third Circuit.¹⁶¹

On remand, the Second Circuit vacated the FCC’s order and its new indecency policy by holding that the new policy violated the First Amendment due to being unconstitutionally vague and lack of notice required by the First Amendment and resulted in creating a chilling effect among broadcasters and heightening self-censorship beyond what the regulation enforces.¹⁶² The court explained that recent technological advances provided parents more ability to control and permit what their children watch, so discredited the FCC’s long-standing argument for protecting children from indecent language and materials.¹⁶³ Comparing a contradictory decision of the FCC for allowing ABC Television Network (“ABC”) to broadcast the film “Saving Private Ryan” due to expletives being integral to an artistic work¹⁶⁴ to another one for not allowing a noncommercial educational station to broadcast an episode of a prerecorded documentary series provided by the Public Broadcasting Service (“PBS”) to profile a unique genre in music¹⁶⁵, the court criticized that this tells the FCC’s subjective opinion of how fleeting expletives in a

¹⁵⁸ 5 U.S.C.A. § 706(1) (LexisNexis, Lexis Advance through PL 115-277, approved 11/3/18).

¹⁵⁹ 5 U.S.C.A. § 706(2)(A) (LexisNexis, Lexis Advance through PL 115-277, approved 11/3/18).

¹⁶⁰ *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 515, 530 (2009).

¹⁶¹ *F.C.C. v. CBS Corp.*, 556 U.S. 1218, 1218 (2009).

¹⁶² *Fox TV, Inc. v. FCC*, 613 F.3d 317, 319 (2d Cir. 2010).

¹⁶³ *Fox TV, Inc. v. FCC*, 613 F.3d 317, 326, 332 (2d Cir. 2010).

¹⁶⁴ *In re Complaints Against Various Television Licensees Regarding Their Broad. on Nov. 11, 2004, of the ABC Television Networks Presentation of the Film Saving Private Ryan*, 20 F.C.C. Rcd. 4507, 4512-13 (2005).

¹⁶⁵ *In re Complaints Regarding Various Television Broadcasts Between Feb. 2, 2002 & Mar. 8, 2005*, 21 F.C.C. Rcd. 2664, 2686 (2006).

fictional movie can be more essential than in the interviews with real people about real life.¹⁶⁶ The court identified the FCC's indiscernible standards leading to a discriminatory manner to suppress particular points of view.¹⁶⁷ The court set out the FCC's policy chilling protected speech of broadcasters which: cancelled to air the Peabody Award-winning "9/11" documentary due to firefighters' occasional expletives in the World Trade Center on September 11th; declined a planned reading of Tom Wolfe's novel due to a single complaint about the adult language in the book; refused to air a political debate; removed live, direct-to-air coverage of news events; rejected to re-broadcast an episode of "That 70s Show" dealing with masturbation without depiction of the act; and re-wrote an episode of "House" because of the character's psychiatric struggles with his sexuality.¹⁶⁸ The court did not recommend the FCC to create a constitutional policy, but just held that its current policy is unconstitutional.¹⁶⁹

On remand, the Third Circuit vacated the FCC's order against CBS by highlighting the FCC's consistent practice of treating both fleeting words and images similarly.¹⁷⁰ When the Court granted certiorari, it hesitated to consider the constitutionality of the FCC's current indecency policy, but held that the FCC's application of its revised indecency policy violated the Due Process Clause of the Fifth Amendment due to vagueness for lack of notice to the broadcasters.¹⁷¹

In sum, even though the court acknowledged too similar definition of obscenity and indecency, the FCC successfully defined the difference and treated obscene and indecent

¹⁶⁶ *Fox TV, Inc. v. FCC*, 613 F.3d 317, 333 (2d Cir. 2010).

¹⁶⁷ *Id.* at 332.

¹⁶⁸ *Id.* at 334-35.

¹⁶⁹ *Id.* at 335.

¹⁷⁰ *CBS Corp. v. FCC*, 663 F.3d 122, 130 (2011).

¹⁷¹ *FCC v. Fox TV Stations, Inc.*, 567 U.S. 239, 241 (2012).

materials differently. However, when applying two different rules, the FCC heightened the standard of keeping indecent materials out of broadcasting by arguing that its duty is to serve public interest and to protect children. Its statement is very broad and general public policy argument without any significant research done in terms of correlation of exposure to obscene or indecent materials and children's behavior. The FCC seems to use this policy argument way too often to remember some of their precedent decisions, as the FCC often overturned its own decision based on the parties' reminder that their case is not obscene or not indecent according to the FCC's past decision.

Additionally, there is no consistency between the Commissioners and its own staffs or Bureaus. If the FCC would have reviewed and reminded itself of how it regulated different content of materials, it would have not overruled its own decision which was the main reason why there was such a chaotic mass in the years from 2002 till 2005. This massive litigation affected the whole complaint handling procedure, and this influenced the FCC's performance in reviewing complaints. The FCC did not check whether some complaints were written by the same person, whether the complaint was coming from a region where the broadcast of materials was within safe harbor timeframe, or even the dates of complaints after how many dates since the broadcasting. Recommendations will be made in the later section.

v. Development of censorship law in Korea in chronological order

The very first case involving censorship in Korea was Movie Society (or Association), a private organization established to promote movies and improve policies towards movie making.¹⁷² The plaintiff was the Directors Committee within the Society, alleging that it is

¹⁷² Constitutional Court [Const. Ct.], 1990Hun-Ma56, Jun. 3, 1991, (3 KCCR 289, 290) (S. Kor.).

unconstitutional for the KECPP to require all members of the Society submitting movies before production and distribution of movies, editing portions of movies or stopping production of movies criticizing societies. The Constitutional Court dismissed the case because the plaintiff was a private organization whose presence was not visible on documentations unlike public organization, rather than an individual claiming remedies for damages. The Court suggested the Society to put its head president's name to proceed.

Following the Court's recommendation, a director filed the same complaint.¹⁷³ The Court unanimously held that the KECPP's pre-censorship was unconstitutional. The Court explained three factors to determine whether reviewing process is censoring or is equivalent to censoring: first, there is a required submission in order to get permission for expression; second, the administrative power is central to the reviewing process; third, the expression without permission is not allowed, or there is an appeal to the compulsory measures within the organization. The Court emphasized that even if the KECPP is a private organization voluntarily run, so long as its administrative power of being legally delegated to censor movie constantly affects the organization and operation of the KECPP, it is a censoring agency. Moreover, it is censorship when the reviewing process eventually decide whether the reviewed movie can be distributed or not, but it is not censorship, but it is just a screening when KECPP assigns the rating levels to the reviewed movie for more efficient distribution.

After holding the KECPP's movie reviewing process as unconstitutional, the Court held that KECPP's reviewing process for record albums and videos is unconstitutional as well.¹⁷⁴ The

¹⁷³ Constitutional Court [Const. Ct.], 1993Hun-Ga13, Oct. 2, 1996, (8-2 KCCR 212, 214) (S. Kor.).

¹⁷⁴ Constitutional Court [Const. Ct.], 1994Hun-Ga6, Oct. 31, 1996, (8-2 KCCR 395, 397) (S. Kor.).

Court stressed, once again, that even though an organization is an independent committee, as long as its administrative authority affects the reviewing process, then their administrative authority is equivalent to censorship.

These two cases disbanded the KECP, but a new organization, Association for Promotion of Performance and Arts (“APPA”) was established with its own reviewing process for record albums and videos, again.¹⁷⁵ The Court affirmed the reviewing process as unconstitutional, again, stating that there had been nothing different in analysis of three factors to determine whether the reviewing process is a censorship, except the change in the name, which did not have an effect on the Court’s decision.

The Korea Media Rating Board has a rating system to assign different levels of rating symbols that informs the audience before watching movies.¹⁷⁶ In that process, the Board can withhold assignment of rating level for maximum three months for any of the following reasons: the content violates constitutional order of democracy, or damages reputation of the nations; the content highly promotes violence and indecency which can dismantle public order; or the content deteriorates international foreign affairs, people’s cultural identities, etc. The issue of the case was whether the Board’s withholding is equivalent to censorship or not. The Court declared that only the withholding is a censorship, but not assigning the rating levels. Even though the Board does not report to the Chief of the Ministry of Culture, Sports, and Tourism, its Board members are appointed by the President whose enforcement decree specifies the Board’s organization and operation, and the Board gets government subsidies shows. These administrative authorities

¹⁷⁵ Constitutional Court [Const. Ct.], 1999Hun-Ga1, Sep. 16, 1999, (11-2 KCCR 245, 249) (S. Kor.).

¹⁷⁶ Constitutional Court [Const. Ct.], 2000Hun-Ga9, Aug. 30, 2001, (13-2 KCCR 134, 139) (S. Kor.).

within the Board can affect the reviewing process, and no limitations on how many times the Board can withhold submitted videos concerned the Court as infinite censorship towards certain expressions.

After all these cases that set up the basic foundation of censorship law, KCC and its delegated organization, KOCSC, has reviewing process that are constitutional by promoting voluntary submission, not subjecting themselves as administrative authority which would influence the release of the music or performance, and not punishing or allowing the unsubmitted expression of works.

IV. Criticism and recommendations

Both the FCC and the KCC can be criticized for projecting their own subjective view of obscenity and indecency. The FCC's sudden change in policy, regardless of what and why the change in policy occurred, confused many broadcasters and the FCC projected its subjective view that obscenity and indecency influence children without giving any scientific basis. The Korean Broadcasting Act does lay out detailed guideline of what the broadcaster should look out for in terms of programming, but it is still the KCC's decision and interpretation of, for instance, what elements in the song or choreography provoke violence to children.

The FCC has struggled in applying indecency rules on the analysis of the content of the material and courts in the States have touched grounds of APA and avoided the subject matter in the First Amendment protection. By applying the Korean censorship law's three factor test that focuses on the administrative authority of the agency, rather than the content of the material, would be much more unambiguous and clearer rule for the courts in the States to follow. Moreover, the FCC can establish a statutorily created broadcast station, like Korea Broadcasting

System, and a public educational channel like Educational Broadcasting System under the Korean Broadcasting Act.¹⁷⁷

¹⁷⁷ Korean Broadcasting Act, *supra* note 3 at art. 43-69(7).