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110TH CONGRESS *1st Session*	SENATE	REPORT 110–236

PROTECTING CHILDREN FROM INDECENT PROGRAMMING ACT

R E P O R T

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ON

S. 1780

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SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ONE HUNDRED TENTH CONGRESS

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Mr. INOUYE, from the Committee on Commerce, Science, and Transportation, submitted the following

REPORT

[To accompany S. 1780]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 1780) to require the FCC, in enforcing its regulations concerning the broadcast of indecent programming, to maintain a policy that a single word or image may be considered indecent, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

PURPOSE OF THE BILL

The purpose of S. 1780 is to require the Federal Communications Commission (FCC), in administering its regulations concerning the broadcast of indecent programming, to maintain a policy that a single word or image may be considered indecent.

BACKGROUND AND NEEDS

The FCC's authority to police "indecent" speech stems from section 1464 of title 18, United States Code, which provides that "[w]hoever utters any obscene, indecent, or profane language by means of radio communications shall be fined or imprisoned not more than two years, or both." Sections 503(b)(1)(B) and 503(b)(1)(D) of the Communications Act of 1934 empower the FCC to issue forfeiture penalties for violations of section 1464. The FCC first exercised this authority in 1975 when it issued a declaratory order identifying seven "dirty words" in a radio monologue by comedian George Carlin as indecent. The agency announced its inten-

tion to restrict the broadcast of such indecent material to hours when children would most likely not be in the listening audience.

The FCC's indecency policy was upheld by the Supreme Court in the landmark decision *FCC v. Pacifica Foundation,* 438 U.S. 726 (1978) (*Pacifica*). In *Pacifica*, the Court held that broadcasting is entitled to more limited First Amendment protection than other forms of communication because of its uniquely pervasive presence and its unique accessibility to children.

In the decade that followed *Pacifica*, the FCC took a more limited approach toward indecency enforcement. For instance, in a case where the broadcaster in question had aired programming during the morning hours containing some of the terms used in the Carlin monologue, the FCC determined that the broadcaster did not violate section 1464, because that the language did not amount to "verbal shock treatment" and the complainant had failed to show that this was more than "isolated use." *Application of Pacifica Found.*, 95 F.C.C.2d 750 at paras. 16, 18 (1983).

In a 1987 decision, however, the FCC revised the way in which it enforced broadcast indecency violations, explaining that the exclusive focus on specific words "made neither legal nor policy sense." *Infinity Broad. Corp.*, 3 FCC Rcd 390 at para. 5. The FCC noted that going forward it would use the generic definition of indecency that was used in the order upheld by *Pacifica*. Under that definition, "language or material that depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs." *Id.* at para. 2. The D.C. Circuit ultimately upheld the FCC's decision to move beyond the narrow specifics of the monologue underlying *Pacifica* and use this generic definition. *Action for Children's Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995)(en banc).

To provide further guidance, the FCC later issued a policy statement on broadcast indecency. *Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464*, 16 FCC Rcd 7999 (2001)(*Policy Statement*). In this *Policy Statement*, the FCC noted that indecent speech is protected by the First Amendment, thus requiring the government to identify a compelling interest for any regulation it may impose and choose the least restrictive means to further that interest. However, even under this rigorous standard, the FCC noted the courts' consistent support for the FCC's authority to regulate indecent speech, albeit with certain limitations. *Id.* at para. 3. In particular, the FCC noted the Supreme Court's recognition in *Reno v. ACLU*, 521 U.S. 844 (1997), of the "special justifications for regulation of the broadcast media that are not applicable to other speakers." *Policy Statement* at para. 4. The FCC went on to explain that an indecency finding involves two determinations. First, the FCC considers whether the material at issue describes or depicts sexual or excretory organs or activities. Second, the FCC considers whether the broadcast is patently offensive as measured by contemporary community standards for the broadcast medium.

The FCC noted in its policy statement that it considers three factors in determining whether or not material is patently offensive. First, the FCC considers the explicit or graphic nature of the description or depiction of sexual or excretory organs or activities. Second, the FCC considers whether the material dwells on or re-

peats these activities at length. Third, the FCC considers whether the material appears to pander or is used to titillate or appears to have been presented for its shock value. In discussing the second factor in its patently offensive test, the FCC cited examples distinguishing between material that dwells on offensive content and material that is fleeting and isolated (*Policy Statement* at para. 19).

In 2003, during a live broadcast of the Golden Globe Awards, the musician Bono used the F-Word as an adjective before the word "brilliant" to described an award. In response, the FCC received hundreds of complaints. The agency's Enforcement Bureau initially denied the complaints directed at this broadcast on the basis that the expletive was not used to describe sexual or excretory organs or actions and that the utterance was fleeting and isolated. *Complaints Against Various Broadcast Licensees Regarding their Airing of the "Golden Globes Awards" Program*, 18 FCC Rcd 19859 (Enforcement Bureau 2003). On review, however, the FCC reversed the Bureau's decision, holding that the word at issue has inherently sexual connotation and was patently offensive under contemporary community standards. *Complaints Against Various Broadcast Licensees Regarding their Airing of the "Golden Globes" Awards Program*, 19 FCC Rcd 4975 at para. 3 (2004) (*Golden Globes*). Furthermore, while noting that its finding was contrary to prior rulings relying on the deliberate and repetitive use of patently offensive words, the FCC found that the fleeting and isolated use of the word at issue was irrelevant and concluded that its use in the context at issue was indecent:

> The "F-Word" is one of the most vulgar, graphic and explicit descriptions of sexual activity in the English language. Its use invariably invokes a coarse sexual image. The use of the "F-Word" here, on a nationally telecast awards ceremony, was shocking and gratuitous. In this regard, NBC does not claim that there was any political, scientific or other independent value of use of the word here, or any other factors to mitigate its offensiveness. If the Commission were routinely not to take action against isolated and gratuitous uses of such language on broadcasts when children ere expected to be in the audience, this would likely lead to more widespread use of the offensive language. Neither Congress nor the courts have ever indicated that broadcasters should be given free rein to air any vulgar language, including isolated and gratuitous instances of vulgar language. The fact that the use of this word may have been unintentional is irrelevant; it still has the same effect of exposing children to indecent language . . . .
>
> While prior Commission and staff action have indicated that isolated or fleeting broadcasts of the "F-Word" such as that here are not indecent or would not be acted upon, consistent without our decision today we conclude that any such interpretation is no longer good law. In *Pacifica Foundation, Inc.*, 2 FCC Rcd 2698, 2699 (1987) (subsequent history omitted), for example, the Commission stated as follows: "If a complaint focuses solely on the sue of expletives, we believe that . . . deliberate and repetitive use in a patently offensive manner is a requisite to a finding of indecency." The staff has since found that the isolated or fleeting use of the "F-Word" is not indecent

> in situations arguably similar to that here. We now depart from this portion of the Commission's 1987 *Pacifica* decision as well as all of the cases cited in notes 31 and 32 and any similar cases holding that isolated or fleeting use of the "F-Word" or a variant thereof in situations such as this is not indecent and conclude that such cases are not good law to that extent. We now clarify, as we have made clear with respect to complaints going beyond the use of expletives, that the mere fact that specific words or phrases are not sustained or repeated does not mandate a finding that material that is otherwise patently offensive to the broadcast medium is not indecent. *Id.* at paras. 9, 12 (internal footnotes omitted).

In making this change in policy, the FCC further commented on the development of technologies that licensees could use to bleep out even isolated utterances of offending words and on the fact that such an outcome might have been foreseeable to licensees given prior incidents involving the similar use of offensive language during live broadcasts of award shows.

Several parties, including broadcasters, filed petitions for reconsideration of the *Golden Globes* decision. These petitions remain pending at the FCC. Nonetheless, the FCC has applied the policy announced in *Golden Globes* in subsequent cases.

Notably, on February 21, 2006, the FCC issued an order resolving various complaints against several television broadcasts that found indecency violations in four separate programs consistent with the policy announced in *Golden Globes*. *Complaints Regarding Various Television Broadcasts between February 2, 2002 and March 8, 2005*, 21 FCC Rcd 2664 (*Omnibus Order*). Citing *Golden Globes*, the FCC dismissed the fact that the expletives used in these four programs were fleeting and isolated and again held that repeated use is not a prerequisite for a finding of indecency. Nonetheless, the FCC declined to issue a forfeiture in these cases in light of the fact that the broadcasts at issue occurred before the release of the *Golden Globes* decision.

Several broadcasters filed a petition for review of the *Omnibus Order*. The action was consolidated in the Second Circuit Court of Appeals. Before briefing began, however, the FCC sought a voluntary remand in order to address petitioners' arguments regarding the ability of licensees to seek a full opportunity to be heard before the FCC issues a final decision. The court granted the FCC's request for remand and provided the agency with sixty days to issue a final appealable order. In response, the FCC issued a public notice seeking comment on its decision in the *Omnibus Order*. In response to the comments it received, the FCC issued a new decision on November 6, 2006. *Complaints Regarding Various Television Broadcasts between February 2, 2002 and March 8, 2005*, FCC 06-166 (*Remand Order*).

In the *Remand Order*, the FCC reaffirmed its earlier finding with respect to two of the four programs it had found indecent in the *Omnibus Order*. Specifically, the FCC reaffirmed its finding that remarks featured in the 2002 and 2003 Billboard Music Awards programs were indecent. In the 2002 Billboard Music Awards program, Cher stated: "People have been telling me I'm on the way out every year, right? So f*** 'em." In the 2003 Billboard

Music Awards program, Nicole Richie stated: "Have you ever tried to get cow sh** out of a Prada purse? It's not so f***ing simple." Moreover, the FCC noted that the remarks in the 2003 Billboard Music Awards would have been actionably indecent prior to its *Golden Globes* decision because of the repeated use of offensive language.

In the *Remand Order*, the FCC also reversed its earlier finding with respect to one of the four programs it had found indecent in the *Omnibus Order*, because it occurred in the context of a *bona fide* news interview. The language at issue was heard during a live interview on the CBS Early Show of a contestant from the CBS reality show Survivor. The FCC noted that in light of First Amendment concerns, this required proceeding "with the utmost restraint when it comes to news programming." *Id.* at paras. 71-72. In addition, on review, the FCC dismissed the complaint underlying one of the four programs it had found indecent in the *Omnibus Order* because the lone individual complaining of the material resided in an area of the country where it was broadcast during the "safe harbor" period after 10 p.m. *Id.* at para. 75; *see also* 47 C.F.R. section 73.999(b).

Following the release of the *Remand Order*, the broadcasters' appeal of the *Omnibus Order* was automatically reinstated in the Second Circuit Court of Appeals. On June 7, 2007, the court released a decision remanding the FCC's efforts to declare "fleeting expletives" indecent speech. *Fox v. FCC*, 489 F.3d 444 (2nd Cir. 2007) (*Fox*). In a divided opinion, the majority concluded that the FCC decision sanctioning fleeting expletives was arbitrary and capricious under the Administrative Procedure Act. Specifically, the majority concluded that the FCC departed from its prior precedent without providing a reasoned analysis explaining why it was doing so. Though the *Fox* holding was procedural, the majority decision continued in dicta to question if it would be constitutionally permissible for the agency to sanction fleeting expletives as indecent speech. In concluding, the majority went so far as to suggest their doubts that the FCC would be able to proffer a revised analysis that would meet constitutional muster.

In contrast, the dissenting judge found that the FCC gave a reasoned explanation for its change of policy and therefore complied with the Administrative Procedure Act. The dissenting judge further noted that agencies are not locked into statutory interpretations but are free to change standards as their expertise and experience may require.

S. 1780 would clarify the authority of the FCC to regulate indecent speech in light of the *Fox* decision. Specifically, it would clarify that in enforcing Federal restrictions on the broadcast of indecent or profane material, the FCC shall maintain a policy that indecent or profane material may include a single word or image. In so doing, the legislation does not require the FCC to adopt a *per se* rule in considering whether isolated utterances of offensive language constitute an indecency violation. Rather, the legislation allows the FCC to continue its consideration of the full context in which the material appeared when considering whether material is patently offensive. The FCC has never had an exception to its indecency enforcement policies for isolated images, and the *Fox* decision

addressed only spoken expletives. In order to be complete, however, S.1780 would include images as well as utterances.

SUMMARY OF PROVISIONS

S. 1780, the Protecting Children from Indecent Programming Act, would amend the Public Telecommunications Act of 1992 by requiring the FCC, in enforcing its regulations concerning the broadcast of indecent programming, to maintain a policy that a single word or image may be considered indecent.

LEGISLATIVE HISTORY

The Protecting Children from Indecent Programming Act (S. 1780) was introduced by Senator Rockefeller on July 12, 2007, and referred to the Senate Committee on Commerce, Science, and Transportation. The bill is cosponsored by Senators Inouye, Stevens, Pryor, McCain, Byrd and Brownback. On July 19, 2007, the Committee considered the bill in an open Executive Session. The bill was adopted by voice vote. The Committee, without objection, ordered that S. 1780 be reported.

ESTIMATED COSTS

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget Act of 1974, the Committee provides the following cost estimate, prepared by the Congressional Budget Office:

S. 1780—Protecting Children from Indecent Programming Act

S. 1780 would require the Federal Communications Commission (FCC) to maintain its current policy that a single word or image may constitute indecent programming. The FCC considers such actions to fall within its authority and levies penalties when violations occur. As a result, single words or images that are considered to be indecent, obscene, or profane can draw civil penalties (which are recorded in the budget as revenues). CBO estimates that enacting the bill would have no effect on revenues over the 2008–2017 period, and also would have no other impact on the budget.

According to the FCC, cases in which a single word or image are broadcast that would be considered obscene, indecent, or profane are very infrequent, but fines levied by the FCC for such actions have resulted in some court challenges by the broadcasters. This legislation would clarify the statutory basis for the FCC's current policy.

S. 1780 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on public or private entities. Because the bill would codify existing policy, it would not impose a new enforceable duty on public or private broadcasters.

The CBO contact for this estimate is Barbara Edwards. The estimate was approved by G. Thomas Woodward, Assistant Director for Tax Analysis.

REGULATORY IMPACT STATEMENT

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following evaluation of the regulatory impact of the legislation, as reported:

NUMBER OF PERSONS COVERED

S. 1780 is intended to require the FCC, in enforcing its regulations concerning the broadcast of indecent programming, to maintain a policy that a single work or image may be considered indecent. The persons subject to the regulations the FCC would implement under this bill are broadcast licensees already subject to FCC authority to police obscene, indecent, or profane language by means of radio communications under section 1464 of title 18, United States Code.

ECONOMIC IMPACT

S. 1780 would not have an adverse impact on the Nation's economy.

PRIVACY

The reported bill would have no impact on the personal privacy of United States citizens.

PAPERWORK

The reported bill should not significantly increase paperwork requirements for individuals and businesses.

SECTION-BY-SECTION ANALYSIS

Section 1. Short title

The short title would provide that the Act could be cited as the "Protecting Children from Indecent Programming Act".

Section 2. FCC may regard single word or image as indecent

Section 2 would amend the Public Telecommunications Act of 1992 by adding a new subsection (c).

New subsection (c) would direct the FCC, in administering its regulations concerning the broadcast of indecent programming, to maintain a policy that a single word or image may be considered indecent.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new material is printed in italic, existing law in which no change is proposed is shown in roman):

PUBLIC TELECOMMUNICATIONS ACT OF 1992

BROADCASTING OF INDECENT PROGRAMMING

[47 U.S.C. 303 note]

SEC. 16. (a) FCC REGULATIONS.—The Federal Communications Commission shall promulgate regulations to prohibit the broadcasting of indecent programming—

(1) between 6 a.m. and 10 p.m. on any day by any public radio station or public television station that goes off the air at or before 12 midnight; and

(2) between 6 a.m. and 12 midnight on any day for any radio or television broadcasting station not described in paragraph (1).

The regulations required under this subsection shall be promulgated in accordance with section 553 of title 5, United States Code, and shall become final not later than 180 days after the date of enactment of this Act.

(b) REPEAL.—Section 6078 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1989 (Public Law 100–459; 102 Stat. 2228) is repealed.

(c) SINGLE WORD OR IMAGE POLICY.—In administering the regulations promulgated under subsection (a), the Commission shall maintain a policy that a single word or image may constitute indecent programming.

○