

ADVISORIES

Media & Entertainment

Regulatory and Industry Standards Applicable to Mature, Indecent and Obscene Programming

10.14.03

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proposed a statutory maximum fine of \$357,500 against Infinity Broadcasting for a series of broadcasts on the “Opie and Anthony Show” in New York, regarding alleged sex acts staged in public places. At the same time, the FCC proposed a \$55,000 fine against AMFM Radio for indecent broadcasts on an FM morning show in Washington, D.C. Although cable television networks are not directly subject to the FCC’s rules or to local franchise provisions that prohibit distribution of indecent material, distribution agreements between networks and multichannel video programming distributors (“MVPDs”) (such as cable operators and DBS distributors) often prohibit or impose limits on indecent content. Moreover, the cable industry, through the National Cable Television Association (“NCTA”), has pledged to adhere to voluntary ratings guidelines regarding mature programming. In this CRB Update, we review the regulatory and industry standards applicable to mature, indecent and obscene programming.

1. Programming requiring a rating

Pursuant to a 1996 Congressional directive, the broadcast, motion picture and cable industries jointly adopted voluntary rules to rate programming that contains violence and sexual or other indecent material, known as the TV Parental Guidelines. The rating system adopted in the TV Parental Guidelines consists of six descriptive labels designed to indicate the appropriateness of television programming to children according to age and/or maturity, as well as content indicators concerning sexual situations, violence, language or dialogue. The ratings are divided into two categories: (1) programs designed solely for

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TV-Y (All Children – *These programs are designed to be appropriate for all children.*) Whether animated or live-action, the themes and elements in these programs are specifically designed for a very young audience, including children from ages 2-6. These programs are not expected to frighten younger children.

TV-Y7 (Directed to Older Children – *These programs are designed for children age 7 and above.*) These programs may be more appropriate for children who have acquired the developmental skills needed to distinguish between makebelieve and reality. Themes and elements in these programs may include mild fantasy or comedic violence, or may frighten children under the age of 7. Therefore, parents may wish to consider the suitability of these programs for their very young children. Note: For those programs where fantasy violence may be more intense or more combative than other programs in this category, such programs should be designated TV-Y7-FV.

For programs designed for the *entire audience*, the ratings are:

TV-G (General Audience – *Most parents would find these programs suitable for all ages.*) Although this rating does not signify a program designed specifically for children, most parents may let younger children watch these programs unattended. These programs contain little or no violence, no strong language and little or no sexual dialogue or situations.

TV-PG (Parental Guidance Suggested – *These programs contain material*

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situations (S), infrequent coarse language (L), or some suggestive dialogue (D).

TV-14 (Parents Strongly Cautioned -- *These programs contain some material that many parents would find unsuitable for children under 14 years of age.*)

Parents are strongly urged to exercise greater care in monitoring these programs and are cautioned against letting children under the age of 14 watch unattended. These programs contain one or more of the following: intense violence (V), intense sexual situations (S), strong coarse language (L), or intensely suggestive dialogue (D).

TV-MA (Mature Audience Only – *These programs are specifically designed to be viewed by adults and therefore may be unsuitable for children under 17.*)

These programs contain one or more of the following: graphic violence (V), explicit sexual activity (S), or crude indecent language (L).

The rating icons and associated content symbols must appear for 15 seconds at the beginning of all rated programming. The ratings are intended to work with the v-chip technology, which will be installed in televisions sets, or available through set-top boxes, to permit parents to block programming with a certain rating. An Oversight Monitoring Board made up of broadcast, motion picture and cable industry representatives, is responsible for ensuring that the ratings are applied accurately and consistently to television programming. However, the Board is not empowered to mandate a change or impose fines or penalties for failure to comply with the ratings program.

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the FCC requires broadcasters to channel indecent programming between the hours of 10 p.m. and 6 a.m. Although there is no similar channeling requirement applicable to cable programming, federal law requires cable operators to provide parental control devices, i.e., lock boxes, to subscribers upon request, and to notify subscribers in advance of receiving free previews of premium services containing X, NC-17 or R rated programming. Moreover, program networks' affiliate agreements with MVPDs often impose restrictions on indecent programming.

a. What is indecent programming?

The FCC defines "broadcast indecency" as language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs.

This definition has remained substantially unchanged since it was first enunciated in 1975. Decisions of the FCC interpreting the indecency standard in the context of radio and television broadcasts and telephone messages provide some guidance as to whether material is indecent. For example, the FCC has stated that "the concept of indecency is intimately connected with the exposure of children to material that most parents regard as inappropriate for them to hear." In addition, the FCC has found to be indecent "vulgar, repeated and gratuitous references" that "inescapably involve a sexual organ and sexual activity." The FCC has specifically classified as indecent explicit verbal descriptions of sexual activity. The Commission has also focused on the manner of delivery,

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simply one of many variables that make up a work's context" and the fact that material is political or social commentary would not be, in itself, decisive. Some of the programming found on Playboy, Spice and other nationally available adult programming services is considered to be indecent.

b. Broadcast Limitations

FCC rules ban the *broadcasting* of indecent programs except between the hours of 10 p.m. and 6 a.m., a period known as the "safe harbor hours." Earlier this year, the FCC imposed a \$27,500 fine on a broadcaster for broadcasting indecent material outside of the safe harbor. In assessing the fine, the FCC stated that it will begin revoking broadcast licenses for repeated violations of the indecency rules.

Significantly, the time channeling requirement for indecent programming *does not* apply to indecent programming that is transmitted solely via *cable* systems. As noted by the Supreme Court in a 2001 decision striking down a portion of the Communications Decency Act aimed at signal bleed, there is a "key difference between the cable television and broadcasting media": unlike broadcasters, cable systems can block unwanted program channels on a household-by-household basis. Indecent content is constitutionally protected. Regulations restricting indecent speech distributed via cable must serve a "substantial government interest" and must be "narrowly tailored to achieve that interest". While the Supreme Court has not addressed the standards that would be applied to DBS, comparable blocking

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c. MVPD Limitations

Cable operators' provision of indecent material, while not prohibited, is regulated to some degree. For example, cable operators are required to provide parental control devices to block indecent programming upon the request of a subscriber, and are also obligated to notify subscribers in advance of free (i.e., unscrambled) previews for premium services containing X, NC-17 or R rated programming. Cable operators are not permitted to block indecent content on public, educational and governmental channels, but are permitted to prohibit the distribution of indecent content on commercial leased access channels. Despite the more limited nature of restrictions on cable, many cable operators include provisions in their affiliation agreements with program networks that limit or forbid the network's distribution of indecent programming and certain other types of programming, such as nudity. Accordingly, cable networks should be aware of any limitations in their affiliation agreements before transmitting programming that might run afoul of those limitations.

3. Obscene Programming

There is no "safe harbor" for obscenity in the United States. Federal law criminalizes the distribution of obscene material via broadcast or cable, and expressly permits states to adopt independent laws banning and/or criminalizing the distribution of obscene speech. Many states have such laws in place.

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works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.

Like the indecency standard, the standard for obscenity is measured using the “average person” and applying “contemporary community standards.” Thus, what is considered obscene in Omaha, Neb., may not be obscene in New York City. However, certain hard-core pornography is considered to be obscene in all communities in the United States.

* * *

In sum, there are a series of questions satellite program networks should ask themselves to ensure that their program content complies with the networks’ obligations. First, does the programming comply with the ratings system set forth in the TV Parental Guidelines? Second, if the programmer is providing indecent programming or programming rated by MPAA standards as R, NC-17 or X, is this permitted by the operator’s affiliation agreement and, if so, is the programmer coordinating with the cable operator to avoid unscrambled previews or to provide notice for unscrambled previews of such programming? Finally, the network should not be transmitting obscene programming.

Please let us know if you would like additional information or guidance regarding the rules applicable to mature, indecent or obscene program content.

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