YOUR REVOLUTION: THE FEDERAL COMMUNICATIONS COMMISSION, OBSCENITY AND THE CHILLING OF ARTISTIC EXPRESSION ON RADIO AIRWAVES

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The title of this article is an allusion to DJ VADIM & SARAH JONES, *Your Revolution*, *on* USSR: LIFE FROM THE OTHER SIDE (Ninja Tune Records 1999), *available at* http://www.ninjatune.net/ninja/release.php?id=149.

INTRODUCTION

"These are challenging times for the Broadcast industry," remarked the then Chairman of the Federal Communications Commission ("FCC"),[1] Michael Powell, in 2004. Powell blamed the "competitive pressures" of consolidation in the broadcast industry for the growing trend of programming that tests the limits of indecency, violence and obscenity.[2] In recent years the federal government has issued more fines, with higher costs, against radio and television stations. Congressional support for these increasing fines has renewed public interest in the issue of indecency laws in the United States.[3] The arguments against greater freedom of expression over the airwaves do not consider the effect that tightened restrictions on broadcasters will have on artistic and cultural expression by artists in this country. The artists whose work is scrutinized and labeled as obscene or indecent when a broadcaster is targeted and fined are caught in the middle of this legal action and are denied an opportunity to participate in the debate in any meaningful way.

This article explores the tensions that exist between enforcement of obscenity laws and the protection of indecent speech by the First Amendment.[4] It focuses specifically on the "special category" of the broadcast media and the federal

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[1] *See, e.g., About the FCC: A Consumer Guide to Our Organization, Function and Procedures,* CONSUMER & GOV'T AFF. BUREAU PUBL'N, Mar. 28, 2005, *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-247863A1.pdf. The FCC was established by the Communications Act of 1934 as a U.S. government agency independent of the Executive Branch and directly responsible to Congress. The FCC regulates television, radio, wire, satellite and cable in all of the 50 states and U.S. territories. There are five Commissioners who direct the FCC. They are appointed by the President and confirmed by the Senate. Only three Commissioners can be of the same political party at any given time and none can have a financial interest in any Commission-related business. The President selects one of the Commissioners to serve as Chairperson. All Commissioners, including the Chairperson, have five-year terms, except when filling an unexpired term.

[2] Michael Powell, Chairman, Federal Communications Commission, Remarks at National Association of Broadcasters Summit on Responsible Programming (Mar. 31, 2004), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-245663A1.pdf (discussing the impact of the debate over media ownership on the ongoing debate over the role of government in restricting offensive content or promoting favored content and viewpoints).

[3] Carl Hulse, *House Votes, 391-22, to Raise Broadcasters' Fines for Indecency to $500,000,* N.Y. TIMES, Mar. 12, 2004, at A12.

> "Saying much of the public is fed up with indecent television and radio programming, members of the House voted overwhelmingly on Thursday to increase penalties on broadcasters and performers who violate federal standards. Spurred by a racy Super Bowl halftime show, the House voted, 391 to 22, to raise fines to $500,000. The measure would also force the Federal Communications Commission to act more quickly on complaints and move to revoke the licenses of repeat offenders."

[4] U.S. CONST. amend. I, ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or

regulation of artistic speech over the country's airwaves. Part I of this article tells the story of performance artist Sarah Jones, whose poem was the subject of an FCC case against a radio station. This account of Jones' struggle to vindicate her First Amendment rights illustrates not only the vagueness of indecency laws, but also how little recourse exists for the artistic individual whose freedom of speech is labeled indecent by the FCC. This section further illustrates how proposed increases in fines against broadcasters will have the effect of chilling artistic expression[5] and censoring the words and ideas of individuals whose speech may be subjectively considered unpopular or indecent and unacceptable by the government.

Part II of this article surveys the history of obscenity rulings by the Supreme Court and searches Supreme Court opinions for a clear analysis of behavior that falls within the category of unlawfully obscene speech. The standards for what will be considered indecent remain vague and uncertain. Historically, the definition of obscene and indecent language has shifted with the moral, political, cultural and societal norms of the moment, making it challenging for artists to determine whether their work will be considered legally acceptable at any given time. Essentially, the strictness of enforcement depends on constantly shifting cultural and political norms.

Part III argues that the FCC's current regulations regarding indecent and profane language are stifling artistic expression. This section begins by examining how the distinction between obscene and indecent material is resolved in the broadcast arena. The article then considers the role of the FCC in the enforcement of federal laws prohibiting the transmittal of indecent and profane material over the airwaves, including the procedure for filing complaints against a radio station. This section analyzes the current FCC test for indecency and how it has been applied in two recent cases.

Part IV explores the current controversy regarding the FCC and indecency enforcement and whether Congressional proposals

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of the press; or the right of the people peaceably to assemble, and to petition the Government for the redress of grievances.").

[5] Vague laws restricting speech are troubling to the Court because of concern that the vague regulation will chill constitutionally protected speech. The Court has observed that freedom of speech is "delicate and vulnerable, as well as supremely precious in our society . . . [and] the threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." NAACP v. Button, 371 U.S. 415, 433 (1963). A law is unconstitutionally overbroad if it regulates substantially more speech than the Constitution allows to be regulated. *See, e.g.*, Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981).

for increased fines are merely a disguised form of content censorship. The section further argues that the FCC's current indecency regulation in the United States is stifling artistic and creative expression. This section considers the procedures of the FCC in the enforcement of federal laws prohibiting the transmittal of indecent and profane material over the airwaves. The article argues that the artist's work is effectively censored when a radio station is reported to the FCC for an alleged indecent broadcast. The censored artist is then without standing under the current procedural scheme to challenge the label of indecency in the administrative agency action. Although the fines are meted out against broadcast radio and television networks, the effect is actually felt more acutely by the artists, especially less commercial artists, whose work is effectively removed from the radio by broadcasters fearsome of further fines. This section discusses commercial recourse, the only remedy currently available to an artist who is censored by FCC regulations, and the inadequacies of this remedy, especially for poorer or less mainstream artists who lack commercial recourse as well as legal recourse. This section will examine some of the underlying rationale and policy behind First Amendment jurisprudence and its importance in the protection of unpopular speech.

Lastly, this section makes a recommendation intended to address the impact of the FCC regulations on creative expression and artistic development. The article ultimately argues for the creation of legal remedy by a congressional amendment to the indecency statute that allows for "intervenor" status for artists whose work has been removed entirely or partially from the airwaves. In discussing this recommendation, the article illustrates the current procedure and its outcome by examining Sarah Jones' experience in attempting to protect her First Amendment right to free expression. This section will discuss both the potential problems and the benefits created by developing a private right of action to challenge the FCC scheme.

I. A Case Study: Sarah Jones and "Your Revolution"

In 1998, award-winning poet, playwright and artist Sarah Jones[6] recorded "Your Revolution,"[7] a spoken word song inspired

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[6] *See* Sarah Jones - Biography, http://www.sarahjonesonline.com. Sarah Jones is an Obie Award-winning playwright, actor and poet. She attended Bryn Mawr College where she was the recipient of the Mellon Minority Fellowship, then returned to her native New York and began writing and performing. Jones and her solo shows "Surface Transit," "Women Can't Wait," and "Bridge and Tunnel," which was produced by Meryl Streep, have

by the Gil-Scott Heron poem "The Revolution Will Not Be Televised."[8] The song, which was recorded in collaboration with DJ Vadim, was released on Vadim's 1999 anthology and quickly became an underground hit on independent radio stations. Jones, who has spoken about women's rights internationally, often performed the song at middle and high school assemblies and at performances of her one-woman theater show, *Surface Transit*.[9]

Your Revolution was Jones' feminist attack and social commentary on misogyny and commercialism in rap music. In a 2002 interview, she discussed her motivation for writing the piece and described it as "a response to music played on mainstream radio which often treats women as sex objects and playthings."[10] The song repackages popular rap lyrics containing graphic sexual imagery and uses them as part of a critique of much of the popular music that dominates this country's airwaves:

> Your revolution will not happen between these thighs/Your revolution will not happen between these thighs/Your revolution will not happen between these thighs/Not happen between these thighs/Not happen between these thighs/The real revolution ain't about booty size/The Versaces you buys, or the Lexus you drives/And though we've lost Biggie Smalls/Baby your notorious revolution/Will never allow you to lace no lyrical douche/In my bush/Your revolution will be killing me softly/ With Fugees/Your revolution ain't gonna knock me up without no ring/And produce little future emcees/Because that revolution will not happen between these thighs/Your revolution will not find me in the backseat of a jeep/With LL, hard as hell, you know doin' it and doin' it and doin' it well/ doin' it and doin' it and doin' it well, nah come on now/Your revolution will not be you smacking it up,/flipping it, or

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garnered numerous honors including a Helen Hayes Award, HBO's Comedy Arts Festival's Best One Person Show Award, and two Drama Desk nominations. Jones' plays have enjoyed sold-out runs at The Kennedy Center, Berkeley Repertory Theater and the American Place Theatre, among others, and have been presented for such audiences as the United Nations, the Supreme Court of Nepal, and members of the U.S. Congress. She has received grants and commissions from Lincoln Center, The Ford Foundation, the W.K. Kellogg Foundation, and many others.

7 DJ Vadim & Sarah Jones, *supra* note 1.

8 GIL SCOTT-HERON, *The Revolution Will Not Be Televised*, *on* SMALL TALK AT 125TH AND LENOX (Flying Dutchman Records 1970), *available at* http://www.gilscottheron.com/GILDISC.htm.

9 *See* Lonnae O'Neal Parker, *Battle Station In A Rap 'Revolution': Poet-Performer Takes on FCC for Ruling Her Feminist Song 'Indecent,'* WASH. POST, Feb. 2, 2002, at C1, *available at* http://www.fairness.com/resources/one?resource_id=4028.

10 *See* Press Release, People for the American Way, Award-winning Poet Sarah Jones Appeals Procedural Dismissal of Censorship Suit Against FCC, (Oct. 2, 2002), *available at* http://www.pfaw.org/pfaw/general/default.aspx?oid=5502.

> rubbing it down/Nor will it take you downtown and humpin' around/Because that revolution will not happen between these thighs/Your revolution will not have me singing/ain't no nigga like the one I got/And your revolution will not be sending me for no drip, drip VD shot/And your revolution will not involve me, feelin/ your nature rise/Or helping you fantasize/Because that revolution will not happen between these thighs/No no, not between these thighs/Oh, my Jamaican brother, your revolution will not make you feel bombastic/And really fantastic/And have you groping in the dark for that rubber wrapped in plastic/You will not be touching your lips to my triple dip of french vanilla, butter pecan, chocolate deluxe/Or having Akinyele's dream, m-hmm a 6-foot blowjob machine m-hmm/You want to subjugate your queen? uh-huh/Think I'm a put it in my mouth, just cuz you made a few bucks?/Please brother please/Your revolution will not be me tossing my weave/And making me believe I'm some caviar-eating ghetto mafia clown/Or me giving up my behind, just so I can get signed/And maybe having somebody else write my rhymes/I'm Sarah Jones, not Foxy Brown/You know I'm Sarah Jones, not Foxy Brown/Your revolution makes me wonder, where could we go/If we could drop the empty pursuit of props and ego/We'd revolt back to our Roots, use a little Common Sense/On a quest to make love De La Soul, no pretense/But your revolution will not be you flexing your little sex and status/To express what you feel/Your revolution will not happen between these thighs/Will not happen between these thighs/Will not be you shaking and me *yawn* faking/Between these thighs/Because the real revolution, that's right I said the real revolution/You know I'm talking about the revolution/When it comes, it's gonna be real/ it's gonna be real/it's gonna be real when it finally comes/when it finally comes/it's gonna be real, yeah yeah.[11]

In 2001 the FCC issued a Notice of Apparent Liability for Forfeiture ("NAL")[12] against KBOO, a radio station in Portland, Oregon, that played *Your Revolution*, after a listener filed a complaint with the FCC alleging broadcast of obscene material on the airwaves.[13] The NAL gave the radio station notice that the FCC

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11 DJ Vadim & Sarah Jones, *supra* note 1.

12 *Cf.* 47 U.S.C. § 503(b)(1) (2005) (providing in pertinent part: "Any person who is determined by the Commission, in accordance with paragraph (3) or (4) of this subsection to have . . . (D) violated any provision of section 1304, 1343, or 1464 of title 18, United States Code; shall be liable to the United States for a forfeiture penalty.").

13 *See In re* KBOO Found., 16 F.C.C.R 10731 (2001) [hereinafter *KBOO I*] ("The Commission received a complaint alleging that KBOO-FM broadcast indecent material on October 20, 1999 between 7:00 p.m. and 9:00 p.m. during the 'Soundbox.' The complainant submitted a tape containing allegedly indecent material that aired on the

was seeking a forfeiture of $7,000 from KBOO for the broadcast of indecent language and claimed that the lyrics of Jones' song were "indecent" and that the sexual references—mostly lifted from mainstream songs that received national radio play—were "designed to pander and shock and are patently offensive."[14] The FCC later issued the NAL stating that the FCC found KBOO had willfully broadcast indecent language in violation of 18 U.S.C. § 1464[15] and 47 C.F.R. § 73.3999.[16] It concluded that KBOO was "liable for a forfeiture" of $7,000. KBOO opposed the NAL, a matter that remained pending before the FCC, which had not yet issued its final decision when Jones brought her suit against the FCC in the United States District Court of the Southern District of New York.[17]

In her complaint, Jones challenged the constitutionality of the FCC regulations concerning the issuance of NALs as applied in this case.[18] Jones argued that the NAL issued to KBOO was an unconstitutional prior restraint on her speech, and she contended that the FCC had violated its own regulations by finding *Your Revolution* indecent.[19] She claimed that the NAL had damaged her reputation and livelihood, and had a chilling effect on the broadcasting of certain music. She also complained of the delay in the FCC decision on KBOO's objection to the NAL. Jones sought a declaration that *Your Revolution* was not indecent and that her First and Fifth Amendment rights had been violated, as well as an injunction against any further FCC enforcement proceedings related to the song.[20]

'Soundbox' on this date. After reviewing the complainant's tape, we issued a letter of inquiry to the licensee.").

14 *Id.* at 10733.

15 18 U.S.C. § 1464 (2005) ("Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both.").

16 47 C.F.R. § 73.3999 (2006) ("(a) No licensee of a radio or television broadcast station shall broadcast any material which is obscene. (b) No licensee of a radio or television broadcast station shall broadcast on any day between 6 a.m. and 10 p.m. any material which is indecent.").

17 *See* Press Release, People for the American Way, *supra* note 10 ("Sarah Jones today appealed the dismissal on procedural grounds of her censorship suit against the Federal Communications Commission. The appeal to the U.S. Court of Appeals for the Second Circuit was filed by People For the American Way Foundation and prominent New York-based media law firm Frankfurt Garbus Kurnit Klein & Selz. On September 4th, Judge Denise Cote of the U.S. District Court of the Southern District of New York dismissed Jones' lawsuit without reaching the merits of the case. Jones sued the FCC because the commission branded one of her works 'indecent.' That designation has had a continuing chilling effect on her First Amendment right to free speech."). **R**

18 Jones v. FCC, 30 Med. L. Rep. 2534 (BNA) (S.D.N.Y. Sept. 4, 2002).

19 *Id.*

20 *Id.*

Judge Denise Cote of the U.S. District Court of the Southern District of New York dismissed Jones' lawsuit on both procedural and jurisdictional grounds.[21] The court stated that the FCC had not yet issued a final order of forfeiture. KBOO's objection to the NAL was still pending before the FCC, and the objection included a defense of Jones' song and the contention that it was not indecent. However, the District court ruled "there is a 'strong presumption that judicial review will be available only when agency action becomes final.'"[22] The Court also stated that Congress has vested exclusive jurisdiction to review final FCC orders in the Court of Appeals.[23] The judge reasoned that the narrow statutory exception to this exclusive grant of jurisdiction, an exception for the enforcement of FCC forfeiture orders, does not vest a district court with jurisdiction over Jones' claims. Beyond the limited grant to the district courts of jurisdiction over forfeiture orders, the Communications Act of 1934[24] "cuts off original jurisdiction" in those courts in all other cases.[25] Thus, Jones would have to wait for the FCC to review KBOO's challenge to the NAL before she would have any opportunity to address the impact that the FCC's actions were having on her artistic expression and livelihood.

Nearly two years after labeling *Your Revolution* indecent, the FCC rescinded the NAL, finding that the radio station had not violated the applicable statute or the FCC indecency rule and therefore no sanction was necessary.[26] The radio station had argued that the song was not actionably indecent when examined in context and that any other analysis was contrary to the free speech protections afforded to broadcasters under the Constitution's First Amendment.[27] In an independent action,

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[21] *Id.* ("Jones will not be subject to a forfeiture order, should one be issued. In cases in which the plaintiff is not the subject of the forfeiture order, the circuit court has jurisdiction. Consequently this court lacks jurisdiction over Jones' claims.").

[22] *Id.* (quoting Bell v. New Jersey, 461 U.S. 773, 778 (1983)). The court also stated that "[p]remature intervention by the courts during the administrative review process 'denies the agency an opportunity to correct its own mistakes and to apply its expertise.'" *Id.* (quoting Fed. Trade Comm'n v. Standard Oil Co., 449 U.S. 232, 242 (1980)).

[23] *Id.*

[24] 47 U.S.C. § 151 (2005).

[25] *See Jones*, 30 Media L. Rep. at 2534.

[26] *See In re* KBOO Found., 18 F.C.C.R 2472 (2003) [hereinafter *KBOO II*] ("In this Order, we rescind the Notice of Apparent Liability ("NAL") in this proceeding, which found that The KBOO Foundation, licensee of noncommercial Station KBOO-FM, Portland, Oregon, apparently violated 18 U.S.C. § 1464 and section 73.3999 of the Commission's rules, 47 C.F.R. § 73.3999, by willfully broadcasting indecent language. Based on our review of The KBOO Foundation's response and supplemental response to the NAL, we conclude that the licensee did not violate the applicable statute or the Commission's indecency rule, and that no sanction is warranted.").

[27] *Id.* at 2473.

Jones—in an attempt to assert her personal First Amendment rights as the writer of the censored song—had filed an informal request pursuant to 47 C.F.R. § 1.41[28] with the FCC. When the FCC rescinded the NAL against KBOO the agency deemed Jones' request moot[29] and dismissed her informal request, essentially removing any chance for her to vindicate the effect of the censorship of her song on her nascent recording career.

To understand the implications of Jones' struggle for vindication of her First Amendment rights and for a finding by the FCC that her song was indeed not "indecent," it is necessary to begin with an understanding of where "indecency" stands in First Amendment jurisprudence. Indecency, in particular, and sexually oriented speech, in general, have long been examined in the United States courts in terms of First Amendment rights[30] and ultimately the courts have held that indecent and sexually oriented speech is not obscene and is thus afforded somewhat greater protection under First Amendment analysis. Indecent speech is protected by the First Amendment as low value speech. There are exceptions, one of which is within the broadcast media.[31] The Supreme Court has justified the regulation of indecency over the airwaves by a rationale that stresses the special context of broadcasting and its inability to exclude children from the listening audience.

II. HISTORICAL BACKGROUND: OBSCENITY DEFINED: "ONE MAN'S VULGARITY IS ANOTHER MAN'S LYRIC"[32]

Obscenity has a long history in the courts, and that history directly relates to the procedures and regulations in place in the

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[28] 47 C.F.R. provides for informal requests for commission action as follows:

> Except where formal procedures are required under the provisions of this chapter, requests for action may be submitted informally. Requests should set forth clearly and concisely the facts relied upon, the relief sought, the statutory and/or regulatory provisions (if any) pursuant to which the request is filed and under which relief is sought, and the interest of the person submitting the request.

47 C.F.R. § 1.41 (2006).

[29] *KBOO II*, 18 F.C.C.R. at 2475.

[30] *See* Roth v. United States, 354 U.S. 476, 484 (1957) ("Implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance.").

[31] *See* FCC v. Pacifica Found., 438 U.S. 726 (1978) (rationalizing the Court's decision to uphold the ability of the Federal Communications Commission to prohibit and punish indecent language over television and radio on the basis that the broadcast media is uniquely pervasive and intrusive into the home and that "broadcasting is uniquely accessible to children.").

[32] Cohen v. California, 403 U.S. 15, 25 (1971).

broadcast industry today.[33] It is a category of speech that has historically remained outside the purview of First Amendment protection, and in identifying the appropriate analysis for obscenity cases, the Supreme Court has struggled to identify the proper characteristics that determine whether certain material is obscene. In *Chaplinsky v. New Hampshire*,[34] the Supreme Court upheld the conviction of a Jehovah's Witness for addressing a police officer as a "god damned racketeer" and "a damned Fascist."[35] Justice Murphy's opinion reasoned:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and the obscene, the profane, the libelous, and the insulting or fighting words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace . . . Such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.[36]

This opinion sparked a continuing debate in the Court over the degree of protection due to language deemed obscene.[37] The determination proved to be an elusive one based on subjective analyses regarding the social value of the particular words balanced against the government's interest in upholding morality and order. Defining these concepts remains a challenge.[38]

The Supreme Court first held that obscenity was not protected under the First Amendment in *Roth v. United States*.[39] The Court

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[33] *See* Susan Brenner, *Complicit Publication: When Should the Dissemination of Ideas and Data Be Criminalized?*, 13 ALB. L.J. SCI. & TECH. 271, 280-281 (2003) (discussing control over speech and the use of criminal prohibition to control the dissemination of ideas and information (citing *Roth*, which noted in its 1957 opinion that all 14 states which had ratified the Constitution by 1792 had made "either blasphemy or profanity or both" a crime)).

[34] Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

[35] *Id.* at 569.

[36] *Id.* at 571-572.

[37] *See infra* text accompanying notes 39to 67. **R**

[38] *See* Ryan P. Kennedy, *Ashcroft v. Free Speech Coalition: Can We Roast the Pig Without Burning Down the House in Regulating "Virtual" Child Pornography?*, 37 AKRON L. REV. 379 (2004) (acknowledging that the First Amendment's guarantee of free speech is not limitless but demonstrating the ongoing challenge to define the boundaries of regulation).

[39] Roth v. United States, 354 U.S. 476 (1957). In this case, the Supreme Court upheld a federal criminal obscenity statute that provided, in pertinent part:

> Every obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print or other publication of an indecent character and every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may

attempted to define obscenity, but was more successful at determining what it was not. "Sex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to the prurient interest."[40] The Court also highlighted a standard for analyzing whether or not something should be labeled obscene. They stated it was "not whether [the speech] would arouse sexual desires or sexual impure thoughts" in children or in "the highly prudish." Rather, the Court stated that the test in each individual case was "the effect the material considered as a whole" had upon the average community member as judged by the current standards of that community.[41] Under the *Roth* test for obscenity, material that met these standards was deemed to lack social importance. This put the government in the position of having to make a determination as to whether the content of speech or in this case, the thought provoked by certain material, was of a certain character.[42] There were critics of this course, among them Justice Douglass and Justice Black who, in their dissenting opinion in *Roth*, stated that the majority opinion's test for obscenity "gives the censor free range over a vast domain" and allows the "State to step in and punish mere speech or publication that the judge or jury thinks has an undesirable impact on thoughts but that is not shown to be a part of unlawful action."[43]

Following the *Roth* case, the Court struggled to further clarify the meaning of obscenity. In *A Book Named 'John Cleland's Memoirs of a Woman of Pleasure,' v. Attorney General of Massachusetts*,[44] commonly known as "Fanny Hill," the Court examined whether

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> be obtained or made, . . . whether sealed or unsealed . . . is declared to be unmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier. Whoever knowingly deposits for mailing or delivery, anything declared by this section to be non-mailable, or knowingly takes the same from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1461 (1954). Roth, a New York businessman was charged for mailing obscene circulars and advertising, and an obscene book in violation of this statute.

40 *Roth*, 354 U.S. at 487.

41 *Id.* at 490.

42 *See* David A.J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. (1974). *See also* Kelly M. Doherty, *www.obscenity.com: An Analysis of Obscenity and Indecency Regulation on the Internet*, 32 AKRON L. REV. 259 (1999) ("Our efforts to implement . . . [the Roth standard] demonstrate that agreement on the existence of something called 'obscenity' is still a long and painful step from agreement on a workable definition of the term." (quoting Justice Brennan's dissenting opinion in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 79 (1973))).

43 *Roth*, 354 U.S. at 509.

44 A Book Named 'John Cleland's Memoirs of a Woman of Pleasure,' v. Attorney General of Massachusetts, 383 U.S. 413 (1966) [hereinafter *Fanny Hill*].

the lower court had properly determined whether a book that had been proscribed by the Massachusetts Attorney General had met the standard for obscenity established under *Roth*.[45] The case interpreted the *Roth* test to be a three-element test: to prove material obscene, it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.[46] The Court found that Supreme Judicial Court of Massachusetts had erred in its holding that the book was obscene, indecent, and impure, and that a book cannot be proscribed unless it is determined to completely lack redeeming social value.[47] That same year, the Court in *Mishkin v. State of New York*[48] further attempting to define obscenity, declared that the "prurient-appeal requirement" of the *Roth* test could be adjusted based on each individual case and in terms of the "sexual interests of its intended and probable recipient group." The characteristics of the intended group (i.e. "sexually deviant") would satisfy this prong of the test if the dominant theme of the material, taken as a whole appealed to the prurient interest in sex of the members of that group.

In *Ginsberg v. New York*[49] a business operator was convicted of personally selling two "girlie" magazines to a 16-year-old boy.[50] The Supreme Court, recognizing prior authority, found that the state has an interest in protecting the welfare of children and safeguarding them from abuses which could prevent their "growth into free and independent well-developed men and citizens."[51] The Court acknowledged, however, that although the "girlie" magazines were considered obscene for the consumption of minors, they were not so for adults consumers.[52] With this case, the Court shifted its focus from obscenity protection for the

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[45] *Id.* at 418.

[46] *Id.*

[47] *Id.* at 420 ("Evidence that the book was commercially exploited for the sake of prurient appeal, to the exclusion of all other values, might justify the conclusion that the book was utterly without redeeming social importance.").

[48] Mishkin v. New York, 383 U.S. 502 (1966). Mishkin was convicted under a criminal obscenity statute for his role in several businesses whose focus was the production and distribution of allegedly obscene books. The books portrayed sex in many permutations, some very graphically. The books were accompanied by graphic cover illustrations as well.

[49] Ginsberg v. New York, 390 U.S. 629 (1968).

[50] *Id.* at 631.

[51] *Id.* at 640-641 (citing Prince v. Mass., 321 U.S. 158, 165 (1944)).

[52] *Id.* at 634 n.3 (citing Redrup v. New York, 386 U.S. 767 (1967)).

general public (which was occasionally justified by the example of the affect of prurient material on impressionable children) to protecting children, and it introduced the concept of variable obscenity.

> Variable obscenity furnishes a useful analytical tool for dealing with the problem of denying adolescents access to material aimed at a primary audience of sexually mature adults. For variable obscenity focuses attention upon the make-up of primary and peripheral audiences in varying circumstances, and provides a reasonably satisfactory means for delineating the obscene in each circumstance.[53]

Although the Supreme Court had clearly stated that obscene material would not find protection in the First Amendment, the Court began to draw a distinction between "obscene" material and "indecent" material. In *Cohen v. California*,[54] the Court overturned Cohen's conviction for disturbing the peace. Cohen had been convicted for wearing a jacket that had the words "Fuck the Draft" emblazoned upon it in a California state court.[55] Justice Harlan assumed in his decision that the young man had been convicted for the offensive nature of the words on his jacket and not for any conduct on his part.[56] Harlan found that these words were not "fighting words" or obscene words and thus were protected by the First Amendment from censorship by the state.[57] Writing for the Court, Justice Harlan said, "We cannot indulge the facile assumption that one can forbid particular words without running a substantial risk of suppressing ideas in the process." He further cautioned against allowing governments to make determinations about censoring "particular words as a convenient guise for banning the expression of unpopular views.[58]

The Court also addressed the state's contention that people confronted with Cohen's jacket were an unsuspecting and unwilling captive audience[59] and therefore needed the state's

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53 *Id.* at 636 (citing William B. Lockhart & Robert C. McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 85 (1960)).

54 Cohen v. California, 403 U.S. 15 (1971).

55 *Id.* at 16. There were women and children present in the corridor. Cohen was arrested. He testified that he wore the jacket knowing that the words were on the jacket as a means of informing the public of the depth of his feelings against the Vietnam War and the draft.

56 *Id.* at 18.

57 *Id.* at 20.

58 *Id.* at 26.

59 *See generally* Marcy Strauss, *Redefining The Captive Audience Doctrine*, 19 HASTINGS CONST. L.Q. 85, 96 (1991) (discussing the captive audience doctrine, a concept that is raised in a number of cases, but has never been defined by the Court).

intervention and protection.[60] The Court held that where there is not a significant invasion of privacy, the government is not justified in abridging the freedom of expression protected by the First Amendment, even if it is offensive.

A year later, the Court decided *Miller v. California*[61] and reaffirmed that obscene material is unprotected under the First Amendment, formulating the test which provides the current standard for determining whether material is obscene:

> (a) Whether "the average person, applying contemporary community 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.[62]

The Court in *Miller* revised the third prong of the old obscenity test articulated in *Memoirs v. Massachusetts*.[63]

The holding in *Cohen* was further examined in *Sable Communications v. FCC*.[64] There the Court held that the government could not ban speech because it was "indecent"[65] but could regulate "the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest." The court recognized that the government indeed had a compelling interest in protecting the well being of minors.[66]

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60 *Cohen*, 403 U.S. at 21 ("The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections.").

61 Miller v. California, 413 U.S. 15 (1972). *Miller* involved the prosecution of a mass mailing campaign advertising the sale of illustrated books on "adult" material. Miller was convicted for the act of mailing five unsolicited advertising brochures to a restaurant, where the envelope was opened by the manager and his mother.

62 *Id.* at 24 (citation omitted). The Court thus rejected the *Roth* test of "utterly without redeeming social value" as a constitutional standard.

63 Memoirs v. Massachusetts, 383 U.S. 413, 418 (1966). *See also* Pamela Weinstock, *The National Endowment For the Arts Funding Controversy and the* Miller *Test: A Plea for the Reunification of Art and Society*, 72 B.U. L. REV. 803, 807-808 (1992) (describing the significance of the change in the obscenity standard as requiring " a 'serious' level of value, a much higher standard than *Memoir*'s 'not utterly without' level.").

64 Sable Communications v. FCC, 492 U.S. 115 (1989). The Supreme Court ruled that a federal statute designed to eliminate the "dial-a-porn" industry by prohibiting obscene or indecent conversations was constitutional as to obscene speech but was unconstitutional in prohibiting indecent speech.

65 *Id.* at 126 ("Sexual expression which is indecent but not obscene is protected by the First Amendment.").

66 *Id.* at 126 ("We have recognized that there is a compelling interest in protecting the

The Court in *Sable* distinguished its decision by noting that "there was no 'captive audience' problem here; callers will generally not be unwilling listeners."[67] This case illustrates the rationale extended by the Court to distinguish the broadcast medium as an exception to the general rule that indecent speech is a protected class of speech.

III. Broadcast Obscenity

The Court has held that the special characteristics of the broadcast medium in general, and radio in particular, justify regulation of indecent materials over the airwaves, despite its constitutionally protected status (as not being obscene).[68] The doctrine has developed based on the policy that radio and television have a broad reach and that unlike a telephone call (such as the dial-a-porn phone call in *Sable*), which is performed by willing parties, the radio may reach individuals who are "captive" to whatever content is broadcast. Thus, the conclusion has been, regulation of broadcasters is necessary to protect a captive audience from potentially offensive material. The FCC is charged with the regulation of indecent speech.[69] This section will explore the justifications and the problems that arise in the enforcement of such regulations for the FCC. This section explores the collision of First Amendment protections for those who are sanctioned by FCC regulations with the imperative of protecting vulnerable listeners.[70]

A. *The Federal Communications Commission: A Notable Exception*

Although the Supreme Court has stated that it is

physical and psychological well-being of minors. This interest extends to shielding minors from the influence of literature that is not obscene by adult standards. The Government may serve this legitimate interest, but to withstand constitutional scrutiny, 'it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms.'" (citations omitted)).

67 *Id.* at 128

68 FCC v. Pacifica Found., 438 U.S. 726, 748 (1978) ("Of all forms of communication, it is broadcasting that has received the most limited First Amendment protection. Thus, although other speakers cannot be licensed except under laws that carefully define and narrow official discretion, a broadcaster may be deprived of his license and his forum if the Commission decides that such an action would serve 'the public interest, convenience, and necessity.'" (citations omitted)).

69 47 U.S.C. § 503 (b)(1) (2005).

70 *See generally* Edythe Wise, *A Historical Perspective on the Protection of Children from Broadcast Indecency*, 3 Vill. Sports & Ent. L.J. 15, 16-17 (1996) ("Controversy complicates the law of broadcast indecency because such regulation precipitates collisions of apparently conflicting constitutionally protected rights and compelling state interests . . . Conflicting rights and interests do not create the only problem in this area. Part of the difficulty arises from the nature of broadcasting. Unlike the print and motion picture media, broadcasting does not provide a convenient means to protect children from indecency while simultaneously allowing adults access to it.").

unconstitutional for government to prohibit the use of language that is profane or indecent,[71] it has upheld the ability of the FCC to prohibit and punish indecent language broadcast by radio and television during certain times of day.[72] In *FCC v. Pacifica Foundation*,[73] the Court considered the issue of whether the FCC had the power to regulate a radio broadcast that was indecent but not obscene. The Court stated that it was the uniquely pervasive and intrusive nature of the radio into one's home that gave the FCC its power to proscribe indecent language at certain hours of the day.[74] The Court's decision held that "patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder."[75] The opinion further stated that the radio is uniquely accessible to children, even children who were not yet able to read.[76] This fact distinguished the Court's decision in *Pacifica Foundation* from the *Cohen* and *Sable Communications*, cases in which the Court ruled that government regulation was not justified, explicitly stating that the facts did not show a captive audience situation or a privacy situation that would expose children to indecent or obscene language. In *FCC v. Pacifica Foundation,* the Court considered children to be captive audience members whose vocabulary could be "enlarged" in "an instant," by one radio broadcast containing indecent or profane material.[77]

The FCC's role in overseeing program content is meant to be

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[71] *Sable Communications*, 492 U.S. at 126.

[72] Action for Children's Television v. F.C.C., 852 F.2d 1332, 40-44 (D.C. Cir. 1988) ("The potential chilling effect of the FCC's general definition of indecency will be tempered by the Commission's restrained enforcement policy . . . Broadcast material that is indecent but not obscene is protected by the First Amendment; the FCC may regulate such material only with due respect for the high value our Constitution places on freedom and choice in what people may say and hear.").

[73] *Pacifica Found.*, 438 U.S. 726. A radio station in New York, as part of a program on language played comedian George Carlin's monologue on the "seven dirty words." The monologue, entitled "Filthy Words" repeatedly used profane language and made fun of people's lack of comfort with certain language. The "seven dirty words" are "shit," "piss," "fuck," "cunt," "cocksucker," "motherfucker," and "tits."

[74] *Id.* at 731 n.2 ("Broadcasting requires special treatment because of four important considerations: (1) children have access to radios and in many cases are unsupervised by parents; (2) radio receivers are in the home, a place where people's privacy interest is entitled to extra deference, (3) unconsenting adults may tune in a station without any warning that offensive language is being or will be broadcast; and (4) there is a scarcity of spectrum space, the use of which the government must therefore license in the public interest. Of special concern to the Commission as well as parents is the first point regarding the use of radio by children." (citations omitted)).

[75] *Id.* at 748.

[76] *Id.* at 749.

[77] *See id.* at 749.

limited to enforcement of federal laws regarding the broadcast of indecent material over the airwaves. It is a violation of federal law to broadcast obscene programming at any time. To be obscene, material must meet the three-prong *Miller* test.[78]

The Communications Act expressly prohibits the FCC from censoring broadcast material, in most cases, and from making any regulation that would interfere with freedom of speech.[79] The courts have held that indecent material is protected by the First Amendment to the Constitution except in the broadcast medium, where regulation of indecent material is constitutional.[80] Nonetheless, the FCC has taken numerous enforcement actions against broadcast stations for violations of the restrictions on broadcast indecency. It is also a violation of federal law to broadcast indecent programming during certain hours.[81] Congress has given the FCC the responsibility for administratively enforcing the law that governs these types of broadcasts. The Commission may revoke a station license, impose a monetary forfeiture, withhold or place conditions on the renewal of a broadcast license, or issue a warning, for the broadcast of obscene or indecent material.[82]

Under the current FCC regulations, a radio station violates the federal law when it broadcasts indecent or profane programming during the hours of 6 A.M. to 10 P.M.[83] Indecent speech is defined as "language that, in context, depicts or describes sexual or excretory activities or organs in terms patently offensive as measured by contemporary community standards for the broadcast medium."[84] Profane speech is defined as language that "denotes certain of those personally reviling epithets naturally tending to provoke violent resentment or denoting language so grossly offensive to members of the public who actually hear it as to amount to a nuisance."[85]

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78 Miller v. California, 413 U.S. 15, 24 (1972).

79 *See* 47 U.S.C. § 326 (2006) ("Nothing . . . shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.").

80 Sable Communications v. FCC, 492 U.S. 115, 126 (1989) ("[S]exual speech which is indecent but not obscene is protected by the First Amendment . . .").

81 *See* 47 C.F.R § 73.3999 (2006).

82 *See* 47 U.S.C. § 503 (2005).

83 Enforcement of Prohibitions Against Broad. Indecency in 18 U.S.C. § 1464, 8 F.C.C.R. 704, 704, Release No. 93-42 (Jan. 19, 1993).

84 In Matter of Clear Channel Broadcasting Licenses Inc., 19 F.C.C.R. 1768, 1771, Release No. 04-17 (Jan. 27, 2004).

85 *Id.*

The FCC enforcement bureau takes action based on the complaints it receives from the public about indecent/profane or obscene broadcasts.[86] The FCC staff reviews these complaints to determine whether there is sufficient information to make a determination as to whether there has been an actual violation of federal law. To be sufficient, the complaint must include the date and time of broadcast, the call sign of the broadcast station, and details about what was said or depicted during the broadcast.[87] There must be sufficient context in the complaint to provide the examiner with enough detail to analyze the content of the broadcast in the context in which it was presented.[88]

B. *Applying the FCC Test for Indecency*

To better understand the way in which the FCC applies the indecency statute, this section will consider two recent FCC cases, *In Matter of Clear Channel Broadcasting Licenses Inc.*,[89] and *In Matter of KBOO Foundation*, which was the case regarding Sarah Jones' song.[90] The *Clear Channel* case involved a NAL, issued pursuant to § 503(b) of the Communications Act of 1934 and Section 1.80 of the Commission's rules.[91] The FCC found that the captioned licensees, all of which are subsidiaries of Clear Channel

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86 Industry Guidance on the Commission's Case Law, Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, 16 F.C.C.R. 7999, 8015, Release No. 01-90 (April 6, 2001).

87 *Id.*

88 *Id.* at 8015-8016 ("If a complaint does not contain the supporting material described above, or if it indicates that a broadcast occurred during "safe harbor" hours or the material cited does not fall within the subject matter scope of our indecency definition, it is usually dismissed by a letter to the complainant advising of the deficiency. In many of these cases, the station may not be aware that a complaint has been filed. If, however, the staff determines that a documented complaint meets the subject matter requirements of the indecency definition and the material complained of was aired outside "safe harbor" hours, then the broadcast at issue is evaluated for patent offensiveness. Where the staff determines that the broadcast is not patently offensive, the complaint will be denied. If, however, the staff determines that further enforcement action might be warranted, the Enforcement Bureau, in conjunction with other Commission offices, examines the material and decides upon an appropriate disposition, which might include any of the following: (1) denial of the complaint by staff letter based upon a finding that the material, in context, is not patently offensive and therefore not indecent; (2) issuance of a Letter of Inquiry (LOI) to the licensee seeking further information concerning or an explanation of the circumstances surrounding the broadcast; (3) issuance of a Notice of Apparent Liability (NAL) for monetary forfeiture; and (4) formal referral of the case to the full Commission for its consideration and action. Generally, the last of these alternatives is taken in cases where issues beyond straightforward indecency violations may be involved or where the potential sanction for the indecent programming exceeds the Bureau's delegated forfeiture authority of $25,000.").

89 *Clear Channel Broadcasting*, 19 F.C.C.R. 1768.

90 *KBOO I*, 16 F.C.C.R 10731 (2001); *KBOO II*, 18 F.C.C.R 2472 (2003).

91 *See* 47 U.S.C. § 503 (b) (2005); 47 C.F.R. § 1.80. (2006).

Communications, Inc., had violated the indecency laws[92] by willfully and repeatedly airing indecent material over the captioned stations during several broadcasts of the "Bubba the Love Sponge" program in 2001. Based on the totality of the evidence, the FCC held Clear Channel liable for a monetary forfeiture in the amount of $755,000.[93] In *KBOO II*, the FCC rescinded the NAL, which found that the KBOO Foundation, had violated the indecency laws[94] of the Commission's rules, by willfully broadcasting indecent language. The FCC based its review on the KBOO Foundation's response and supplemental response to the NAL, and concluded that the licensee did not violate the applicable statute or the Commission's indecency rule and that no sanction was warranted.[95]

In applying the FCC's test for indecent and profane material, the first prong the FCC considers is whether the material falls within the scope of the FCC definition for indecency and profanity.[96] To be within the scope of the FCC definitions, the broadcast must describe or depict sexual or excretory organs or activities. In *Clear Channel* the broadcast contained discussions of oral sex, penises, testicles, masturbation, intercourse, orgasms and breasts,[97] whereas in KBOO Foundation, where the FCC considered Jones' song, *Your Revolution*, the material constituted a social commentary spoken word song which included the phrase, "six-foot blow-job machine."[98]

The second prong of the FCC test looks at whether the broadcast was patently offensive[99] as measured by contemporary community standards for the broadcast medium.[100] Here, the FCC considers several factors: (a) the explicitness or graphic nature of

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92 *See* 18 U.S.C. § 1464 (2005); 47 C.F.R. § 73.3999 (2006).

93 *Clear Channel*, 19 F.C.C.R. at 1769.

94 *See* Industry Guidance on the Commission's Case Law, *supra* note 86. R

95 *KBOO II*, 18 F.C.C.R. 2472.

96 *Id.* at 2474.

97 *Clear Channel*, 19 F.C.C.R. at 1771.

98 *KBOO II*, 18 F.C.C.R. at 2474.

99 *See* Industry Guidance on the Commission's Case Law, *supra* note 86, at 8002-03 ("In R
determining whether material is patently offensive, the full context in which the material appeared is critically important. It is not sufficient, for example, to know that explicit sexual terms or descriptions were used, just as it is not sufficient to know only that no such terms or descriptions were used. Explicit language in the context of a bona fide newscast might not be patently offensive, while sexual innuendo that persists and is sufficiently clear to make the sexual meaning inescapable might be.").

100 *See* WPBN/WTOM License Subsidiary, Inc., 15 F.C.C.R. 1838, 1841, Release No. 00-10 (Jan. 14, 2000) ("The determination as to whether certain programming is patently offensive is not a local one and does not encompass any particular geographic area. Rather, the standard is that of an average broadcast viewer or listener and not the sensibilities of any individual complainant.").

the description; (b) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities, and (c) whether the material appears to pander to or is used to titillate and shock.[101] In *Clear Channel* the FCC concluded that there was an attempt to entice[102] the child listener with the use of cartoon voices and theme music to discuss subject matter that had "prurient" content.[103] The FCC found that the sexually explicit use of cartoon characters during hours of the day when children are likely to be listening was shocking and patently offensive.[104] The Commissioners stated that they were compelled in their decision by the fact that in their opinion, the radio station personnel had been "calculated and callous" in their decision to play the offensive material and should have been able to predict the impact of the "offensive material upon young, vulnerable listeners."[105]

In *KBOO Foundation II,* the FCC found that although there was some mention of sexually oriented material, it was not repeated at length, and based on that fact, the FCC rescinded its earlier decision to fine the radio station for indecency.[106] In that earlier decision, *KBOO Foundation I*, the FCC decided that the lyrics to *Your Revolution* were "patently offensive."[107] The radio station argued against that interpretation saying that the song was not offensive because it was contemporary social commentary meant to critique "male attempts to equate political 'revolution' with promiscuous sex [in rap music]."[108] Alternatively KBOO argued that the FCC should consider the artistic merit of the rap music

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101 *Clear Channel*, 19 F.C.C.R. at 1772.

102 *Id.* at 1773 ("The use of cartoon characters in such a sexually explicit manner during hours of the day when children are likely to be listening is shocking and makes this segment patently offensive. It is foreseeable that young children would be particularly attentive listeners to this segment because of the character voices and the cartoon theme music used in the segment.").

103 *Id.* at 1772 (One of the alleged indecent skits was described as "skits in which the voices of purported cartoon characters talk about drugs and sex are inserted between advertisements for Cartoon Network's Friday night cartoons that are identified as 'provocative adult cartoons to help you get your freak on.' The first skit begins when Shaggy tells Scooby Doo that he needs crack cocaine but has no money to buy it. Scooby Doo responds that Shaggy could "su(bleep)ck d(bleep)ick" to pay for the drugs . . .").

104 *Id.* at 1773.

105 *Id.*

106 *KBOO I*, 16 F.C.C.R 10731 (2001) ("In this Notice of Apparent Liability for Forfeiture ("NAL"), we find that The KBOO Foundation, licensee of noncommercial Station KBOO-FM, Portland, Oregon, apparently violated 18 U.S.C. § 1464 and 47 C.F.R. § 73.3999, by willfully broadcasting indecent language. Based on our review of the facts and circumstances in this case, we conclude that The KBOO Foundation is apparently liable for a forfeiture in the amount of seven thousand dollars ($ 7,000).").

107 *Id.* at 10733. "Considering the entire song, the sexual references appear to be designed to pander and shock and are patently offensive."

108 *Id.*

genre.[109] Initially, the FCC rejected both of these arguments and fined the radio station. In its subsequent opinion,[110] the FCC reversed itself and held that although *Your Revolution* contained material that "was sexual in nature and warranted scrutiny,"[111] taken in context it was not indecent.

> While this is a very close case, we now conclude that the broadcast was not indecent because, on balance and in context, the sexual descriptions in the song are not sufficiently graphic to warrant sanction. For example, the most graphic phrase ("six foot blow job machine") was not repeated. Moreover, we take cognizance of the fact presented in this record that Ms. Jones has been asked to perform this song at high school assemblies. While not controlling, we find that this is evidence to be considered when assessing whether material is patently offensive. In sum, we find that The KBOO Foundation has demonstrated that the lyrics of "Your Revolution," measured by contemporary community standards, are not patently offensive and therefore not indecent.[112]

The FCC determination seemed to turn on the fact that the phrase at issue was not sufficiently graphic, was not repeated in an attempt to pander to listeners' obscene tastes, and contained social commentary to contextualize the language in question.

Nevertheless, despite KBOO's victory, the Commission never reached the merits of Jones' informal request for review because it deemed the request moot once it reversed the NAL against KBOO. The victory was thus bittersweet for Jones, who was hoping for recognition of the impact of the enforcement process and the imposition of the NAL upon her career and her First Amendment rights.

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[109] *Id.* ("Merit is one of the variables that are part of the material's context, and the Commission has rejected an approach to indecency that would hold that material is not *per se* indecent if the material has merit. The contemporary social commentary in 'Your Revolution' is a relevant contextual consideration, but is not in itself dispositive. The Commission previously has found similar material to be indecent, and we see no basis for finding otherwise in this case. In addition, although The KBOO Foundation has submitted a petition signed by listeners who support the 'Soundbox,' we have previously ruled that neither the statute nor our case law permits a broadcaster to air indecent material merely because it is popular.").

[110] *KBOO II*, 18 F.C.C.R. 2472, 2474 (2003).

[111] *Id.*

[112] *Id.* The FCC acknowledged that the contemporary social commentary in "Your Revolution" is a relevant contextual consideration.

IV. "DON'T BURN THE HOUSE TO ROAST THE PIG"[113]

A. *The Current Landscape: The Artist Adrift*

1. Regulation as Government Sanctioned Censorship

In the last two years, in the aftermath of several high profile "indecency" incidents over radio and television broadcast airwaves,[114] Congress' House, Energy and Commerce Committee proposed an increase in the penalties for radio and television broadcasters who air indecent material.[115] The FCC had originally recommended a tenfold increase to $275,000, but the congressional committee voted in favor of raising the fine to $500,000.[116] The bill, which enjoyed broad bipartisan support from lawmakers, was approved in 2005 by the full House of Representatives, with a final vote of 398-38.[117] The bill would allow the FCC to fine broadcasters who air indecent material and the station's parent company from $32,500 to half a million dollars. Individual entertainers can be fined from $11,000 to half a million dollars. To become effective, the full Senate must also vote for the increased fines. Committee Chairman Representative Joe Barton said, "This is a penalty that makes broadcasters sit up and take notice. This legislation makes great strides in making it safe for families to come back into their living room."[118]

The bill's opponents state their growing concern that the higher fines would lead to more self-censorship by broadcasters and entertainers who are "unclear about the definition of 'indecent.'"[119] The recent heightened scrutiny of indecency by Congress has resulted in some radio stations taking extreme preventive measures to avoid being fined, including firing several of their radio personalities and not playing material deemed borderline. In Santa Monica, California public radio station

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113 Butler v. Michigan, 352 U.S. 380, 383 (1957).

114 The incidents include U2 singer Bono's comment at the Golden Globes that used an expletive phrase commonly used in conversation, and Janet Jackson's infamous breast baring performance during her Super Bowl Halftime performance. *See* Jude Shiver, Jr. *FCC Rules Bono Remark is Indecent*, LOS ANGELES TIMES, March 19, 2004, at Business C1.

115 Frank James, *House OKs Higher Fines for Indecency on Airwaves; Repeat Offenders Could Face License Revocation. Critics Cited First Amendment Issues,* ORLANDO SENTINEL TRIB., Mar. 12, 2004, at A3.

116 Jonathan Krim, *House OKs Higher Fines for Indecency in Broadcasts; Payments Could Rise Into The Millions, and Three Violations Could Mean Loss of Broadcasting License*, THE ORLANDO SENTINEL TRIB., Mar. 12, 2004, at A3.

117 *House Approves Tougher Indecency Fines, Senate Considers Similar Bill*, THE ASSOCIATED PRESS, February 16, 2005, *available at* http://www.neilrogers.com/news/articles/2005021825.html.

118 *Id.*

119 NAACP v. Button, 371 U.S. 415, 433 (1963).

KCRW-FM fired Sandra Tsing Loh, a commentator, writer, and performance artist, who inadvertently allowed the "f—" word to be aired during one of her commentary shows, *The Loh Life*. "That I could get fired over this has everybody in a white-hot panic," Loh told guests of a Beverly Hills Bar Association luncheon on censorship, the FCC and the Justice Department. "I think I've gotten more media attention than would merit for a person who works for $150 per week."[120] Similarly, Clear Channel dropped radio "shock jock" Howard Stern from six of its radio stations after the company said he conducted an "insulting" interview, and eventually Howard Stern departed Clear Channel altogether to go to satellite radio, where he perceived he would have more First Amendment freedom.[121] Clear Channel, the largest U.S. radio station operator with more than 1,200 outlets, recently adopted a "zero tolerance" policy.[122] This policy, which was announced by the Company in a press release, states that Clear Channel will now impose "a strong new 'Responsible Broadcasting Initiative' to make sure the material aired by its radio stations conforms to the standards and sensibilities of the local communities they serve."[123] The company's President and Chief Operating Officer said that the company's "zero tolerance policy" will include company-wide trainings and immediate suspensions for anyone the FCC alleges has violated the indecency rules on air.[124]

The proposed increase in fines and the increased scrutiny of radio stations may be having the effect desired by legislators: forcing broadcasters to take a more careful approach to the material they broadcast on the radio. However, the undesirable side effect of these regulations has been the tendency of broadcast executives to self-censor the content of their own broadcasts rather than risk monetary loss. The vagueness of the FCC regulations has thus achieved "broad and inadvertent application"[125] which, in the

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120 Jesse Hiestand, *Public Radio Firing Fuels Debate*, HOLLYWOOD REP., Mar. 18, 2004 ("Sandra Tsing Loh said she was surprised to be caught up in the nation's indecency debate along with Howard Stern, Bubba the Love Sponge and Janet Jackson. Loh was fired after a technician failed to bleep an intentional use of the word 'fuck' during a radio commentary on knitting.").

121 *See* Krysten Crawford, *Howard Stern Jumps to Satellite*, CNN/MONEY, Oct. 6, 2004, *available at* http://money.cnn.com/2004/10/06/news/newsmakers/stern_sirius/.

122 *See* '*Huge Fines' for U.S. TV Indecency*, BBC NEWS WORLD EDITION, Mar. 4, 2004, *available at* http://news.bbc.co.uk/2/hi/entertainment/3532089.stm.

123 Press Release, Clear Channel Communications, Inc., Clear Channel Imposes Strict New Standards For Broadcast Decency (Feb. 25, 2004) (available at http://www.clearchannel.com/Radio/documents/2004_02_25_CC_RBI.pdf).

124 *Id.*

125 *See, e.g.*, Broadrick v. Oklahoma, 413 U.S. 601, 607-08 (1973). To be considered vague, a statute must have "prohibitions that are too broad in their sweep" and not be

First Amendment context, is discouraged by the Court. In the television broadcast arena, several ABC affiliates "did not air the World War II drama *Saving Private Ryan* because of worries that violence and profanity would lead to fines, even though the movie had already been aired on network television." Such decisions seem to come from an uncertainty on the part of radio and television broadcasters as to what exact speech is proscribed by the FCC regulations. Often, broadcasters take these actions as sweeping preventive measures; they are not guided by the current regulations as much as they are guided by the fear of fines and increased industry regulation.[126]

The FCC regulations currently in place are not clearly worded and reflect the vagueness of the definition of obscenity.[127] Broadcast companies, artists and others attempting to communicate over the airwaves cannot be certain in advance how their speech will be deemed based on local contemporary community standards. The FCC's recent onslaught could lead to a stifling of unpopular views and ideas.[128]

2. The Artist without Recourse

Regulations place artists in a more precarious situation than the broadcasters are placed because, typically, the economic impact on broadcast companies is lessened by the companies' greater financial resources. The regulations hamper artists' creative freedom while simultaneously having an economic impact on their livelihood. The artists' ability to express themselves in multiply manifested ways allows them to be creative and artistic individuals. Additionally, being able to disseminate one's recorded

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written in "terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with." To be overbroad, a statute must "fail[ ] to distinguish between conduct that may be proscribed and conduct that may be permitted." *Id.*

126 *See* Tara Phelan, *Selective Hearing: A Challenge to the FCC's Indecency Policy*, 12 N.Y.L. SCH. J. HUM. RTS. 347, 382 (1995) ("A broadcaster is obliged to exercise some form of self-censorship in order to ensure license renewal. Thus, most broadcasters, attempting to avoid sanction, will refrain from airing anything that may have even the slightest appearance of offensiveness. As a result, the free flow of ideas supposedly promised by the First Amendment may not be received through our radios.").

127 *See* Jonathan Weinberg, *Vagueness and Indecency*, 3 VILL. SPORTS & ENT. L.J. 221 (1996).

128 *See* Jacques Steinberg, *Eye on F.C.C., TV and Radio Watch Words*, N.Y. TIMES, May 10, 2004, at P1 ("Television and radio broadcasters say they have little choice but to practice a form of self-censorship, swinging the pendulum of what they consider acceptable in the direction of extreme caution. A series of recent decisions by the F.C.C., as well as bills passed in Congress, have put them on notice that even the unintentional broadcast of something that could be considered indecent or obscene could result in stiffer fines or even the revocation of their licenses.").

work via the radio is an integral part of artists' ability to support themselves and to gather an audience for their work. The FCC regulations do not target artistic individuals; they are aimed at the broadcast station which bears the brunt of the economic deprivations. However, the ultimate loss is felt by the person whose speech is removed from the air and labeled indecent, whether it be the radio commentator who inadvertently misses the bleeping out of a "bad word"[129] or the musician whose song is removed from the air.[130] These long term consequences ultimately are more damaging to the creative individuals in our community who already struggle to make a living in a world of multi-media conglomerates.

The current climate of censorship being generated by the FCC actions may ultimately cause great harm to the "marketplace of ideas" valued by the First Amendment.[131] The Supreme Court has held that viewing or hearing indecent material is a right that is protected by the First Amendment.[132] However, "the Court has also upheld the rights of parents to protect their children from influences the parents deem harmful."[133] The FCC has always justified its special ability to sanction what is otherwise considered protected First Amendment speech by claiming it has a compelling government interest in protecting children from exposure to indecent material.[134]

In the current scrutiny of broadcast indecency, the FCC is pushing to increase fines and to prosecute greater numbers of broadcasts. Yet the FCC continues to apply standards for indecency that are not sufficiently clear enough as to what language or conduct will bring sanction.[135] This is not a new

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[129] Hiestand, *supra* note 120. R

[130] *KBOO II*, 18 F.C.C.R. 2472 (2003).

[131] *See* Abrams v. United States, 250 U.S. 616 (1919) (Holmes, J., dissenting). In Justice Oliver Wendell Holmes' dissent, he invoked the powerful metaphor of the "marketplace of ideas" and wrote, "[t]he best test of truth is the power of the thought to get itself accepted in the competition of the market and that truth is the only ground upon which their wishes safely can be carried out." *Id.* at 630. The argument is that the truth is most likely to emerge from the clash of ideas.

[132] *See* Sable Communications, Inc. v. FCC, 492 U.S. 115, 126 (1989).

[133] Wise, *supra* note 70, at 16. R

[134] *See* Phelan, *supra* note 126, at 385. The FCC claims that the indecency policy is aimed at 1) ensuring that parents have an opportunity to supervise their children's listening and viewing of over the air broadcasts, 2) ensuring the well-being of minors regardless of parental supervision, and 3) protecting the right of all members of the public to be free of indecent material in the privacy of their homes. R

[135] *See* Phelan, *supra* note 126, at 351. In a 1987 FCC case, Infinity Broad. Corp. of Pa., 2 F.C.C.R. 2705 (1987), the agency stated that indecency will be judged by the standard of an average broadcast viewer or listener and emphasized that determinations would necessarily be made on a case-by-case basis after reviewing all attendant circumstances. Phelan notes that this statement of the regulation did not prove sufficient, as the broadcasters still have R

problem for the FCC. But as the fines become more expensive and the consequences more severe (including the possibility of licenses being revoked for multiple sanctions and fines on individual artists for their "indecent" speech),[136] it is evident that unless artists are provided with the opportunity to respond directly to allegations against their work, they are effectively silenced in this ongoing debate.[137]

Jones was compelled to challenge the FCC action against KBOO and her song because of the impact that it had on her career and her reputation as a performer and international women's rights activist.[138] Yet when she attempted to bring suit directly against the FCC, she met several procedural obstacles. Some were due to the deference given to agency determinations and the fact that the FCC had not yet ruled when Jones brought her initial suit against the FCC in the Southern District of New York.[139] The next procedural challenge came when Jones filed an informal request,[140] which provides for judicial review of FCC decisions, asking that the Commission rescind the NAL *and* issue a declaratory ruling that "Your Revolution" was not actionably indecent."[141]

Ultimately, her request for the declaratory ruling was dismissed by the FCC as moot, when the agency rescinded the NAL against KBOO.[142] Although the rescission of the NAL was a victory for the radio station, Jones was never provided an opportunity to repair the damage done to her reputation and career during the two years she could not get her song on the air due to the protracted FCC proceeding. Jones was fortunate that the radio

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to determine who the average broadcast viewer or listener instanced by the FCC is; what the viewer might consider patently offensive; what contemporary community standards are; and whether this is a local or a national standard. The existence of these questions demonstrates the vagueness of the regulations under which broadcasters must operate. *See also* Industry Guidance on the Commission's Case Law, *supra* note 86, at 9002 ("The determination as to whether certain programming is patently offensive is not a local one and does not encompass any particular geographic area. Rather, the standard is that of an average broadcast viewer or listener and not the sensibilities of any individual complainant."). R

136 *See* Steinberg, *supra* note 128. R

137 *See* Jeremy Harris Lipschultz, *Conceptual Problems of Broadcast Indecency,* 45 FED. COMM. L.J. 339 (1993) (arguing that the lack of clear standards of what constitutes broadcast indecency combined with the current application of a "generic legal definition" has led to unsatisfactory, haphazard results which do not provide sufficient content guidelines for the broadcast industry).

138 *See* Parker, *supra* note 9 ("To have 'sexually indecent' attached to my name is something we couldn't let stand."). R

139 Jones v. FCC, 30 Med. L. Rep. 2534 (BNA) (S.D.N.Y. Sept. 4, 2002).

140 *See* 47 C.F.R. § 1.41 (2005).

141 *See* 47 U.S.C. § 151 (2005).

142 *KBOO II*, 18 F.C.C.R. 2472, 2475 (2003).

station, the only party given the right to appear in an indecency proceeding under the FCC enforcement scheme, was willing to contest the FCC ruling. KBOO's efforts to refute the fine offered Jones some measure of relief in that the FCC ultimately rescinded the NAL and the labeling of her song as "indecent". In this case, both the radio station and Jones shared a common understanding that the FCC ruling was wrong and deserving of a challenge. KBOO is a listener-supported, independent community radio station with a commitment to multicultural programming, and despite the fact that station managers were aware of the FCC regulations, the station was certain that the song's context and strong empowerment message would provide a safe haven from the FCC regulation, and were as surprised as Jones was at the sanctioning of her song.[143]

The problem with the current enforcement scheme is that an artist such as Jones is at the mercy of the radio station to enforce her personal, professional and individual rights. The artist's power to vindicate her personal rights is necessarily beholden to a profit making media corporation (usually concerned more about loss of revenue to fines than protecting free speech). If the radio station is an independently owned, politically progressive station like KBOO, an artist is more likely to find an ally in the fight to protect free speech. It is a much different scenario when the radio station is a multi-national media organization like Clear Channel or Infinity Broadcasting.

Under the current enforcement process, the FCC only takes enforcement actions when FCC commissioners receive complaints of indecent broadcasts from members of the viewing public.[144] The complaint must contain "as full a record as possible."[145] Generally, a complaint will include a full or partial recording or transcript of the broadcast, the date and time of the broadcast and

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143 Chisun Lee, *Counter Revolution, FCC Dubs Feminist Lyrics 'Patently Offensive,"* THE VILLAGE VOICE, June 20-26, 2001 ("Station manager Chris Merrick figured the song's empowerment message would easily exempt it from the FCC investigation, which beginning this February looked at about a half-dozen other hip-hop songs broadcast on KBOO. 'Our lawyer and I were both stunned,' says Merrick, when they received the May 17 notice fining KBOO for airing indecent language at a time—between 6 a.m. and 10 p.m.—when children might have been listening. KBOO lawyer John Crigler argues, '[The FCC] oversimplified the context. We said, 'You gotta listen to the song. You have to understand that the song itself, musically, is a critique, it's a feminist attack on macho values of typical rap music. And you don't get that unless you listen to something.' The commission just said, 'No thanks, we don't want to consider that,' but Crigler says, the station will challenge the fine and the reasoning behind it in a July appeal.").

144 *See About the FCC: A Consumer Guide to Our Organization, Function and Procedures, supra* note 1. R

145 *See id.*

the call sign of the radio station.[146] Once the FCC Enforcement Bureau reviews the material and determines whether it is indecent, it issues a Letter of Inquiry (LOI) or a Notice of Apparent Liability (NAL) for monetary forfeiture or it makes a formal referral of the case to the full commission for consideration.[147] When LOIs or NALs are issued, the licensee radio station is given the opportunity to respond. The licensee is afforded an opportunity to respond pursuant to 47 U.S.C. § 503(b) (2006). The FCC guidelines for enforcement of the indecency statute[148] do not provide the individual whose work is the subject of a given NAL or LOI an opportunity to respond or to refute the agency sanction.

3. Commercial Recourse: Eminem and Sarah Jones in Sharp Contrast

When a radio station comes under FCC scrutiny for something heard over its airwaves, the first response of the radio station is to remove the song or other offensive material from the airwaves until the matter has been resolved through the regulatory process.[149] What this means for musicians is that the song is labeled "indecent" and effectively censored by removal from the airwaves until a later date. That date occurs after the FCC determines whether or not the song is indecent and whether the radio broadcaster is subject to regulation before that song can return to the airwaves.[150] The labeling of a song as indecent and its removal from the broadcast airwaves impacts each musician or artist differently.

The solo rap artist, Eminem, has had many encounters with controversy, and some would argue that the controversy over his music has actually had a positive impact on his image.[151] In 2001

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146 *See id.*

147 *See id.* ("Generally, the last of these alternatives is taken in cases where issues beyond straightforward indecency violations may be involved or where the potential sanction for the indecent programming exceeds the Bureau's delegated forfeiture authority of $25,000 (47 C.F.R. § 0.311).").

148 *See About the FCC: A Consumer Guide to Our Organization, Function and Procedures, supra* note 1. R

149 *Radio Station Fined For Playing Eminem*, BBC NEWS, June 6, 2001, *available at* http://news.bbc.co.uk/2/hi/entertainment/1373207.stm ("The FCC said last week that the version of the record played by KKMG 'contains unmistakable offensive sexual references.' KKMG operations manager Bobby Irwin said the record had already been edited by Eminem's record company and was not indecent, but the station has stopped broadcasting it.").

150 *See About the FCC: A Consumer Guide to Our Organization, Function and Procedures, supra* note 1. R

151 Eric Boehlert, *Invisible Man,* Salon.com, Arts & Entertainment, June 7, 2000, http://www.salon.com/ent/music/feature/2000/06/07/eminem/ ("Accountants for Interscope Records and rapper Eminem weren't the only ones cheering last week when the star's new

the FCC fined radio station KKMG-FM in Colorado Springs for playing a radio edit of the Eminem song, "The Real Slim Shady."[152] The Grammy Award winning song[153] was broadcast throughout the United States during the summer of 2000, when the complaint was made to the FCC.[154] The FCC issued a NAL to KKMG and fined the station $7000 for playing a song that "contained sexual references in conjunction with sexual expletives that appear intended to pander and shock."[155] However, the FCC ultimately rescinded the NAL, concluding that the "material at issue is not patently offensive under contemporary community standards for the broadcast medium."[156]

The entire FCC enforcement procedure in the Eminem case took approximately six months.[157] During that time, the rapper's song received no radio play, yet did win three Grammy awards. The record label sold millions of copies of "The Real Slim Shady" and the album on which it appeared. Additionally, Eminem's follow up album, *The Eminem Show*, made mention of the FCC ordeal in a song titled, "Without Me."[158]

Meanwhile, Sarah Jones, whose political rap song, *Your*

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album, 'The Marshall Mathers LP,' debuted at No. 1 in blockbuster style. The aggressively demented album, which features the white rapper weaving rapid-fire tales about rape, faggots, bitches, drug overdoses and throat cuttings, sold 1.7 million copies in just seven days, according to SoundScan, becoming the second-biggest-selling debut week in industry history—and certainly the most successful showing by a rapper ever.").

152 EMINEM, *The Real Slim Shady, on* THE MARSHALL MATHERS LP, (Interscope Records 2000). Sample lyrics include "And that's the message we deliver to little kids/And expect them not to know what a woman's *bleep* is/Of course, they're gonna know what intercourse is by the time they hit fourth grade/They got the Discovery Channel, don't they?"

153 *See Eminem Radio Fine Dropped*, BBC NEWS, Jan. 9, 2002, *available at* http://news.bbc.co.uk/1/hi/entertainment/music/1750251.stm ("The Real Slim Shady single and album won three Grammy Awards last year, including those for the best rap solo performance and rap solo album.").

154 *See Radio Station Fined For Playing Eminem*, *supra* note 149 ("'Virtually every pop, Top 40 station played that song,' said Cat Collins, the program director for Denver's KQKS-FM. "That was a number one record—the kind of record that stations played 65 to 70 times a week."). **R**

155 *Citadel Broadcasting Company*, 16 F.C.C.R. 11839, 11840 (2001).

156 *Citadel Broadcasting Company,* 17 F.C.C.R. 483, 483 (2002). In its analysis, the FCC determined:

> The passages in question, in context, refer to sexual activity. Thus, the material warranted scrutiny. Based on our review of Citadel's response, however, we conclude that the material broadcast was not patently offensive, and thus not actionably indecent.
>
> With respect to the first key factor set out in the *Indecency Policy Statement*, we agree with Citadel's contention that the sexual references contained in the song's "radio edit" version are not expressed in terms sufficiently explicit or graphic enough to be found patently offensive. Although the song, as edited, refers to sexual activity, these references are oblique.

Id. at 486 (footnotes omitted).

157 *Cf. id.* The radio station was first fined on June 1, 2001, and on January 7, 2002, the FCC rescinded the NAL.

158 EMINEM, *Without Me,* THE EMINEM SHOW (Aftermath Records 2002). Sample lyrics

Revolution, attacks sexual exploitation and the degrading lyrics in popular music, had her song removed from the radio when the independent radio station, KBOO-FM in Portland was fined.[159] It took the FCC nearly two years to rescind the NAL against the radio station and to remove the label of indecency from Jones' song.[160] Jones is not a mainstream pop artist, and in her case, the labeling of her song as indecent and the accompanying controversy did not have the same positive impact on her career as it did on Eminem's. At the time of the controversy surrounding her song, Jones was an up-and-coming performance artist with a fledgling career as a recording artist. The removal of her song from the airwaves had an economic impact on her livelihood that was significant, and it effectively silenced her in the broadcast arena for two years. The negative effect that the FCC actions brought upon her career and her reputation was the impetus for Jones' attempt to vindicate her rights. Unlike Eminem, Jones lacked the widespread financial support of a devoted fan base and the recourse available to a commercially successful artist like Eminem, who does not need the radio forum to drive his exposure and his success. Additionally, while it may have served Eminem's "bad boy persona" to have his song banned and called "indecent," Jones did not relish the experience[161] of having her reputation marred by having her song labeled sexually explicit and indecent. Jones, however, attempted to exercise legal recourse over the injury to her reputation and career, and despite her attempts ultimately never truly vindicated the harm done to her career during that time.

B. *Recommendations: Legal Recourse for the "Indecent" Artist*

The current regulations are overly broad. They are meant to protect children from the actions of broadcasters, but they also have a serious impact on the livelihood of artists and other creative individuals who make their living in the broadcast arena. Under the current FCC enforcement scheme, artists do not have a direct procedure with which to challenge the FCC censorship of their art and the unconstitutional chilling of their freedom of expression. Neither are they provided an opportunity to vindicate any haphazard harm that may result in the application of the FCC's vague standards of decency and judgments of

include: "So the FCC wont let me be or let me be me so let me see/they tried to shut me down on MTV but it feels so empty without me."

159 *See* Parker, *supra* note 9. R

160 *Cf. KBOO II*, 18 F.C.C.R. 2472 (2003).

161 *See* Parker, *supra* note 9. R

morality.[162] Although the record industry has grown accustomed to the FCC rules and has seemingly embraced self-censorship by, in most cases, playing radio edits of songs with potentially offensive lyrics,[163] or bleeping out words that might come under scrutiny, this is not a long-term solution. This article's ultimate purpose is to propose alternatives to the current FCC strategies and procedures for regulating indecency. This section considers a recommendation for revision to the FCC policies and procedures in order to mitigate the impact on creative individuals attempting to make a living, and to ensure that there is a creative marketplace of ideas.

1. Legal Recourse: Standing for Artists

Given the inadequacies of the current recourse available to artists labeled indecent and removed from the airwaves by FCC actions against broadcasters, there must be a change in the FCC enforcement procedure to provide artists with legal recourse, first at the agency level and then within the federal courts. This section recommends specifically that Congress amend the FCC indecency statute to allow for artists and individuals affected by the enforcement of the statute against broadcasters to have intervenor status in the agency adjudication regarding their speech.[164] Without intervenor status, the artists affected by FCC enforcement of the indecency statute are merely third parties to the agency proceeding and lack any real power over the outcome of the enforcement proceeding. Allowing for third party artists to have intervenor status provides them with the standing necessary to advocate for their First Amendment rights at the agency level.

There are two important aspects to this proposal in the context of the FCC indecency regulation. First, the FCC must allow for those private citizens whose First Amendment expression is the subject of agency adjudication against a radio broadcaster to be given the opportunity to appear as an intervening party in interest in any agency proceedings pertaining to that expression.

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[162] FCC v. Pacifica Found., 438 U.S. 726, 766 (1978) (Brennan, J., dissenting) (noting that the FCC's indecency statute "permits majoritarian tastes completely to preclude a protected message from entering the homes of a receptive, unoffended minority.").

[163] Kenneth A. Paulson, *1970 revisited: The FCC vs. rock 'n' roll, Inside the First Amendment*, July 15, 2001, http://www.freedomforum.org/templates/document.asp?documentID=14372 ("Record companies issue edited versions of potentially offensive songs, bleeping out profanity and overt sexual and drug references. The record companies get their songs played; radio stations play the hits; and the FCC imposes fines against radio stations that played the unedited versions of adult oriented songs.").

[164] An intervenor is defined as "one who voluntarily enters a pending lawsuit because of a personal stake in it." BLACK'S LAW DICTIONARY 712 (7th ed. 1999).

FCC enforcement of indecency laws is focused on radio and television broadcasters because Congress delegated power to the FCC to regulate the broadcast industry. The FCC's power is to adjudicate broadcasters who violate the indecency statute. However, because the matter being adjudicated in the indecency context necessarily involves a third party, the creator of the sanctioned expression, the agency should allow those individuals to be heard. There is no statutory language in the indecency regulation that expressly prohibits the agency from inclusion of the third party artist in these enforcement proceedings. In fact, it is not uncommon in the administrative agency setting for interested parties to have a role in the adjudication of a matter.[165]

Allowing third party artists to intervene will better serve the agency in applying the indecency statute fairly. The FCC test for indecency examines whether the broadcast was patently offensive[166] as measured by contemporary community standards for the broadcast medium and considers the sanctioned material in this context.[167] It is therefore necessary to consider the material and all the surrounding circumstances. In Jones' case, the fact that she had performed her song in high schools was important to the ultimate agency adjudication of the matter. But this information was not something that a broadcaster would have known. Careful agency review should therefore require the agency to hear from the creators of the alleged indecent material themselves in a formal manner, allowing third party artists to make the case that their songs are not indecent under the statute as a matter of right. Although under current practices, third party creators of sanctioned speech may participate informally in the adjudication by filing supporting documentation and briefs, the fact that they are not formally recognized as one of the parties in interest to the agency proceeding has the added affect of removing the potential

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165 *See* Peter A. Appel, *Intervention in Public Law Litigation: The Environmental Paradigm*, 78 WASH. U. L.Q. 215, 238 (2000) ("The interested parties in an environmental case often have participated in the matter before it reaches court because of the agency setting. Article III standing principles do not limit the parties who may participate in the agency's own decision-making process. Often, agencies will allow any party who expresses an interest in the matter to submit comments on a proposed decision or to otherwise participate in what becomes the agency's final decision.").

166 *See* Industry Guidance on the Commission's Case Law, *supra* note 86, at 8002-3. In determining whether material is patently offensive, the full context in which the material appeared is critically important. It is not sufficient, for example, to know that explicit sexual terms or descriptions were used, just as it is not sufficient to know only that no such terms or descriptions were used. Explicit language in the context of a bona fide newscast might not be patently offensive, while sexual innuendo that persists and is sufficiently clear to make the sexual meaning inescapable might be. R

167 *See* Industry Guidance on the Commission's Case Law, *supra* note 86, at 8015. R

for further judicial review of their matter.[168]

Second, once artists are permitted the formal recognition of intervenor status, they would be given the ability to proceed with their action in the Federal courts should they be able to attain review of an agency decision which was not satisfactory. In Jones' case, if she were given the status of intervenor in the adjudication against KBOO, she would have the official status of being a party to the proceeding. If Jones then wished to gain judicial review of the FCC's decision once she had exhausted her options for review within the agency, she would be able to attain judicial review by the federal courts of the agency's decision. Without the status of intervenor in the agency proceeding, Jones would first have to satisfy the Article III standing requirements for bringing an original action in the federal courts.[169] Jones would likely fail to satisfy the Article III requirements and ultimately would be left without any legal recourse.

As the law currently stands, if Jones wished to litigate her First Amendment rights in the federal courts (as a third party to the action between the FCC and KBOO) she would need to bring an original action and would, as a threshold issue, have to satisfy the Article III standing requirements.[170] Traditionally, the standing doctrine involves a court's determination as to whether a certain plaintiff is the appropriate person to bring the cause of action. Generally, a plaintiff has the burden of satisfying both constitutional and prudential requirements.[171] The standing doctrine stems from the case or controversy requirement of Article III as well as from prudential limitations consistent with notions of judicial restraint and separation of powers analysis.[172] These requirements serve several purposes. They ensure that the court will hear concrete rather than abstract cases, promote judicial

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168 *See Special Feature: A Blackletter Statement of Federal Administrative Law: Prepared by the Section of Administrative Law and Regulatory Practice of the American Bar Association*, 54 ADMIN. L. REV. 17, 37 (2002) [hereinafter *ABA Statement*]. *Cf.* 5 U.S.C. § 706(2)(B) (2005) ("The reviewing court shall . . . set aside agency action . . . contrary to constitutional right . . ."); 5 U.S.C. § 706(2)(C) (2005) ("The reviewing court shall . . . set aside agency action . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.").

169 *Cf.* 28 U.S.C. § 2342(1) (2005) ("The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of . . . all final orders of the Federal Communications Commission . . .").

170 *See ABA Statement, supra* note 168, at 52. R

171 *See, e.g.*, Emily Longfellow, *Friends of the Earth v. Laidlaw Environmental Service: A New Look at Environmental Standing*, 24 ENVIRONS ENVTL. L. & POL'Y J. 3, 5-6 (2000).

172 Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992). "Though some of its elements express merely prudential considerations that are part of judicial self-government, the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Id.* at 560.

restraint by limiting occasions of judicial intervention and ensure decisions will be made on behalf of those directly affected.[173]

In determining whether an individual has standing, the court will look to see whether the plaintiff has a sufficient stake in the lawsuit to give rise to a case or controversy and overcome prudential limitations.[174] To do so, the plaintiff must first have an injury in fact, whether the injury is threatened or actual, that is personal to the plaintiff, and concrete and particular, actual and imminent.[175] The second requirement is that there must be causation between the defendant's action and the injury to the plaintiff. That causal link must be fairly traceable to the challenged action.[176] Lastly, an award to the plaintiff must be likely to redress the alleged injury.[177]

In *Friends of the Earth v. Laidlaw*,[178] the Supreme Court detailed the current standing requirements for members of the public seeking to bring a suit under a private right of action. Although the factual situation is different—a private attorney general suit against a polluter brought by a public NGO[179]—the standard for who will have standing is considered definitive for who can sue an agency.

The Supreme Court granted certiorari to address not only mootness but whether the *Friends of the Earth* plaintiffs had demonstrated all elements of the constitutional and prudential

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173 *See* Allen v. Wright, 468 U.S. 737, 751-752 (1984).

174 *See ABA Statement, supra* note 168, at 52. Such prudential limitations include: "(1) a prohibition against parties raising claims or defenses that involve a third party's legal rights (the *jus tertii* limitation); (2) a requirement that the injury be arguably within the zone of interests protected or regulated by the statute invoked; and (3) a prohibition against litigating generalized grievances." *Id.* **R**

175 *Lujan*, 504 U.S. at 560.

176 *Id.*

177 *Id.*

178 Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167 (2000).

179 *See id.* at 175-178. In 1986, Laidlaw Environmental Services, Inc. purchased a hazardous waste incinerator facility and wastewater treatment plant. In 1987, it received a National Pollution Discharge Elimination System permit under the Clean Water Act (CWA) authorizing the discharge of treated water into a nearby river. Laidlaw repeatedly exceeded the discharge limits set by the permit. Specifically, it "consistently failed" to meet its discharge limit on mercury, violating this limit 489 times between 1987 and 1995. On April 10, 1992, the plaintiffs Friends of the Earth and Citizens Local Environmental Action Network, Inc. (later Joined by Sierra Club, collectively referred to as FOE) sent a sixty-day notice letter of intent to file a citizen suit under the CWA. After the 60-day period expired, Department of Health and Environmental Control (DHEC) and Laidlaw reached a settlement requiring Laidlaw to pay $100,000 in civil penalties and to make efforts to comply with the permit obligations. On June 12, 1992, FOE filed a citizen suit against Laidlaw alleging non-compliance with the National Pollutant Discharge Elimination System (NPDES) permit and seeking declaratory and injunctive relief and an award of civil penalties. Laidlaw moved for summary judgment on the ground that FOE lacked Article III standing to bring the lawsuit.

standing requirements. The Court reversed the Fourth Circuit's decision, which held that the case was moot because civil penalties would not redress the plaintiff's alleged injuries.[180] The Court found that the plaintiffs had demonstrated injury in fact by showing the impact of the pollution to their water supply: the fact that they avoided using that water for recreational and aesthetic purposes and that the proximity of one plaintiff's home to the polluting Laidlaw facility had reduced the market value of her home.[181] The Court also found that the plaintiffs demonstrated that the injury to their recreational, aesthetic and economic interests was in fact imminent.[182] The Court did not analyze the issue of causation but rather went on in its decision to examine the issue of redressability. Laidlaw argued that even if Friends of the Earth had standing to seek injunctive relief, it lacked standing to seek civil penalties.[183] Justice Ginsberg, writing for the Court, stated that the plaintiffs had met the requirements for redressability because "civil penalties in the face of ongoing violations have a deterrent effect . . . to the extent (civil penalties) encourage defendants to discontinue current violations and deter them from committing future ones, they afford redress to citizen plaintiffs."[184]

Without official status as a party in interest to the agency adjudication, artists such as Jones will have a difficult time proving standing in a federal court. Jones may be able to prove the Article III requirements by showing a clear injury in fact based on the fact that for two years while the FCC adjudicated the KBOO case she experienced damage to her career and reputation, which can be measured in concrete monetary terms. Awarding her relief would likely redress the harm done. However, the prudential limitations prove difficult to overcome, in particular the "zone-of-interests" requirement,[185] because Jones as the creator of the sanctioned speech is not a member of "either (1) the group directly regulated by, or (2) the group intended as beneficiaries of, the relevant

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180 Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 149 F.3d 303, 306-7 (4th Cir. 1998).

181 *Friends of the Earth*, 528 U.S. at 182-3.

182 *Id.* at 184.

183 *See id.* at 185 ("Civil penalties offer no redress to private plaintiffs, Laidlaw argues, because they are paid to the government, and therefore a citizen plaintiff can never have standing to seek them.").

184 *Id.* at 185-186.

185 *See ABA Statement, supra* note 168, at 56 ("A cognizable injury in fact . . . requires that the injury be 'arguably within the zone of interests to be protected or regulated by the statute . . . in question.'"(citation omitted)). R

statute,"[186] and is therefore not "indisputably within its zone of interests."[187] Jones would have to show that the interest she seeks to protect (her First Amendment speech rights) is arguably within the zone of interests to be protected or regulated by the indecency statute. Since the indecency statute is meant to regulate the broadcast industry and protect children from indecent speech over the airwaves, she is likely to lose the argument. Without standing and review in federal court, Jones is ultimately left to the mercy of a process that seeks to adjudicate her work as violating the indecency statute, which impacts upon her personal, professional and individual rights under the First Amendment, yet she is completely without a voice in the process.

CONCLUSION

To avoid a scenario that puts artistic individuals and the broadcast industry within which they often operate in the vulnerable position of fearing the wrath of government sanction of their freedom of expression, Congress must consider amending the indecency statute to allow for individuals whose speech is sanctioned by an FCC enforcement action against a given broadcaster to have the option to intervene in that action. Allowing for the injured third party artist to have standing within the agency provides them with the proper arena within which to protect their ability to express themselves freely. Greater participation in the enforcement process will have the added benefit of forcing the agency to further clarify their standards for enforcement of the indecency statute. The FCC has taken on the job of being the "final arbiter of taste and values" and has the power to impose "subjective moral standards upon all radio broadcasters"[188] and individuals who find themselves as the anonymous third party in the middle. Reducing the protections afforded to individuals whose work is heard in the broadcast media and then not allowing them procedural safeguards is suspect, especially in a society that values unpopular voices, dissent and the freedom of the idea.

Additionally, giving voice to the third party artist within the FCC enforcement scheme may be the only way of reigning in the

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186 *See ABA Statement, supra* note 168, at 57. **R**
187 *Id.*
188 *See* Phelan, *supra* note 126, at 390-391. **R**

agency's enforcement practices. It would also emphasize our society's constitutional consideration for free speech and balance it against the statutory command to protect the nation's children from inappropriate sexual material.