

A Hard Look Podcast: Audio Transcript – The FCC’s Impact on U.S. Media

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Opening Theme: Welcome to a hard look, the Administrative Law Review podcast from the Washington College of Law. We'll discuss how administrative law impacts your daily life for regulatory actions by agencies and the litigation over them to the balance of power among branches of the government. This is a hard look.

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Alexander Naum (Host): Hello, and welcome to a hard look, recording on a partly cloudy summer day in our nation's capital. My name is Alexander Nam, and I'm ALRs new Senior Technology editor and curator of this podcast. Also joining and curating the podcast is our new technology editor. Hi, everyone. I'm Eva, thank you so much for tuning into our very first episode together. We are so excited to build upon the work of the previous Senior Technology editor and the previous technology editor over this next year. For returning listeners, you may notice some changes we decided to make we updated our podcasts logo and our theme song to better reflect the tone of this podcast. We hope you enjoy it.

Alexander Naum (Host): The focus of today's conversation is the Federal Communications Commission, also known as the FCC, a federal agency that regulates interstate and international communications via television, cable, radio, and certain other platforms that reach the eyes and ears of people all across the US. Over the years various incidents have propelled the FCC into media spotlight, including the recent altercation at the Oscars, which generated some FCC consumer complaints and led to a media frenzy of coverage, including an article in the Washington Post in which a Washington College of Law Professor Victoria Phillips was quoted. While this episode will not focus on the event at the Oscars, we wanted to dive into the role of the FCC and regulating media content. Here to help us better understand the impact of the FCC on US media. We're happy to be joined today by two incredible individuals representing two distinct sides of the topic. First is Crystal Evans, a counsel for NBC Universal and the regulatory affairs department, where she provides legal support to NBC owned and operated stations with an emphasis on FCC regulatory requirements. She graduated from the Washington College of Law in 2016 and is an alum of our journal. And her undergraduate studies crystal attended the University of Miami, graduating in 2011, where she majored in broadcasting journalism and political science. We are also joined with Chad Guo, an attorney advisor and the industry analysis division of the media Bureau of the FCC. He has worked on media ownership matters with a focus on television related issues. He attended the Washington College of Law and graduated in 2013. And his undergraduate studies, Chad studied English literature and International Relations at the University of Virginia and graduated in 2008. And a fun fact in between undergrad and law school. He was a cast member for the studio backlot tour, The Great Movie Ride and Main Street USA at Walt Disney World. As a reminder to our guests, these are the personal views of Crystal Evans and Chad Guo and are not a reflection of their employers, organizations, federal agencies, or other individuals in which these opinions can be imputed. Before we begin, Chad, I just have to say The Great Movie Ride was one of my favorite rides growing up, and I was so sad to see it go a couple years back.

3:41

Chad Guo (Guest): Yes was one of my favorite places to work as well. And yeah, still not over that.

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3:47

Alexander Naum (Host): All right. So when most people think of how the FCC regulates American media, often there's this thought of government enforcement knocking on the door of a media company to find them for something deemed obscene, indecent or profane, by the agency. However, this isn't the main mode of enforcement. Chad, can you elaborate for our listeners on how the agency regulates media?

4:09

Chad Guo (Guest): Yes, as much as I would love to watch TV for a living, there really isn't anyone at the FCC that gets to patrol the various forms of media looking for possible FCC rule violations. Instead, the FCC would have to receive a substantive complaint from the public before it opened any enforcement proceeding. Usually, after receiving a substantive complaint, the FCC would start by sending a notice or letter of inquiry to the party against whom an allegation of rule violation was being made. After giving the party an opportunity to respond to the allegations and to and the FCC finds that there indeed has been a rule violation. The FCC then since the party, a notice of apparent liability, and they also propose a forfeiture amount. This is also known as popularly as fine, the party is given a chance to argue that its forfeiture amounts should be reduced or canceled. A party can also resolve a potential violation outside of this process. By engaging in settlement discussions with SEC staff. These discussions generally result in a consent decree, which will include a compliance plan that is designed to prevent recurrence of the violation that led to the enforcement action in the first place, as well as inappropriate, voluntary financial contribution to the US Treasury. Again, that's another fancy way of saying Fine. The Commission can also impose a forfeiture through a hearing process, or take another number of other enforcement actions that do not include a financial penalty or contribution. Another way for enforcement to occur during license renewals broadcast stations must periodically renew their license to operate. Before the FCC renews the station's license has to determine whether during the preceding license term number one, the licensee has served the public interest to has not committed any serious violations of the Communications Act or the FCC has rules. And three has not committed other violations which taken together would constitute a pattern of abuse. During this time, the public can comment and notify the FCC. If the licensee has not met these obligations, or is not being truthful in its renewal application statements. The Commission finds the licensee has not met its obligation it may delay the license renewal or revoke the license. But this is relatively a relatively rare mode of enforcement.

6:26

Crystal Evans (Guest): Great. And just to add a second, everything Chad said. But I think based off of all of that there is a bit of industry, self regulation that tends to go on. To an extent I think that the FCC is and decency rules are sort of, quote unquote unsettled in that there is no delineated list of what you can, or what can or can't be shown or set on broadcast TV, until we have lines drawn in the sand broadcasters are always going to be guessing as to whether something is indecent or not. For example, one incident involved a Martin Scorsese produced documentary about the blues that aired over a number of PBS stations. The FCC had issued fines over those earrings since there were scenes with musicians and producers that had used profanity. However, in a prior case, the FCC actually declined to penalize stations, a different set of stations that aired the film Saving Private Ryan, which was written with explicit

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IPs. Because in that context, the FCC found that the profanity was actually essential to the artistic vision of the movie and for demonstrating the realities of war during that time. So with that kind of precedent, obviously, it's it's hard to know for sure what isn't what is and isn't allowed on on TV.

7:46

Alexander Naum (Host): Yeah, I can imagine with that type of president it's hard. It's very interesting. I think it's also important to address the type of content that is moderated. As US media is often associated with guns and violence, something maybe not the most appropriate for a young impressionable child while at the same time, there is an effort to protect children from other content that is deemed to be obscene, indecent or profane. Much of this as a result of key incidents in cases going as far back as the 1970s that helps shape what content can and cannot be broadcasted crystal. Can you help our listeners to better understand this timeline beginning with FCC V. Pacific foundation?

8:23

Crystal Evans (Guest): Absolutely. And this is a long answer. So strap in. So first, you have FCC vs. Pacifica where the Supreme Court agreed with the FCC is finding that the broadcast of George Carlin's, quote unquote seven dirty words monologue was indecent. This is the case that also established that broadcast TV was entitled to lesser First Amendment protection and that the FCC could actually regulate and decency on the airwaves then around the late 80s, however, the FCC determined that their interpretation of how Pacifica was decided, was too narrow. Rather than solely focusing on the seven specific words that were at issue in the George Carlin monologue, they started to shift their analysis of indecency to focus more so on context of the broadcast as a whole. And there again, late 80s, early 90s There were a number of shock jock cases that were found to be indecent, even though no quote unquote filthy words had been used in those broadcasts. A good example, or I think a famous example was a case called the candy wrapper song, which was a song that had errored that was entirely made up of candy bar names. And yet the FCC still found that that broadcast was in decent due to all of the sexual innuendos in the lyrics, then you have a case in 1991. It was called the Peter Branton case in which the FCC found that the repeated use of the F word in a news story that was broadcast by NPR was actually not indecent because the language was actually integral to a bonafide news story. In that case, the material in question was a wiretap recording of the mobster John Gotti, which was used as evidence in his widely covered trial. So that may made sense. Yeah, that makes sense for sure. Then fast forward about 10 years to 2001, the FCC decides to issue a new policy statement that was supposed to provide guidance to the industry on indecency. And in that guidance, they lay out a new two part test. In order for material to be found in decent it must one depict sexual or excretory organs or activities, and two, it had to be patently offensive when describing the factors made for patently offensive material. One of the factors was whether or not the material had dwelled on or repeated sexual or excretory activities. The agency also made clear in that guidance that the repeated and persistent focus on sexual or excretory activity had always been a factor in finding material offensive. In contrast, were those offensive references had been fleeting, or one offs that tended to lean towards a finding that the material was not in fact in decent. The guidance then went on to list several examples of material that was not found in decent since the material in question had been fleeting or isolated, then you have the early aughts. And during that time, you had a handful of indecent quote unquote slip ups. So in 2002, we had the Billboard Music Awards in which an F bomb is dropped. The next year in 2003. There's the Golden Globe Awards and another F bomb is dropped. In that same year, again at the Billboard Music Awards, an F bomb and an S bomb is dropped. And then also in 2003,

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during an episode of NYPD Blue, a woman's new butt appears on TV for seven seconds along with her side boob. All of these events generated complaints to the FCC in 2003. The FCC Enforcement Bureau took up one of these cases the Golden Globes case and actually declined to find the F bomb slip up in decent due to the FCC is long standing policy against finding pleading explicit lives in decent. They also noted that the remark in question didn't depict or describe any sexual or excretory activities. So they were gonna let that go. Interesting. However, enter February 2004, Super Bowl performance right? The Super Bowl happens and Janet Jackson's nipple is exposed for about half a second generating a lot of complaints the following month. Interestingly, the full commission comes back and issues in order actually reversing that initial Golden Globes order by the Enforcement Bureau. And they basically established a new policy in this reconsideration recon order, if you will, they stated that the F word was now presumptively indecent since it had an inherently sexual connotation and invoked a core sexual image. And even though the remark in the in the Golden Globes incident was a one off and fleeting, quote, unquote, the FCC kind of reverses itself and now states that words or phrases don't actually have to be sustained or repeated in order to be found in decent. Oh, wow. So with this new standard moving forward, in 2006, the FCC now issued a ruling for the Super Bowl performance, as well as for the both of the billboard, quote unquote, blenders and finds them all in decent. And then two years later, in 2008, the FCC issued a ruling against that NYPD Blue incident and also finds that indecent. So a lot of things happen after all of that a lot of court. Yeah, everything goes back and forth through the court systems and eventually this all bubbles up to the Supreme Court and 2012. Right, and the Supreme Court actually ends up striking down the FCC has actions in the billboard and the NYPD Blue cases because they found that the FCC had changed its policy on fleeting expletives after those broadcasts had occurred. So they moreso ruled against the FCC on procedural grounds, not the constitutionality of it the indecency regulations for the CBS case that kind of had a different trajectory after the FCC is initial ruling, you know, the case was brought up to court, the FCC lost that that third circuit, and then the government files cert, and that was denied. The Supreme Court ultimately, you know, just suggested to the FCC that they re examine their entire indecency policy. So following on from that a few months later, the then chairman of the agency puts out a directive and basically directs the FCC staff to only focus in decency enforcement on the strongest cases that had involved in egregious indecency violations the following year in 2013, the FCC actually opens a proceeding to consider this new indecency policy and the egregious standard comments had been filed, but no action has been taken since. So as of right now, we're kind of in a limbo, with that standard sort of still in place. But you know, with broadcaster still unsure of what to do. There's only been a handful of indecency cases I think since 2012, or 2013. One of the most notable ones being I think the one that everyone knows about was the case in 2015, which involved a station in Roanoke, Virginia that had aired male genitals during the newscast during the day. And given all the factors, you know, it was during the day kids might have been home, blah, blah, blah. The FCC actually issued its largest fine in this realm of indecency regulation, I think it was the highest fine that you could get at the time. \$325,000 Oh, wow. And again, since then, there hasn't been much activity. That is that's where we are right now.

16:03

Alexander Naum (Host): Crystal, thank you so much for that timeline. And out of all of the incidents that you mentioned, something that likely every listener remembers, or at least has heard of the Janet Jackson, Super Bowl performance definitely is the most profound in my memory, because she was instill is this legendary pop culture icon, who was admired by the black community, the queer community, and the overall culture as a whole, not just because of her musical talent and ability, which were clearly there, but also because of how strong and confident she was in her sexuality and expression, only for it to seemingly

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come crashing down in front of her to be held under this intense scrutiny by the public, the media, and the FCC for displaying something as simple as a nipple, something that cisgender men often freely display and broadcasting. And she only displayed it for nine sixteenths of a second. But also it reminds me that indecency is a very subjective term, I would love to hear your thoughts on the driving forces that have shaped the definition of indecency and the groups that may benefit from this definition, while also touching on the groups that are hindered by this definition.

17:04

Crystal Evans (Guest): Thanks. And also in that case, in the Janet Jackson case, the FCC didn't go after Janet it. They went after the stations that had aired the Super Bowl. I think at that year, it was CBS. But I think you hit on a good point in decency enforcement is definitely subjective. And in my opinion, I think enforcement can change depending on you know, whoever is in charge of the Enforcement Bureau at the time, and whatever their priorities are, we should also keep in mind that indecency enforcement is complaint driven, right. So it depends on who the viewers are, and how sensitive they are to whatever it is that they're viewing the Super Bowl, you know, just the sheer greatness that that event is, you know, is just a heavily watched event by all sorts of people, families included. So if anything, airs, that tends to be, you know, sensual, so to speak, you're going to probably drum up complaints, even if those complaints don't necessarily violate the FCC ease and decency rules, right. And we certainly saw this recently with the 2020 Super Bowl that was headlined by JLo. And Shakira, I think there were a lot of complaints about what was shown on TV despite that nothing was actually in violation of the FCC rules. I think another recent event was also an award show Grammys with Cardi B and Meghan the stallion, they performed the song together. And I think that drummed up a lot of complaints, or at least a lot of news articles. So you have, you know, those events that are heavily watched by all sorts of people that will drum up a lot of complaints and, you know, may not necessarily violate FCC rules, but you will also have events on the opposite spectrum. Like, for example, and we had this recently, a sports game, which may accidentally pick up a number of explicit divs by a team or something like that, I won't, I won't, you know, hash out what that event was again, but again, given that audience at that sports event that didn't drum up a lot of complaints and drummed up a few but not a lot. And I don't think that the FCC had taken any action over that issue, despite the fact that explicit ABS were aired on broadcast TV. So it again, it all just depends on its objective, and it definitely depends on who the viewers are.

19:27

Alexander Naum (Host): Yeah, it definitely seems very subjective. And I mean, it's also worth diving into the First Amendment implications of the censorship of this form of speech, as the expression of sexuality or even profanity can be viewed as a form of speech. Chad, can you elaborate more on the First Amendment implications of the FCC overseeing content?

19:47

Chad Guo (Guest): Sure, as initial matter, both the First Amendment and the communications that expressly prohibit the FCC from censoring broadcast content. The FCC is role in overseeing program content is thus very limited. The basis for the FCC is role stems from the scarcity of spectrum. The idea is that in exchange for obtaining a license to operate a broadcast TV, or radio station using the public's

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airwaves, which not everyone can do because the spectrum is limited, each licensee is obligated to operate its station in the public interest, convenience and necessity. How a licensee does this is entirely at their discretion. But generally, this means it must err programming that is responsive to the needs and interests of the local community where it's licensed. Despite how it may sound, this is actually a very low bar to clear. Basically, unless someone complains that a station isn't airing content responsive to the needs and interests of the local community. The FCC isn't going to make a judgment call that something doesn't meet that standard. But the FCC over the years as Crystal described, in response to complaints, has determined that certain sexual or profane content does not meet the standard when it's aired at certain times and thus should be regulated. The courts have held that the FCC regulation of sexual and profane programming is constitutional. Because of society's interest in protecting children from potentially harmful programming and supporting parents abilities to determine the programming their children will be exposed to at home. I'd call this the Helen Lovejoy logic, "please someone think of the children!" But the courts have also held that sexual and profane programming are entitled to First Amendment protections. So the Commission cannot prohibit broadcasters from airing such programming completely unless the programming fits the definition of being obscene, which has no constitutional protection. To balance the Affer mentioned societal interest in protecting children with their First Amendment protection or free speech. The FCC allows some sexual profane content aired during times when children are unlikely to be tuning in, which is from 10pm to 6am. local time.

21:55

Alexander Naum (Host): That's interesting. And it also reminds me when I was younger, and I would watch Cartoon Network, and then it would eventually turn into a whole different station later at night. Yeah. So moving on to our last question. And just the future of FCC regulation. A 2020. Study by the audience analytics company, Nielsen found that television broadcasting both cable and network is still the primary mode of consuming video content. But that consumer use of digital streaming services are significant and rising, which I could imagine has expanded so much since the pandemic and since a lot of people have been home a lot more, given that the media landscape is rapidly changing. How do you both see regulation of streaming services evolving? And we can start with Crystal!

22:38

Crystal Evans (Guest): Sure. So... and Chad may have a very different opinion than I do. So just putting that up front. But you know, content on the internet hasn't been regulated by the FCC. So in my view, I think it's going to take an act of Congress to grant the FCC the authority that it would need to tread into this area, similar to what was done in the closed captioning context. And to add, you know, I'm just not sure how the FCC is interest in regulating content on broadcast TV would also apply to the internet. So this issue has arisen in the context of cable television, right? As we know, the FCC is and decency rules only apply to broadcast TV, not your cable networks like HBO, MTV or TNT. You may have wondered why you don't hear cuss words on basic cable, and that's more so an avenue of them trying to appease advertisers. They certainly can drop cuss words if they want, but it's a business decision at that point. But either way the FCC does not regulate indecency on cable nets and courts have established or they did establish a while back that cable was different than broadcast in that cable was quote unquote invited into the home through subscriptions and could also be uninvited quote unquote, by canceling subscriptions or by blocking channels. Now I know the V chip exists. And you know there are questions about whether FCC should also be able to regulate and decency on broadcasts with fi chips in place that's a whole nother

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discussion but essentially in the in the context of cable television the government's interest in restricting programming on cable didn't in that case overcome the cable networks and their viewers free speech rights in my view, I think the same logic would apply to content online you know, it's it's not over the air here internet you pay for it, you know, you can block things online or you can restrict your child's access. It's not as easily invading the home as broadcast was thought to be, you know, in the in the 70s or in the 80s whenever the the FCC is right to regulate and decency was established. So so that's just my my my take on it.

24:59

Alexander Naum (Host): Chad do you have any takes on that?

25:00

Chad Guo (Guest): Yeah, I agree actually that it is going to take an act of Congress. So as Crystal said, the FCC does not regulate streaming services or for the most part, as you mentioned, closed captioning. Recently in September 2021, the FCC entered into a consent decree with Pluto TV where the streaming service agreed to pay a \$3.5 million fine for failing to provide closed captioning on some of its video programming. Generally speaking, the rule is any video programming that was broadcast with closed captioning has to have closed captioning when it is played via streaming. This requirement comes from a statute called the 21st Century Communications and Video Accessibility Act of 2010 or CVAA. So one way that that the FCC could start to regulate streaming services would be if Congress passed a law that gave the FCC clear statutory authority to do so. Another way is something called ancillary jurisdiction. Basically, the idea is that the FCC could exercise authority to regulate streaming services if such authority was necessary for the FCC to continue regulating effectively, services over which it had statutory authority such as broadcast TV. In other words, it's to prevent an entity from evading the regulations that currently applied to broadcasters, such as emergency alerts, sponsorship identifications, children's programming rules by simply moving all of his programming to streaming or over the top distribution. Remember, the FCC has authority to regulate broadcast comes from the fact that they use the public airwaves. And streaming of course doesn't do that. So that's that's how they could escape the original rationale for the FCC regulations. And ancillary authority is how the FCC first exercise some limited authority to regulate cable TV, but because ancillary jurisdiction requires that the FCC proves to a court that its regulations are, quote, reasonably ancillary to the FCC is effective performance of its statutorily mandated responsibilities. It's not as strong of an authority as a statute by which Congress could clearly give the FCC a regulatory role over streaming services to tie it back to self moderation. Sometimes, you'll see unregulated entities comply with existing rules, even though they don't really have to, because they don't want to create a problem that spurs Congress to take action.

27:12

Crystal Evans (Guest): So Chad is absolutely right about unregulated entities complying with existing rules. I think you also see this with regulated entities that are venturing into other aspects that are not regulated by the FCC, for example, streaming. So in my industry, you see a lot of broadcasters, shift programming or plays programming on streaming services and still abide by a number of the FCC is rules. One because obviously, they don't want to create problems for themselves that would, you know,

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cause Congress to act, but it's also they also do it as a means of generating goodwill. You know, we you still want to represent your brand. Well, you don't want to, you know, just cut out groups of people, for example, in the accessibility context, even if you're not required to caption certain content online or add audio description, you still want to do those sorts of things, not just to prevent Congress from coming after you but also because you want to be a good corporate citizen, and you want to continue serving your your viewers and your listeners in any rhetoric in any way. I just wanted to add that Chad made a good point.

28:24

Alexander Naum (Host): Well, thank you, Chad and Crystal for this very informative conversation, clarifying the agency's role in overseeing media and how media audiences in the form of complaints really shapes how the agency regulates and responds to media content, as well as the broader implications on the affected industries and what the public can view slash here in broadcasting. Before we go, I was wondering if you both had any parting comments to our listeners?

28:47

Chad Guo (Guest): Yeah, I just want to emphasize again, how the FCC is very, very reluctant to make any judgment calls about programming content. Again, the FCC relies on the viewing public to alert to any problematic programming. Few people think of broadcasts in this context nowadays, but the public's relationship with broadcasting hasn't really changed. broadcast television and radio are considered quote trustees of the public airwaves. And so they have an obligation to serve the public interest. So naturally, any action taken to regulate these services should be initiated by the public. And I should plug Professor Victoria Phillips communications law class, where you can learn all about the history of the FCC regulation, Spectrum scarcity, obscene content and isolated jurisdiction and all that fun stuff.

29:32

Crystal Evans (Guest): I would also second that plug for Professor Vicky's communications law class in the realm of indecency. I will just say it's, it's a very interesting topic with a very interesting history. The cases are really interesting. There are a number of articles online that you will find about what we can and can't say on air and how it's still a crazy, you know, unknown realm that no one knows what you actually can and can't do on TV. So very interesting topic. Thank you so much for having me.

30:10

Alexander Naum (Host): Yes, thank you so much to you both! I would like to thank our guests for their substantial contributions to our discussion today, The American Bar Association’s Administrative Law Section, The Administrative Law Review, and of course the podcast’s own Eva Bogdewic for her assistance and support in creating this episode. If you're new to our show and enjoyed this episode, give the episode a like and be sure to follow and share our podcast with your colleagues, friends, and family. Thank you and you’ll hear from us soon as we discuss other topics impacting administrative law.