

A Critique of Obscenity Law in the College Radio Environment

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Presented at the Competitive Papers panel of the Student Media Advisors division at the 2000 BEA Convention in Las Vegas

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If I write "f _ _ _ you," you know exactly what I mean to say. You have quickly filled in this rhetorical crossword puzzle with the three letters that most likely complete the word, and thereby the expression. As silly as it sounds, this practice of leaving out some of a potentially obscene word or phrase is commonly formulated by tv broadcasters in order to comply with FCC regulations and court precedents governing acceptable programming. We see a similar version of partially censoring obscenity in tv sports coverage, when coaches are shown clearly mouthing a so-called obscenity, but the sound has been cut in the news report so as to not make the alleged obscenity blatant. Still another version of partial censorship of potentially obscene words is practiced in radio, when the listener is allowed to hear the first letter--sometimes even the first syllable--of the word, but the rest of the word is bleeped out.

Within the college radio world, obscenity regulations are responded to in an ambivalent fashion because of the unique situation of college radio. Typically, college radio markets include the following unusual circumstances: a large student demographic located mostly in dormitories; a mostly youthful on-air staff in the mood for experimenting with music formats different from those of commercial radio; and an academic backdrop where the expression of ideas is the currency of exchange, both inside and outside of the classroom. Because of this set of circumstances, potentially obscene words are generally more common on college radio than on commercial radio. All of this puts advisors in the unique quandary of trying to teach national obscenity guidelines

to a student staff that will forever test the boundaries of what is considered to be acceptable programming.

This paper offers a critique of current FCC policy and court interpretation of obscenity law in college radio. The paper is meant to provide radio station advisors with information that can help them better defend against a Notice of Apparent Liability regarding an obscenity infraction, or respond better to listener reaction against potential obscenity. Ultimately, this paper will show that our national government policy towards broadcasters is foolhardy because the policy creates exactly what it is designed to prevent. In the remainder of this paper I will critique: (1) obscenity in college radio, (2) FCC regulations covering obscenity, (3) listener involvement in obscene programming, and (4) implications for obscenity law in the college radio environment.

Obscenity in College Radio

College radio--university radio if you prefer--offers a kind of radio programming and organizational-setup that cannot be found in commercial radio. College radio has been described as anarchic (Wilkinson, 1998), alternative (Nagelberg, 1999), and amateurish (McKenzie, 1992); it has been likened to a sandbox (Thompsen, 1992), and it has even been labeled as its own culture (Sauls, 2000). All of these shorthand characteristics testify to college radio's basic tendency towards exploratory programming--programming that is free to cover music, talk and information that would not be supported on a commercial radio station.

Within the course of this fundamental tendency, college radio is likely to air potentially obscene programming also because college radio stations are mostly, but not

always, staffed by students. The 18-22 year old remains the "traditional" student at colleges and universities, while there continues to be growth in the "returning adult" student demographic at colleges. However, because of the primarily youthful age range of college deejays, the music on college radio tends to be an expression of anti-mainstream, or anti-commercial radio played by younger bands.

Also, many college deejays believe they are real music connoisseurs because they have informed tastes and they are not bound to playing music just because it is the most popular music selected by a commercial industry. The ultimate connoisseur in college radio is the Music Director, whose job is to receive servicing mainly from alternative or independent record labels (see Wilkinson, 1998). Bands on these normally independent labels are alternative because the sound they make or the words they use are not tastes represented by mainstream (commercial) music (Nagelberg, 1999). And that means some commercial formats are actually "banned" by students from being played, most notably the CHR, AC, and AOR formats. Such commercial formats are generally dismissed by college deejays for producing mediocre, establishment-type music.

Within this context, so-called obscene programming can regularly be heard on college radio. Examples abound especially in rap (hip-hop), metal (loud rock), and alternative (modern) rock formats. Even though songs with obscene words may be barred by local station rules, renegade or rookie college deejays end up playing songs with potential obscenities to be outrageous, or to be experimental with new music. Many advisors may relate to the feeling that such instances of potentially obscene infractions are fairly common within the college radio station environment, given current FCC law.

College radio gravitates towards experimentation also because programming is such a natural extension of college or university education. The specific affiliation of a college radio station to a university department or program varies among stations nationwide. The mix of factors causing affiliation includes curriculum, funding, paid staff, and facilities. However, in terms of programming, most college stations at least offer educational music shows, where deejays provide their listeners with some background information on the musicians, the song or the genre. Other college radio stations offer specific educational talk shows or interview programs. Others provide theatre on the air. Still others provide newscasts. These programs and others illustrate that college radio extends education beyond the classroom to the listeners. Under the pretense of being educational, college radio provides multiple opportunities gladly accepted by youthful and adventurous deejays ready to discuss at a moment's notice topics related to sex, drugs and drinking. I do not at all mean to imply that college radio stations do not provide excellent educational programs. What I am seeking to highlight for this paper is that there is a strong possibility for student deejays to brush up against obscenity law almost every day they are on the air. For example, I still vividly remember the day when I heard a student on the air at the radio station I currently advise, launch into a discussion somehow related to what he had learned in a sexual education class. Somewhere in his conversation, he randomly picks a phone number out of the phone book, dials the number over the air, puts a male who answers on the air, and asks him right away where he likes to masturbate. Luckily, this incident has been one-of-a-kind. The deejay in question was suspended for three weeks by the station manager.

FCC Regulations of Obscenity

FCC standards are morally derived from American (some would say Puritan) values to protect the public--especially the nation's youth--from being exposed to "patently offensive" material. Once speech becomes broadcast by a radio or tv station, it falls outside of protection by the 1st Amendment, which is to say it is not considered free speech. Rather, it is speech that is in some way considered harmful to society.

FCC law covering obscenity has also evolved into a sub area called indecency. This sub specialization of obscenity breaks out adolescents (under 18 year olds) as an audience demographic that needs to be especially protected from potentially obscene words. The fear of moral corruption of youth is the driving force behind FCC law in the indecency area. FCC law regarding indecency is manifested in the "safe harbor" provision, a 10pm-6am time period in which radio stations can be a little looser with their potentially obscene language because the assumption is that under 18-year-olds are in bed. Indecency is highly relevant to college radio because a significant demographic of the listenership for college radio is made up of high school students.

FCC law covering obscenity has been strongly influenced by deregulation of the early 1980s (McKenzie, 2000). The centerpiece of deregulation was the assumption that the "marketplace" could be used as a mechanism for determining obscene programming. Under then-FCC chairman Normal Fowler's leadership, the burden for proving obscenity was shifted to complaints the FCC received from a station's listening community. Additionally, the Courts have ruled that local and not national standards may be applied to determining obscene programming within a listening community (where community members reside within the station's signal range). Local standards are articulated in state

courts, with juries ultimately determining whether programming is obscene. Thus, a New York city audience (and jury) can generate radically different standards than an Ames, Iowa audience, for example. What this has meant is radio language that overtly refers to excretory or sexual activity has been deemed by the courts to be obscene, whereas language that has not directly referred to either of these activities has been allowed. Thus, the hypothetical deejay statement "I can't believe he's fucking her" (said in response to a rumor that a lead singer is dating a backup singer) would most likely be determined by a jury to be obscene, while the statement "I can't believe he's boffing her" may not.

Today the law governing obscenity in college radio is messy in terms of figuring out whether a word or a sound effect is illegal. Nevertheless, the FCC uses a three-pronged test, derived largely from the Supreme Court case *Miller V. California* (1973), to determine whether material is patently offensive, and thereby obscene. Now I will detail what this test means and why there are problems when it is applied to college radio.

(1) An average person, applying contemporary community standards, must find that the material, as a whole, appeals to the prurient [appealing to unusual desire] interest.

The benchmark for this test is contemporary community standards. The Supreme Court ruled in *Hamling v. US* (1974) that the jury in an obscenity trial does not need to establish a national standard either. Thus, the charges of obscenity can be initiated by a local caller and then ultimately tried by a jury of his or her local peers. Unfortunately, this test cannot be cleanly applied in the college radio environment because the audience

is typically bifurcated into campus listeners and community listeners. What has in other situations been called a town-gown relationship presents sometimes conflicting values as to what is considered acceptable behavior, including radio broadcasting. Moreover, college populations are constantly turning over. The changing demographic of an on-campus population renewed each year with 18-year-olds brings more "contemporary" standards to the community, which in turn tend to be more tolerant of obscenity than standards of communities with more longevity.

(2) The material must depict or describe, in a patently offensive way, sexual conduct specifically defined by applicable law.

Applicable FCC law is grounded in the infamous FCC v. Pacifica (1978) case involving George Carlin's skit, "Filthy Words" (known more commonly as "seven bad words") These words, which are part of a skit that parodies the fact that broadcasters cannot say certain words on the air, include: shit, piss, fuck, cunt, cock sucker, motherfucker, and tits. This case, which was appealed at the Supreme Court level, established that the FCC has the right not only to prohibit these words from being said or played on the air, but more important the right to regulate the realm of obscenity in broadcast media (Holsinger and Dilts, 1997). Although the FCC has not prosecuted most infractions of this regulation, there are plenty of cases where stations have been fined for these words being aired. Regardless, leaders at many college radio stations generally try to abide by these regulations, knowing the college or university is vulnerable because students will usually try to stretch the boundaries.

(3) The material, taken as a whole, must lack serious literary, artistic, political, or scientific value.

Ultimately a jury decides the relative meaning of "value." However, the setting of a university or college and the non-commercial nature of college radio makes it very difficult to determine if a potentially obscene word is literary, artistic, political or scientific. Moreover, one could argue that the very nature of university or college life is to explore such values. Therefore, any music on college radio should be exempt from obscenity law because of its artistic value to the connoisseur deejay I spoke about earlier, as well as the dedicated listeners. Not every obscenity on college radio occurs in the context of a political talk show or the reading of a play, but certainly all obscenity on college radio falls within the boundaries of artistic exploration and not-for-profit expression.

The station advisor who seeks greater cover from this prong of the test would do well to implement a few programming precautions. One is to run a disclaimer during a program that the ideas expressed do not represent the views of management. This precaution places the responsibility for potential infractions on the individual deejay in question. A second precaution is to find a way through classwork or personal mentoring to encourage deejays through carefully selected words to frame a discussion about potentially obscene material as an academic inquiry. For example, a discussion about why women are more quickly labeled as "sluts" than men in our society is an academic question, whereas a discussion about a girl (or a guy) who has been seen at parties with lots of partners is not only dangerously obscene but possibly libelous. This kind of approach to discussing the subject of sex is not easy to convey to college students, but if

successful, it can provide the station advisor with the kind of protection from obscenity law that a radio station needs. A third precaution is to schedule risky shows during the safe harbor period, from 10pm-6am, as a way of minimizing exposure of obscene programming to adolescents. A fourth precaution is to make sure that the station's training program for new deejays provides guidelines, preferably in the form of a station operating manual (which can sometimes co-exist as a club constitution), on what words should be avoided on the air. A final precaution is not to schedule sponsorships during a program that has high risk for obscenity. Having a sponsorship in the mix makes it more difficult to claim that musical selections and deejay chat are driven purely by the need for artistic or literary expression and not by financial gain. To reiterate, having an established training program that teaches incoming deejays the station's guidelines for handling potentially obscene programming can only strengthen the station's case in the event of an FCC inquiry that the deejay acted alone.

Perhaps because the FCC's three pronged test is so difficult to apply to the unique environment of college radio, there have not been any recent obscenity fines against college radio stations (see the College Broadcaster's Website for FCC obscenity actions at <http://www.ruf.rice.edu/~willr/cb/indecentx.html>). This may seem odd, given that potential obscenity is likely to be prevalent throughout the nation's college radio programming, and given that the FCC has fined about 30 commercial stations for obscenity over the last three years. One commercial radio station, for example, was fined in August 1998 for airing a Prince song called "Erotic City," in which the phrase "Fuck so pretty, you and me," occurs throughout the song.

One theory that the FCC has been generally forgiving of college radio stations is because of the natural protection afforded to free speech in the university or the college setting. Moreover, because college radio is non profit, any lapses in obscenity over the air are not generally attributable to disc jockey antics to get ratings. Rather, instances of obscenity in college radio can be seen as occurring in the context of the learning environment where ideas are explored on the merit of exploration itself, and not as some kind of gimmick related to the profitmaking motive behind commercial radio.

Listener Involvement in Obscene Programming

In this section I wish to advance a second critique of FCC law governing potential obscenity in college radio. This critique is directed at the ways in which listeners normally respond to programming modified to adhere to obscenity law. I wish to address two practices for handling potentially obscene words.

The first practice is bleeping out part of the potentially obscene word. Luckily for college radio music directors, music companies provide radio station with "radio edits" of songs, where a word has already been bleeped or deleted at the production house. Many radio edits of songs particularly from the rap genre even use exaggerated sound effects to block out parts of words. Some of these sounds are done in a way as to call attention to themselves, and sometimes to be funny, such as the elephant shriek, the loud buzzer, the ringing bell, or the car horn.

Ironically, rather than "protecting" the audience from hearing the alleged obscenity, this editing technique has just the opposite effect. First, the unusual sound draws the listener's attention to the word in question more so than would have been the

case if the word just played, because a standout noise has been presented. Once attention is turned to the noise, a second level of mental involvement begins: trying to figure out what the word covered up by the noise is. In other words, when the word being withheld is covered by a funny sound, we are only too keen to work out the puzzle. However, as ironic as it may be, in the process we have become actively exposed to the obscenity, which FCC law was supposed to prevent.

The second practice for handling potentially obscene programming in college radio is to talk about a racy subject using code words that do not actually appear on the FCC v. Pacifica (1978) list, but which mean essentially the same thing. College students have no problem inventing code words for sexual behavior, as in the expressions "giving a stiffy," "doing the horizontal bop," "doing the nasty," "boffing," and so on. That kind of talk, perfectly legal from the standpoint of FCC law, is certainly not uncommon on the college radio circuit. And yet, again the result from the listener's point of view is to be invited rhetorically by the play on words to interpret the code and figure out what the deejay is really talking about. Once again, in contrast to FCC objectives, the listener becomes involved with the programming in such a way as to have a heightened fixation on an obscene word or phrase, including all its trappings, because he or she has implicitly been invited to play a fun guessing game.

Implications for Obscenity Law as it is Applied to College Radio

This paper has surveyed obscenity in college radio and somewhat in the larger media environment. It was found that a kind of double standard exists for college radio and commercial radio. While commercial radio stations continue to be fined for potential

obscenity, college radio stations appear to be getting an easy ride. This observation may not be particularly comforting for most college advisors, since the FCC maintains the right to initiate punitive action at any time against college broadcasters for obscene programming. However, with the right kind of proactive programming, station advisors can bolster their stations with some legal protection from charges of obscenity violations.

In this paper I have also shown that the way in which obscenity law as it is interpreted in the practices of both the commercial and the college radio environment creates the opposite intended effect of protecting the listeners. In essence, the way in which obscenity is bleeped out with funny noises or is talked about through code words only invites the listener to focus harder on the obscenity; in the process the listener is directly exposed to the vividness of the obscenity's connotations and denotations.

Now I wish to close with three broader criticisms of obscenity law as it applies both to college and commercial radio, in order to add a more global perspective to how broadcasting is regulated in the United States. First is the criticism that the concept of safe harbor is ill conceived. The idea that high school students and younger audiences are less likely to be listening to the radio from 10 at night until 6 in the morning is irrational. Teenagers stay up past 10pm in their rooms listening to the radio, often alone. Teenagers also get up early in the morning to get ready for school. In fact, their very first act of the day is often to be awakened by a radio program on their alarm clock. Therefore, the idea of 10pm-6am as a safe harbor as a time period where adolescent listenership is down is not very realistic.

Second is the criticism that obscenity law has created a fantasy world of broadcasting talk where there is discourse free from prurient interest. Simply put, the

creation of a fantasy world where no one swears does not exist. Further, it makes no sense for children or adolescents to be exposed to somebody swearing in a grocery store line, but to be prevented from being exposed to the same language by somebody swearing on the air. These two worlds cannot be separated in actual fact, because the real world is one where people do swear. The fantasy world created by court and FCC law as it is applied to obscenity creates a very different broadcast environment than in other countries. In many countries, especially in Europe, so-called obscene words can routinely be heard on television and radio. These words are part of the wallpaper of life. Therefore, the practice of allowing obscene words to be broadcast is simply recognized as a protection afforded by the basic human right to free speech--ironically the 1st amendment of the US constitution. In the end, this criticism maintains that it would be more in keeping with the 1st amendment and with Fowler's marketplace approach to allow obscenity to be floated as just another programming strategy that listeners are willing to support or reject.

Third, prohibiting obscene talk has the same general effect of prohibiting youth from doing anything: It only serves to make what is prohibited more enticing. This is why so many deejays get a charge out of talking about sex in code words, because the thrill comes in making fun of the rules by technically following the rules but actually violating the spirit of the rules. Therefore, to prohibit obscenity is to encourage it and to trivialize the impact of vulgarity.

FCC law regarding obscenity in college radio is flawed. It promotes hypocrisy, heightens attention on the obscene material, and thwarts the general educational mission of exploring ideas freely.

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