**Supreme Court case tests FCC’s power to police TV indecency**

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LOS ANGELES — Researchers at the Parents Television Council have helpful drop-down menus on their computers loaded with just about every profanity and dirty slang term imaginable.

They are handy shortcuts — there are additional ones for violent and sexual content — as the nonprofit group’s headphone-wearing analysts monitor every network prime-time entertainment broadcast for offensive language, bleeped profanity, flashes of nudity, threesomes and gore.

The council documents the increasing coarseness of television broadcasts to rate shows and pressure advertisers and provides a one-click process for supporters to file a complaint with the Federal Communications Commission. More than 1.4 million complaints are pending.

But the Supreme Court is set to hear arguments Tuesday about whether the FCC should still have a role in policing the nation’s airwaves or whether its indecency regulations violate guarantees of free speech and due process.

The networks have argued successfully in lower courts that in a revolutionized world in which they exist “side by side” with cable channels that are beyond the FCC’s regulation, singling them out is not only nonsensical but unconstitutional.

“Today, broadcasting is neither uniquely pervasive nor uniquely accessible to children, yet broadcasters are still denied the same basic First Amendment freedoms as other media,” Washington lawyer Carter G. Phillips, who represents Fox and other networks, told the court in a brief.

“To the average American viewer, broadcasting is just one source among hundreds in a media-saturated environment, a mere press of a button on the remote control away from other, fully protected sources,” he wrote.

The Obama administration is defending the FCC’s powers. If anything, it told the court, the new media world requires continued federal oversight of the public airwaves to provide a haven for parents and children from the anything-goes world of cable and the Internet.

“Generations of parents have relied on indecency regulation to safeguard broadcast television as a relatively safe medium for their children,” U.S. Solicitor General Donald B. Verrilli Jr. wrote in the government’s brief.

The “uniquely pervasive” language in Fox’s brief comes from the Supreme Court’s 1978 decision in FCC v. Pacifica Foundation, in which it upheld the commission’s decision that an afternoon radio broadcast of comedian George Carlin’s 1973 monologue about words that could not be said on television violated indecency standards.

The court found that the FCC was within constitutional boundaries to police the radio and television airwaves during the times children would probably be listening, which was interpreted between 6 a.m. and 10 p.m.

Parents Television Council President Tim Winter said that even though nearly nine of 10 households have cable, broadcast channels remain paramount: The lion’s share of the country’s most watched shows reside there, commanding the most money from advertisers and bringing the highest salaries to the stars and producers.

With the right to the public airwaves, Winter said, come responsibilities.

“If they want to be indecent, as we’ve said in the past, they can wait until 10 o’clock and be as indecent as they want,” Winter said.

**Logging the words**

Few people — even inside the FCC — know more about what’s on television than Winter and his co-workers at the parents council.

With satellite dishes perched outside the downtown L.A. high-rise in which it operates, the council digitally records every prime-time entertainment broadcast on network TV and basic cable. (The council doesn’t monitor news, sports or premium subscription channels such as HBO and Showtime.)

Five researchers in cubicles then go about their daily mission to, as the PTC Web site says, “transcribe every offensive word, sexual innuendo, and describe sexual activity and violence in detail.”

The information is fed into the council’s custom-built Entertainment Tracking System, which Winter calls the nation’s most complete repository of prime-time broadcasts.

The information is used for reports such as “Habitat for Profanity,” which said prime-time profanity increased 69 percent from 2005 to 2010, with the bleeped use of the f-word up from 11 utterances in the first two weeks of the 2005 schedule to 276 uses five years later.

Winter said the group’s main mission is to report to parents the content of television shows and to hold advertisers accountable for the broadcasts they sponsor, Winter said.

On its Web site, each show is rated for sex, language and violence, and its descriptions are candid. For instance, about “2 Broke Girls,” a CBS comedy that airs at 8:30 p.m., the PTC reports: “Sexual jokes and references are abundant, including breast and vagina references.”

The report includes a list of “foul language” used in the program that doesn’t pass the test for inclusion in a family newspaper.

Winter said that the descriptions are written for adults and that specificity is important.

“If you are a proctologist, you are involved with certain things in your work that might not be dining room conversation for most folks,” he said in a recent interview. “We pick our careers here at this organization because we are concerned about the impact on kids, and that means you have to get clinical.”

The council was founded by L. Brent Bozell III, a conservative activist who regularly accuses the mainstream media of liberal bias. But Winter denied that the PTC, which recently issued reports on the way women are portrayed in MTV reality series as well as the “sexualization” of girls on television, has a partisan or political agenda.

“We all come at it from remarkably different perspectives,” said Winter, a former NBC financial executive. “I’m a lifelong Democrat; I haven’t checked a Republican box on a presidential ballot since 1984.”

Still, the council is best known for its feuds with television producers, issuing news releases about provocative Miley Cyrus videos and providing the expected scornful response when “America’s Got Talent” picked radio shock jock Howard Stern as its new judge.

It is not the best of times for the council. The PTC’s staff is half what it once was because of a decline in funding, which Winter said is a fate shared by most nonprofits. Courts are reversing the actions that the council had encouraged the FCC to take.

The PTC’s ability to generate complaints to the FCC, even from those who never saw the allegedly offensive content, has made it the scourge of networks and producers.

In a friend-of-the-court brief filed with the Supreme Court, former FCC officials said that because of the PTC and other family groups, the agency launched a “Victorian crusade” in the past decade that went far beyond what either the agency or the Supreme Court anticipated in the Pacifica case.

“The commission’s complaints policy has become so artificial that it naturally prompts the question, why does the Commission not simply turn the monitoring function over to the Parents Television Council?” wrote the officials, who include former chairmen Mark Fowler and Newton Minow. “The answer is simple: it already has.”

**Policing role**

The cases before the Supreme Court concern the FCC’s role in policing the airwaves for material that describes or depicts “sexual or excretory organs or activities” and is “patently offensive as measured by contemporary community standards for the broadcast medium.”

After Fox broadcast award shows in which Cher told her critics “F--- ’ em” and Nicole Richie referred to “cow s---” and uttered a variation of the f-word, the FCC announced in 2004 that it was changing its policy so that even one-time utterances of profanity could be penalized.

The Supreme Court ruled 5 to 4 in 2009 that the agency was within its rights as a matter of administrative law to change its policy to protect the public against what Justice Antonin Scalia called “foul-mouthed glitteratae from Hollywood.”

But justices sent the case back to the U.S. Court of Appeals for the 2nd Circuit in New York to determine whether there were constitutional problems with the agency’s actions.

That court agreed that there were. It said the agency’s context-heavy determinations about indecency mean that broadcasters “are left to guess” when profanity and nudity might be deemed appropriate or punishable.

For example, the FCC allowed the profanity in an ABC broadcast of the movie “Saving Private Ryan” but disallowed some of the same words in a PBS documentary on blues singers.

So the Fox profanity cases are back at the Supreme Court, along with ABC’s challenge of an FCC decision that a seven-second camera pan of an actress’s bare buttocks in a 2003 episode of “NYPD Blue” violated the indecency standards. That resulted in a $1.2 million fine for 40 ABC affiliates that aired the show (including a Texas station owned by a subsidiary of The Washington Post Co.).

The court’s deliberations this time will focus on whether the FCC’s indecency regulations violate the First Amendment and the Fifth Amendment’s guarantee of due process.

In the 2009 case, Justice Clarence Thomas voted with the majority but said the court should reexamine the Pacifica decision. “Traditional broadcast television and radio are no longer the ‘uniquely pervasive’ media forms they once were,” he wrote.

And Justice Ruth Bader Ginsburg, in dissent, said that when the court considers constitutional questions, “we should be mindful that words unpalatable to some may be commonplace for others.”

In their briefs, the networks say worries about what they will show if the FCC’s regulations are struck down are overblown. They are free to show whatever they want after 10 p.m., and it is not comparable with what is on cable, they say.

Winter said the networks “know they would not win in the court of public opinion,” but he is not as confident about the high court.

“The amount of content that used to be considered too much for broadcast is now ubiquitous,” he said. “They are editing into shows the harshest profanities with bleeps. What will happen is that those bleeps will go away.”

The cases are FCC v. Fox Television Stations and FCC v. ABC.