

## BROADCAST LAW AND POLICY (based upon the December 2018 FCC publication)

### **The FCC and Freedom of Speech**

The First Amendment, as well as Section 326 of the Communications Act, protects freedom of expression. However, the right to broadcast is not absolute. There are some restrictions on the material that a station can broadcast.

### **FCC “CAN DO” LAWS**

#### **Criticism, Ridicule, and Humor**

The First Amendment protects programming that stereotypes or may otherwise offend people with regard to their religion, race, national background, gender, or other characteristics. It also protects broadcasts that criticize or ridicule established customs and institutions, including the government and its officials.

#### **Programming Access**

Stations are not required to broadcast everything that is offered to them. Stations have no obligation to allow any particular person or group to participate in a broadcast or to present that person or group's remarks.

### **FCC “CANNOT DO” LAWS**

#### **Broadcast Journalism**

There are two issues that are subject to Commission regulation: hoaxes and news distortion.

#### **Hoaxes**

This is when a station broadcasts false information. A “crime” is an act or omission that makes the offender subject to criminal punishment by law. A “catastrophe” is a disaster or an imminent disaster involving violent or sudden events affecting the public.

The broadcast violates the FCC's rules if:

- 1) The station knew that the information was false;
- 2) Broadcasting the false information directly causes substantial public harm; and
- 3) It was foreseeable that broadcasting the false information would cause such harm.

The broadcast must cause direct and actual damage to property or to the health or safety of the general public, or diversion of law enforcement or other public health and safety authorities from their duties, and the public harm must begin immediately.

## **FCC “CAN DO” LAWS**

If a station airs a disclaimer before the broadcast that clearly characterizes the program as fiction and the disclaimer is presented in a reasonable manner under the circumstances, the program is presumed not to pose foreseeable public harm.

## **FCC “CANNOT DO” LAWS**

### **News Distortion**

Stations may not intentionally distort the news. The FCC has stated that “rigging or slanting the news is a most heinous act against the public interest.” The FCC will investigate news distortion if it receives documented evidence, such as testimony or other documentation, from individuals with direct personal knowledge that a station engaged in the intentional falsification.

### **Equal Opportunities**

There are obligations regarding political advertising. If a station allows a legally qualified candidate for any public office to broadcast and make an identifiable appearance for at least four seconds, the station must give equal opportunities to all other candidates for that office to also broadcast. This law applies to all legally qualified candidates for public office (federal, state, and local) throughout their campaigns.

### **Objectionable Programming: Inciting “Imminent Lawless Action”**

The Supreme Court has ruled that the government can curtail speech if it is both: (1) intended to incite or produce “imminent lawless action;” and (2) likely to “incite or produce such action.” Even when this legal test is met, any review is generally performed by criminal law enforcement authorities, not by the FCC.

## **FCC “CAN DO” LAWS**

In its 1973 ruling on *Hess v. Indiana*, the Supreme Court clarified “imminent lawless action.” This ruling protects antiwar protest. The Court said that “since there was no evidence, or rational inference from the import of the language, that [the speaker’s] words were intended to produce, and likely to produce, imminent disorder, those words could not be punished by the State on the ground that they had a ‘tendency to lead to violence.’”

The Supreme Court said speech must be directed at a specific person or group and it must be a direct call to commit *immediate* lawless action. The time element is critical. The Court wrote that “advocacy of illegal action at some indefinite future time ... is not sufficient to permit the State to punish speech.”

## **FCC “CANNOT DO” LAWS**

### **Objectionable Programming: Obscene Material**

This IS NOT protected by the First Amendment and CANNOT be broadcast at any time. Obscene material must have all of the following three characteristics:

- 1) An average person, applying contemporary community standards, must find that the material appeals to the prurient interest (definition: A morbid, degrading and unhealthy **interest** in sex);
- 2) The material must depict or describe, in a patently offensive way, sexual conduct specifically defined by applicable law; and
- 3) The material must lack serious literary, artistic, political, or scientific value.

## **CONDITIONS ON “CAN DO” VS “CANNOT DO”**

### **Objectionable Programming: Indecent Material**

This is defined as “language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory organs or activities.” Indecent material is protected by a ruling from the 1978 Supreme Court case of FCC vs. Pacifica Foundation, establishing “The Carlin Warning.”

However, the courts have upheld the prohibition of broadcasting indecent material during times of the day when children may be in the audience, which the Commission determined to be between the hours of 6 a.m. and 10 p.m.

### **Objectionable Programming: Profane Material**

This is protected by the First Amendment. The Commission has defined Profane” as language that is both “so grossly offensive to members of the public who actually hear it as to amount to a nuisance” and is sexual or excretory in nature or derived from such terms. This material cannot be broadcast between 6 a.m. and 10 p.m.

## **FCC “CANNOT DO” LAWS**

### **Lotteries**

Federal law prohibits the broadcast of advertisements or information for a lottery and certain contests. A lottery is any game, contest, or promotion that contains the elements of prize, chance, and "consideration" (a legal term that means an act or promise that is made to induce someone into an agreement).

## **CONDITIONS ON “CAN DO” VS “CANNOT DO”**

### **Broadcast of Telephone Conversations**

Before broadcasting a conversation live or recording a conversation for later broadcast, a station must inform any party to the call of its intention to broadcast the call.

Notification is not necessary when the other party knows that the conversation will be broadcast, such as an employee or reporter of the station or someone who originates the call during a program which customarily broadcasts the calls.

### **Underwriting Announcements**

Noncommercial educational stations may acknowledge contributions over the air, but they may not broadcast commercials or promote the goods and services of for-profit donors.

Acknowledgements may not contain comparative or qualitative descriptions, price information, calls to action, or inducements to buy, sell, rent, or lease.

Acceptable “enhanced underwriting” acknowledgements may include: (1) logograms and slogans that identify but do not promote; (2) value-neutral descriptions of a product line or service; (3) location information; and (4) brand names, trade names, and product service listings. However, these acknowledgements may not interrupt the station's regular programming.

### **Tobacco and Alcohol Advertising**

Federal law prohibits the airing of advertising for cigarettes, cigars, smokeless tobacco, and chewing tobacco. However, the advertising of smoking accessories, pipes, or cigarette-making machines is not prohibited.

Congress has not enacted any law prohibiting broadcast advertising of any kind of alcoholic beverage. The FCC does not have a rule or policy regulating these advertisements.

## **FCC “CANNOT DO” LAWS**

### **False or Misleading Advertising**

The Federal Trade Commission has primary responsibility for determining whether an advertisement is false or deceptive and for taking action against the sponsor. The Food and Drug Administration has primary responsibility for the safety of food and drug products.