

Navigating the waters of Safe Harbor

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Advisers should consider pros and cons of reliance on Safe Harbor broadcast protections

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Anyone who's advised radio or television students for more than a week has faced this question: Can I say (insert questionable word or phrase) on the air? Your gut reaction is no. But are you aware that the answer could potentially be yes?



So while safe harbor is a nice thing to have on paper, let me give you a few reasons why you will want to pretend like it doesn't exist.

Since 1978 when Pacifica Radio lost their court battle to the Federal Communications Commission over the airing of George Carlin's *Seven Dirty Words You Can't Say on Television*, there have actually been nine more instances (either court cases or FCC rulings) that have effected what can and can't be said. But what many people don't realize is that something else even more important than what can be said was also decided – when the rules are to be enforced.

Initially the FCC wanted a 24/7 ban on everything obscene, indecent and profane citing that they had a compelling interest to protect children from being exposed to these types of broadcasts. After some pushback from Congress (who wasn't interested in unduly burdening our First Amendment rights), it was decided to create a "Safe Harbor" period from 10pm to 6am local time each and every night.

So does that mean that beginning at 10pm anything goes and it turns into the wild wild west on both radio and television?

Not exactly. Here is what you need to know:

- **Obscene Language is Never Permitted**

And not only is it never permitted, it's not even protected by the First Amendment. So what is obscene? Thanks to the Supreme Court we've got a definition: It must appeal to an average person's prurient interest; depict or describe sexual conduct in a "patently offensive" way; and, taken as a whole, lack serious literary, artistic, political or scientific value.

- **Indecent Language is Allowed, but...**

Unlike obscene language, indecent language is protected by the First Amendment (so long as it doesn't meet the three criteria listed above) but hasn't officially been defined by the Supreme Court. In fact, words, phrases and descriptions might very well be deemed not obscene but still be considered indecent. According the FCC, it all comes down to context and who is likely to be in the audience at the time it was broadcast. In the end however, if the language is only labeled indecent it would be allowed between the hours of 10pm and 6am local time.

- **Profane Language is Also Allowed**

These are the words that the FCC calls “grossly offensive.” They also call them a public nuisance. And while they very well may be, those four letter words are indeed protected speech so long as the kids aren’t listening, so they are fair game during safe harbor. But like indecent speech, there is no Supreme Court ruling that determines what profane speech is, so in one instance, a word such as “F—“ might be considered profane (as it was when it was used during a speech at the Golden Globes on live TV in 2004) but it might get a pass in another (such as a live newscast where someone unaffiliated with the station screams out the word while the reporter is on-air).

Need some examples of what all this means? In May 2004 Oprah Winfrey aired a show that discussed teenage sexuality (including descriptions of such acts as oral sex) and fans of Howard Stern went after her. They filed complaints with the FCC because earlier that year (and many other times before that) Stern’s program was fined for airing conversations about the same topics. The difference? Oprah’s guests were doctors, Stern’s were comedians. Stern’s fans could not build a case against her, despite their more than 1600 letters filed with the FCC, because Oprah’s program did not lack serious scientific value while Stern’s programs most certainly did. Although both programs used many of the same words, it was determined Oprah’s show was not obscene and the FCC did not find it (in its opinion) indecent.

If Howard Stern’s program would have aired late nights instead of mornings this would be a completely different story. Because once the clock strikes 10pm you’ve got some freedom. But as you might expect you will want to proceed with caution.

I am fond of telling my students the following: Just because you can do something doesn’t mean you should. So while safe harbor is a nice thing to have on paper, let me give you a few reasons why you will want to pretend like it doesn’t exist.

- **Discipline is Key**

We tell our students time and time again – don’t swear (or play profanity) on air. Do you really want to tell them that it is now alright? And what if your first semester freshman who regularly runs the 2am to 4am shift comes in to cover during daylight hours? Will they remember that different rules apply at different times?

- **People Will Still Complain**

You might think that this doesn’t matter right? Let them complain to the FCC, I’m untouchable between 10pm and 6am. While you might not walk away with a fine from the government, you might walk away with something worse. Does your university president or your department chair have your back when the community complains about your indecent programming? Will they still have your back when they hear what your students were playing?

- **It Can Hurt Fundraising and Sponsorship Efforts**

If you are striving to raise funds from community members or local businesses, you want to be taken seriously. College stations have a hard enough time gaining respect in the community sometimes, and stations that air “questionable” material are rarely considered serious. Don’t set yourself back or hurt your image just because you can play an uncensored song during safe harbor.

This probably has left you asking if anything good can come from safe harbor. The answer is surprisingly yes. Knowing that you can’t be fined for even accidentally airing indecent or profane materials is a wonderful feeling, and it makes these hours a great place to start new staff members. It also gives you the freedom to run a show that may be considered an “edgy.” Let’s face it, children might be unlikely to be in the audience pool beginning at 10pm but college kids are just getting their nights started. A talk show that covers topics college students care about might be best suited for the 10pm to 12am time slot.

Of course this doesn't mean you'll want to give them full freedom to do whatever, but they can certainly push it a bit during this time and not cause you any harm (both to your station's finances or your personal health). The best advice I've received as an advisor is to be the person your students feel comfortable talking to yet respect enough to listen to (and follow) your advice. This relationship allows your students to bring to you edgy, controversial and even out of bounce ideas and topics for programs, but through conversations, questioning and brainstorming, you can work with them and guide them into creating a show that follows all of the FCC rules (whether that is during Safe Harbor or not).

For more information on the FCC's Regulation of Obscenity, Indecency and Profanity you can visit <http://transition.fcc.gov/eb/oip/>.

And for a fairly clear cut explanation of these rules you can visit <https://www.fcc.gov/consumers/guides/obscene-indecent-and-profane-broadcasts>.

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