

Oprah and Spielberg vs. *Without a Trace* and Scorsese: Indecent Inconsistency at the FCC

STEPHEN A. WEISWASSER AND ROBERT M. SHERMAN

In a nation that has long exalted freedom of expression, that treats *government censorship* as dirty words, and that wages war against foreign regimes in part because they restrict what ideas their citizens can receive, it is hard to imagine a government agency imposing massive fines on broadcast outlets simply for offering programming that expresses ideas in ways in which the agency does not approve. Yet there is no other way to describe the current state of the Federal Communications Commission's (FCC) enforcement of its broadcast indecency policies.

On its face, the FCC's mandate might be thought limited, channeling until after 10:00 p.m. material that "describe[s] or depict[s] sexual or excretory organs or activities" and that is "patently offensive as measured by contemporary community standards for the broadcast medium."¹ But the indecency decisions released by the FCC on March 15, 2006, have decisively demonstrated that these standards, at least as applied, clearly contravene core First Amendment principles.

The decisions have marked a dramatic and unprecedented expansion of the FCC's indecency enforcement regime and have set a high-water mark for the agency's imposition of indecency fines. They include an expressed intention to impose the largest forfeiture ever for the airing of a single program, an episode of the CBS series *Without a Trace* that contained no nudity or unacceptable language and that merely suggested, but did not depict,

Stephen A. Weiswasser is a former media and network television executive. He is also a partner, and Robert M. Sherman an associate, in the media law practice at Covington & Burling, which represents multiple clients involved in the proceedings discussed in this article. The views in this article are not necessarily those of any client of the firm.

sexual activity; and they reveal a complete inability by the Commission to arrive at or offer principled explanations of the differences among the cases before it. The March 15 decisions, in short, expose a regulatory scheme producing unprincipled and inconsistent results and thrusting the government into an unsustainable supereditor role that exceeds its constitutional authority.

The immediate harbinger of the decisions was undoubtedly the Commission's decision on March 18, 2004, that the 2003 Golden Globe Awards program, aired on NBC, was indecent. The FCC's staff had initially found that the U2 singer Bono's fleeting exclamation, "This is really, really, fucking brilliant," made after receiving an award, was not indecent because it did not meet the statutory requirement that material may only be found indecent if it depicts or describes sexual or excretory organs or activities.² On reconsideration, the full Commission reversed the staff decision and found that "any use of [the word], in any context, inherently has a sexual connotation. . . ." The FCC's reconsideration decision eviscerated decades of existing precedent holding that isolated utterances of coarse terms could not be found indecent unless they were, in fact, indecent in context. Instead of attempting to reconcile its decision with that long-standing principle, the order noted simply that the Commission was departing from this precedent and summarily held that virtually all conflicting cases "are not good law."³

The Bono decision was perhaps influenced by Janet Jackson's famous "wardrobe malfunction" during the halftime show of Super Bowl, broadcast on CBS on February 1, 2004, about six weeks before the *Golden Globe* decision was released. During a duet between Jackson and singer Justin Timberlake, Timberlake removed a por-

tion of Jackson's bustier, briefly revealing Jackson's breast. After receiving a raft of nearly identical complaints generated by the lobbying group Parents Television Council (PTC), which has been the architect of Internet complaint campaigns against many of the programs found indecent by the FCC, the Commission imposed statutory maximum forfeitures in the amount of \$550,000 against all television stations owned and operated by CBS.⁴ That decision was affirmed in a decision released with the March 15, 2006, omnibus order.⁵

But nothing in either of these cases could fully prepare broadcasters for the giant step the FCC took on March 15, 2006, or for the intellectual and regulatory morass its actions on that day have created. These decisions can be wrapped in three distinct packages, each trying to distinguish acceptable expression in a certain area: sexual activity, artistic necessity, and excretory linguistics.

Without a Trace vs. Alias and Oprah

The *Without a Trace* episode in question involved the FBI's discovery that students at the high school attended by a missing teenager had been participating in sex and alcohol parties while their parents were at work. In an effort to dramatize the adverse consequences of the parents' inattentiveness, the episode included two brief flashback scenes (comprising less than a minute out of the one-hour broadcast) depicting a character's recollection of one such party.

As we have noted, the scenes in question included no nudity or unacceptable language. They suggested, but did not show, sexual activity. Characters were portrayed, clothed or wearing underwear but never naked, kissing, smoking, drinking alcohol, or pressed against one another. The scenes

were cut in an impressionistic style and accompanied by loud music, and they did not focus on any particular individual for more than a few seconds. In context, the activities in the flashbacks were presented in an unambiguously negative light, and there was nothing in either scene to suggest that they were intended to pander to, shock, or titillate the audience. Although it launched a campaign against the scenes, even the PTC saw the serious purpose of the program, noting that the “episode’s theme does not glorify or glamorize teen orgies or promiscuity; quite the opposite.”⁶ Nonetheless, in response to the PTC’s complaint-generating campaign, the FCC found the elements of the scenes to go “well beyond what the story line could reasonably be said to require” and proposed a forfeiture of \$3.6 million against the affiliates that aired the program outside of the 10 p.m. indecency “safe harbor,” that is, against the CBS affiliates in the central and mountain time zones.⁷

The agency’s explicit second-guessing of the creative judgments made in a serious episode of a mainstream, highly popular television series is itself jarring. But its failure to harmonize the conclusion it reached with other cases decided on the same day compounds the shock. One of the other programs addressed in the March 15 omnibus order was an episode of the drama *Alias*, in which a male character saves a female character from falling off of a moving train. In the scene after the rescue, the couple is shown in bed, “passionately kissing, caressing, and rubbing up against each other,” accompanied by off-camera music. According to the Commission’s description of the scene, however, “it is not clear whether the characters are engaged in sexual intercourse,” a comment equally applicable to *Without a Trace*. Emphasizing that “[t]he scene involves no display of sexual organs and contains no sexually graphic language,” again an observation equally true of *Without a Trace*, the Commission found that this material in *Alias* did “not depict sexual activities in a graphic or explicit way.” The orders in *Alias* and *Without a Trace* made no mention of each other, even though the

grounds for exculpating one program from an indecency determination could have been applied interchangeably to the other.

Nor did the *Without a Trace* order refer to the Commission’s contemporaneous finding that an episode of the *Oprah Winfrey Show* that very explicitly discussed the dangers of teen sexual activity (in part permitted, according to the program, by parental inattentiveness) was not indecent.⁸ The *Oprah* episode included a highly graphic discussion of specific sexual practices, including “salad tossing” and “rainbow parties,”⁹ but the Commission emphasized that “[t]he material is not presented in a vulgar manner and is not used to pander to or titillate the audience. Rather, it is designed to inform viewers about an important topic.” The Commission further held that the explicitness of the discussion did not make the material indecent because “[t]o the extent that the material is shocking, it is due to the existence of such practices among teenagers rather than the vulgarity or explicitness of the sexual depictions or descriptions.”

The *Without a Trace* episode was intended to, and did, make the very same points, albeit in the less direct way that often distinguishes drama from reportage. But the Commission made no more effort to distinguish between *Oprah* and *Without a Trace* than it made to distinguish the latter from *Alias*. The Commission’s failure thus leaves the basis for the indecency finding in *Without a Trace* unclear: both *Without a Trace* and *Alias* involved scenes suggesting, but not showing, sexual activity; thus, the implication of sex could not have been the basis of the indecency finding. Similarly, because both *Oprah* and *Without a Trace* dealt with teen sexual activity, and, indeed, because *Oprah* was substantially more explicit in that regard, dissatisfaction with the subject matter itself cannot have been the Commission’s motivation.

Scorsese vs. Spielberg

The indecency decisions in the omnibus order were not limited to alleged depictions of sexual activity. The Commission also proposed forfeitures against a PBS

station that aired, outside of the safe harbor, a documentary entitled *The Blues: Godfathers and Sons*, which profiled the early growth of blues music in Chicago. After a brief and conclusory analysis, the FCC held that the occasional use of coarse language by historically significant blues figures interviewed in the documentary was indecent, and it has proposed to fine the public broadcaster that aired the program \$15,000.

The entirety of the Commission’s indecency analysis lasted a mere few sentences. To determine whether material is “patently offensive,” and therefore indecent, the Commission has previously said that it must evaluate the “full context in which the material appeared,” with reference to three factors: (a) whether the material is graphic or explicit; (b) whether it dwells on or repeats descriptions of sexual or excretory activity; and (c) whether it panders to, titillates, or shocks the audience. Here, the Commission applied those factors and found that (a) because the words *fuck* and *shit* were used, the material was explicit and related to sexual or excretory activities; (b) because the words were used more than once, the program “dwelled on or repeated” the sexual material; and (c) because the coarse language “was [not] necessary to express any particular viewpoint,” it was “shocking” to the audience.

What is striking about this decision is not simply that the Commission substituted its own creative judgment for that of the program’s creator, no less a serious and acclaimed director than Martin Scorsese, but how the Commission sought to harmonize the case with its recent decision involving another eminent director, Steven Spielberg, and his film *Saving Private Ryan*. Although the Commission found *fuck* and *shit* (used in a context wholly unrelated to sexual or excretory activity) to be indecent in *Godfathers*, it exonerated far more extensive use of the same words in *Private Ryan* because in that work, editing “would have altered the nature of the artistic work and diminished the power, realism and immediacy of the film experience for viewers.”¹⁰ The

Commission concluded that *Godfathers* is different from *Private Ryan* because, in contrast to *Private Ryan*, the documentary's educational purpose "could have been fulfilled and all viewpoints expressed without the . . . broadcast of expletives."

The Commission's detour into the world of "artistic necessity" is the only apparent objective distinction between *Godfathers* and *Private Ryan*, and it is perhaps without precedent in the history of governmental regulation of protected speech. The upshot is that a documentary attempting to give the audience a feel for the actual figures who shaped a national musical movement should not have shown them as they are or captured how they speak, but a fictionalized portrayal of an event could use the same language to portray characters who are totally imaginary. As others have observed, the lesson apparently to be drawn from a comparison of the two cases is that reality is permissible when fictionalized but prohibited when real people and actual people are involved.

Excretory Function vs. Excretory Function

The Commission has done no better in explaining which words can be used in the broadcast context. The March 15 order found that the word *bullshit* (used in an *NYPD Blue* episode as a synonym for *nonsense*) is indecent because its use "invariably invokes a coarse excretory image," whereas the term *pissed off* (meaning *annoyed*) is a "coarse expression" but, "in the context presented, [is] not sufficiently vulgar, graphic, or explicit to support a finding of patent offensiveness."

In attempting to distinguish these words, the Commission conceded in its analysis that the word "piss" refers to the act of urination," but, ignoring all of the secondary, nonexcretory meanings it could have attached to the proscribed word *bullshit*, found that in context, *piss* "is used as a part of a slang expression that means 'angry.'" Moreover, "the phrase 'pissed off' [does] not invariably invoke coarse sexual or excretory images, and in the context

presented [it does not] rise to the level of offensiveness of the . . . 'S-Word.'"

The Fatal Flaw of the Indecency Regime

What is going on here? Is the Commission unaware of the impossibility of the task it has set for itself of distinguishing among these cases? Is it unaware of how jarring it is to see a government agency casting itself in the role of a content editor and supercensor? Is it insensitive to the way it has claimed the censor's mantle? Or is the Commission simply trying conscientiously to do the job that it thinks the Communications Act (and those citizens worried about television content) has imposed upon it?

We think that the problem of the Commission's indecency regulation resides at its base in the inherent limitations of the standard the Commission employs and in the fact that the standard may literally force the agency to behave arbitrarily. There is, of course, much wrong when a federal agency made up of five government regulators feels itself free, indeed required, to make the kind of fine and unprincipled distinctions on display in the March 15 order, and when it does so without even a nod to consistency. And there is something worse going on when the agency feels itself free or required to decide on the creative merits of work protected by the First Amendment.

It is certainly clear that there is no way for any arbiter, however well-intentioned, to do this job within constitutional limits if the fundamental basis for the Commission's indecency test for television remains unchanged. And, however well-intentioned the Commission may be, it has simply refused to take on the task of making the standard clearer. The Commission has undertaken in each of the cases before it to decide whether material offends contemporary community standards for the broadcast medium and whether the material is, under those standards, patently offensive. But this standard is not self-defining, and in the real world it has not actually guided the Commission to rational decision making or helped broadcasters predict how the Commission will deal with particular

material that might be broadcast.

The problem is that the Commission has steadfastly refused not only to identify (and perhaps it cannot identify) who, specifically, is included within the community, but also to explain how it has measured or can discern the standards those people would apply. It has made clear that the community in question is a national one that does not take account the differences between audiences in, say, San Francisco, Omaha, New Orleans, and Moline. But it has never sought to use surveys or other quantitative methods to arrive at any conclusions about that national community's standards.

The most it has ever said is that it is qualified to judge the contemporary community standards of the broadcast medium because of its "collective experience and knowledge, developed through constant interaction with lawmakers, courts, broadcasters, public interest groups, and ordinary citizens."¹¹ But that is simply another way of saying, "We will know it when we see it, because we are comfortable that our Washington contacts will educate us sufficiently." The Commission simply has not explained how its interactions with legislators, broadcasters, or ordinary citizens could give it the sufficiently thorough feel for the tastes of contemporary communities that we have the right to demand of those presuming to channel First Amendment-protected speech on the ground that it offends community standards.

Nor has the Commission taken much account of how the television audience actually consumes television content. Today, 88 percent of viewers of broadcast television pay monthly fees to receive over-the-air broadcast programming and a substantial amount of other content via cable or satellite on at least one of the receivers in their homes.¹² There is no reason to believe that as a viewer seamlessly changes channels from a broadcast station to a cable network, he is applying different standards of expectation to each. The content from both sources must be considered to comprise part of the broadcasting experience in cable and satellite homes. Because that is so, why are the tastes

and desires for content diversity expressed by that 88 percent of viewers not relevant to the Commission's definition of *contemporary community standards for the broadcast medium*?

The FCC has never explained, nor can it, how it can continue to avoid considering cable and satellite programming as significantly shaping the standards it applies to the broadcast context. Of course, if it were to take that part of the audience into account in some concrete way, the basis for most of its decisions would flat out disappear because cable and satellite viewers (even those limited to basic packages) have regular access to television content that is far more explicit than anything the Commission has found indecent.

It is hard to escape this straightforward explanation for the Commission's decisions: No matter how hard they may try to suggest otherwise or how much they may wish to believe otherwise, the contemporary community is made up solely of the five Commissioners themselves. The standards on which indecency determinations are based are little more than the personal tastes of those Commissioners, as informed in a limited way by lobbying groups such as the PTC. Such standards, of course, are offensive at the very heart of the First Amendment.

Vague Standards Lead to Arbitrary Decisions

In essence, the inherent vagueness of the Commission's March 15 decisions makes it clear that the Commission can fine a broadcaster for airing any material that has even a tangential relationship to sexual or excretory activity, including words that are plainly not used in a sexual or excretory context, or depictions that could not reasonably be said to be harmful to child viewers, the group intended to be protected against indecent content. In *Without a Trace*, the Commission appeared to be guided by its conclusion that "a child watching the program could easily discern that the teenagers shown in the scene were engaging in sexual activities." Because the Commission defines *child* for this purpose as even a seventeen-year-old

viewer, one can only assume that the mere suggestion in a television program that sexual activity might occur between two people is enough to subject a broadcaster to an enforcement action. Under this standard, a sitcom showing a man and a woman kissing, followed by a cut to a commercial break, could well be sufficient to make the material eligible for an indecency determination if it were possible for a seventeen-year-old to imagine that the kissing might be intended to imply subsequent off-screen sexual activity.

And it is vagueness and arbitrariness that produced the different results for *Private Ryan* and *Godfathers*. The Commissioners clearly recognized that the soldiers depicted in *Private Ryan* probably would have used coarse language during war and could not be depicted accurately if they were limited to *darn* and *shucks*. But they simply overrode Scorsese's obvious judgment that his documentary should give viewers a sense of the people and culture responsible for the development of blues music and that it should do so by letting viewers hear how they spoke. Scorsese, who, in contrast to the Commission, actually is entitled to claim expertise in these matters, clearly decided that he could not convey an understanding of the people and events in his documentary if the words they actually used were censored or changed.

It would be reasonable to hope that, in our system, Scorsese's judgment would prevail and that the agency would exercise some modest restraint before it censored or channeled his work. And it should not require much debate to conclude that an indecency policy that, at its core, restricts speech based on the private tastes of five government officials simply cannot be sustained.

An Unstable Foundation

How did the Commission end up in this impossible role, and, more importantly, how will it escape it? Its policy stems from the interplay between two statutory provisions: 18 U.S.C. § 1464, which permits the FCC to fine broadcasters for the utterance of "any obscene, indecent, or profane language by means of

radio communication," and Section 326 of the Communications Act of 1934, which prohibits the Commission from engaging in censorship or interfering "with the right of free speech by means of radio communications." The relative weight of these two interests, broadcasters' right to free speech without government censorship and the public's interest in prohibiting indecent content on radio and television, have long been the subject of shifting political pressures within the FCC and intense debate outside of the Commission.

The present incarnation of the FCC's indecency policy dates to 1970, when the Commission fined an FM radio station for airing an interview with Jerry Garcia, leader of the band The Grateful Dead, in which Garcia used the words *shit* and *fuck*. The Commission determined, in the truly nonanalytical fashion that has served as the agency's model for the decades of indecency decisions that followed, that it had authority to prohibit the use of these words because the interview's meaning would have been just as clear without the language and because permitting such language would "undermine the usefulness of radio to millions." The Commission fined the broadcaster "specifically to prevent any emerging trend in the broadcast field which would be inconsistent with the 'larger and more effective use of radio.'"13

Barely Upholding the Foundation

That policy was not challenged or tested, however, until 1975, when the Commission cited the licensee of another FM radio station for airing George Carlin's famous "Seven Dirty Words" monologue. The broadcaster, Pacifica Foundation, sued the Commission, alleging that the FCC action violated the First Amendment. In what the Supreme Court later called an "emphatically narrow" holding, a plurality of the Court in 1978 upheld the Commission's action, primarily because of two unique aspects of the medium: "(1) the pervasiveness of broadcast media in the lives of Americans, and (2) the unique accessibility of broadcast programming to children."¹⁴

The Court acknowledged in *FCC v. Pacifica Foundation* that its decision to uphold the FCC's indecency regime was based heavily on those factors, and it emphasized that the "content of the program in which the language is used will also affect the composition of the audience, and [that] differences between radio, television, and perhaps closed-circuit transmissions, may also be relevant" to the amount of permissible regulation in each medium.¹⁵ The Court was acutely aware, in other words, that the approach to indecency that was appropriate in 1978 for a comedy sketch broadcast on FM radio at 2:00 p.m. is not necessarily appropriate for other programs or other media such as television and would very likely not be the appropriate approach in perpetuity.

In a display of constitutional bravado that could never have been anticipated by the Court when it decided *Pacifica*, the Commission has maintained into the twenty-first century substantially the same indecency enforcement regime that it used in the 1970s, with no reexamination of the Court's base finding that broadcasting is uniquely pervasive and uniquely accessible to children. In all of this time, no court has reviewed the FCC's underlying basis for its indecency regime.

In fact, aside from *Pacifica*, the only cases that considered indecency at all were a series of D.C. Circuit decisions between 1988 and 1995, which did substantially limit the scope of the Commission's authority to regulate indecent content.¹⁶ In those lawsuits, brought by a coalition of broadcasters, industry associations, and public interest groups (identified in decisions by reference to the first-named plaintiff, the group Action for Children's Television (ACT)), the Commission asserted that its compelling purpose in regulating broadcast indecency was "supporting parental supervision of children and more generally [protecting] children's well being."¹⁷ Ultimately, the court held that the Commission's pursuit of these goals did not justify the imposition of an outright ban on indecent speech. In the *ACT* cases, the D.C. Circuit required

the Commission to implement a "safe harbor" between 10:00 p.m. and 6:00 a.m., during which time indecent programming could be broadcast without penalty.¹⁸

Indecency Regulation After *Reno*

The Supreme Court recently called both of the basic rationales for indecency regulation into serious question. In *ACLU v. Reno*, the Supreme Court in 1997 invalidated a strikingly similar contemporary community standard embodied in the Communications Decency Act's (CDA) effort to regulate indecent speech on the Internet. The Court rejected the CDA and its contemporary community standards as unworkably vague and inconsistent with the First Amendment, finding that the content-based regulation of speech contained in the CDA created an "obvious chilling effect on free speech." Moreover, the Court emphasized that the CDA was unconstitutional because it would "effectively suppress[] a large amount of speech that adults have a constitutional right to receive and to address to one another" when other, less-restrictive methods for protecting children, the Act's primary goal, were available.¹⁹

It is hard to see how the Commission's indecency regime can survive *Reno* without significant adjustment. When the Supreme Court decided *Pacifica* in 1978, absolute channeling may have been the only way to prevent children from hearing sexual content on the radio. The same cannot be said, however, for broadcast television in 2006.

Today, parents have at their disposal numerous tools to regulate their children's television viewing. Entertainment programming on broadcast television today includes parental guidance ratings that identify the age group for which a program is most appropriate and describe whether any adult content is presented. That rating is shown at the beginning of each program and in printed and electronic program guides. Parents who choose to restrict their children's viewing can use the V-chip included in their television set to limit the programming that their children can watch based on this rating. They can also use equipment such as a cable or

satellite lockbox, or similar third-party technologies,²⁰ to limit the programming available to their children.

It is no answer to say that regulation is still required because people do not avail themselves of these tools in sufficient numbers. Failure to use the available controls reflects the reality that, for many, the content available to them and their children is not unacceptable, that is, the content is consistent with the contemporary community standards for the broadcast medium that are supposedly the Commission's decisional touchstone.

The Commission has been wrong to ignore the development of these less-restrictive alternatives, just as it has been wrong to ignore the fact that the broadcast audiences' acceptance of cable programming is a necessary part of the definition of *contemporary community standards for broadcasting*. As matters stand, however, the convergence of cable and broadcast television content in most homes, and the growth of technology that can control content available to children, seem to have led to more, not less, aggressive indecency enforcement.

Chilling Effect of Indecency Regime

The chilling effect of this errant indecency regime has been apparent in recent years. For instance, after *Private Ryan* was aired twice over two years without incident, a series of unduly restrictive indecency rulings in other cases caused many broadcasters to be wary of airing it again. When the network and the film's producer would not agree to edit some of the language from the film because it would damage the artistic merit of the work, sixty-six ABC affiliates declined to air the program rather than risk indecency fines, a decision ultimately rendered unnecessary by the Commission's subsequent announcement that *Private Ryan* passed its indecency test.

Public broadcasters, too, have been forced to censor high-quality programming of public importance out of fear of indecency penalties. In comments recently filed at the FCC, the public broadcasting community has detailed chilling instances of self-censorship compelled by the vagueness and arbitrariness of the

Commission's standard, for example, whether to edit a *Frontline* documentary about the al-Qaeda terrorist network that included a videotape of the second plane crashing into the World Trade Center and an expletive uttered by a horrified onlooker; an *Antiques Roadshow* segment involving a famous fifty-year-old lithograph of a nude celebrity; and an episode of *NOVA* that contained dramatic footage from the Iraq war in which a soldier, enraged after watching a bomb exploding near a convoy, used the word *fuck* as an intensifier when informing his commander that a nearby Iraqi was lying.²¹

Next Steps

The Commission's recent indecency decisions far exceed the limited authority granted to it in *Pacifica*. Indeed, its decisions, read in the context of *Pacifica*, raise serious constitutional questions that the Commission simply cannot answer. As the Court predicted in the analogous context of *Reno*, the ambiguity and standardlessness of this indecency regime has had a substantial chilling effect on First Amendment speech.

On April 14, 2006, the four major broadcast networks and the four affiliate associations of those networks filed petitions for review in the United States Court of Appeals for the Second Circuit, challenging several of the FCC's March 15 enforcement decisions that were final orders as arbitrary and capricious and contrary to the First Amendment. The appeals also claim that, to the extent that the FCC's approach to indecency was ever constitutional, technological and market developments have antiquated the policy and made it unconstitutional.²² Perhaps the courts reviewing these orders will find a way to save some elements of the Commission's enforcement scheme, or perhaps they will lay it to rest forever.

But if the Commission wants to take some control of the issue, it will have to make a significant course correction very soon. In order to ensure that viewers can continue to trust their local broadcasters to provide material of social importance that is aimed at adult audiences, we believe that the Commission must acknowledge that the indecency policy that it adopted in

1970 is indefensible today, if for no other reason than because it cannot survive the analysis of the *Reno* case. At the least, the Commission needs to start from scratch with a much more limited approach to indecency, one that avoids the strictures of *Reno*.

That approach, as a content-based regulation of First Amendment speech, should appropriately place a heavy burden on complainants and the Commission to demonstrate through the use of quantifiable and verifiable measures that a broadcaster violated, within its community of license, not some imaginary community of the broadcast medium, but specific, predefined standards. It is only in a regime of measurable and verifiable standards that broadcasters can accommodate any form of indecency policy and at the same time fully serve the diverse needs of their communities. □

Endnotes

1. Industry Guidance, Policy Statement, 16 FCC Rcd. 7999 (2001).

2. Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 18 FCC Rcd. 19859 (2003) (staff decision).

3. Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 19 FCC Rcd. 4975, ¶¶ 8, 12 (2004) (Commission decision).

4. Complaints Against Various Television Licensees Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show, Notice of Apparent Liability, 19 FCC Rcd. 19230 (2004). When the Commission issued the *Super Bowl* Notice, the statutory maximum forfeiture was \$32,500. But in June 2006, Congress increased the maximum indecency forfeiture tenfold, to \$325,000.

5. Complaints Against Various Television Licensees Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show, Forfeiture Order, File No. EB-04-IH-0011, FCC 06-19 (rel. Mar. 15, 2006).

6. Aubree Bowling, *Worst TV Show of the Week: Without a Trace on CBS*, PARENTS TELEVISION COUNCIL PUBLICATIONS, available at www.parentstv.org/ptc/publications/bw/2005/0102worst.asp (Jan. 2, 2005).

7. Because the FCC's initial forfeiture order included certain stations that aired the episode during the safe harbor hours created by the D.C. Circuit, the Commission cancelled certain of the forfeitures. The total currently stands at approximately \$3.35 million.

8. Complaints Regarding Various Television Broadcasts Between February 2,

2002, and March 8, 2005, Notices of Apparent Liability & Mem. Op. & Order, FCC 06-17 (rel. Mar. 15, 2006) (omnibus notice).

9. The *Oprah* episode defined *salad tossing* as "oral anal sex" and *rainbow parties* as "a gathering where oral sex is performed [and where] all of the girls put on lipstick and each one puts her mouth around the penis of the gentleman or gentlemen who are there to receive favors and makes a mark in a different place on the penis."

10. Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004, of the ABC Television Network's Presentation of the Film "Saving Private Ryan," 20 FCC Rcd. 4507, 4512 ¶ 11 (2005).

11. *In re Infinity Radio License, Inc.*, 19 FCC Rcd. 5022, 5026 (2004).

12. Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Tenth Annual Report, 19 FCC Rcd. 1606, ¶ 7 (2004).

13. *In re WHUY-FM, E. Educ. Radio*, 24 F.C.C.2d 408 (1970).

14. *FCC v. Pacifica Found.*, 438 U.S. 726, 748-50 (1978).

15. *Id.* at 750.

16. *Action for Children's Television v. FCC*, 58 F.3d 654, 661 (D.C. Cir. 1995) (en banc) (ACT III).

17. *Id.*

18. *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988) (ACT I); *Action for Children's Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991) (ACT II); *ACT III, supra* note 16.

19. *ACLU v. Reno*, 521 U.S. 844, 841-74 (1997).

20. *See* TiVo Inc., KidZone, at www.tivo.com/kidzone.

21. Comments of Public Broadcasters on Petitions for Reconsideration, File No. EB-03-IH-0110 (filed May 4, 2004).

22. *See* Fox Television Stations, Inc. v. FCC, No. 06-1760-AG (2d Cir., filed April 14, 2006). For procedural reasons not directly relevant to this discussion, the FCC recently asked the Second Circuit to remand the case to the agency for further proceedings. At press time, the Court had not yet acted on the FCC's request, which is being opposed by one of the network parties.