

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
COMPLAINTS AGAINST VARIOUS) File No. EB-04-IH-0011
TELEVISION LICENSEES)
CONCERNING THEIR FEBRUARY) NAL/Acct. No. 200432080212
1, 2004 BROADCAST OF THE SUPER)
BOWL XXXVIII HALFTIME SHOW)

FORFEITURE ORDER

Adopted: February 21, 2006

Released: March 15, 2006

By the Commission: Chairman Martin, Commissioners Copps and Tate issuing separate statements;
Commissioner Adelstein concurring and issuing a statement.

I. INTRODUCTION

1. In this Forfeiture Order ("Order"), issued pursuant to section 503(b) of the
Communications Act of 1934, as amended (the "Act"), and section 1.80 of the Commission's rules,1 we
impose a monetary forfeiture in the amount of \$550,000 against CBS Corporation ("CBS"), as the
licensee or the ultimate parent company of the licensees of the television stations listed in the Appendix
("CBS Stations").2 We find that CBS violated 18 U.S.C. § 1464 and the Commission's rule regulating
the broadcast of indecent material3 in its broadcast of the halftime show of the National Football League's
Super Bowl XXXVIII over the CBS Stations on February 1, 2004, at approximately 8:30 p.m. Eastern
Standard Time.4

1 47 U.S.C. § 503(b); 47 C.F.R. § 1.80.

2 The Appendix is an updated version of Appendix A from the Notice of Apparent Liability in this proceeding. See
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) (the "NAL"). The NAL was
directed to Viacom, Inc., which was the ultimate corporate parent company of the licensees in question at that time.
As of December 31, 2005, Viacom, Inc. effected a corporate reorganization in which the name of the ultimate parent
company of the licensees of the CBS Stations was changed to CBS Corporation. Accordingly, we generally refer to
the company herein as CBS even for periods preceding the reorganization. As part of the reorganization, certain
non-broadcast businesses, including MTV Networks, were transferred to a new company named Viacom Inc. At the
time of the violations, however, the CBS Stations and MTV Networks were corporate affiliates under common
control.

3 47 C.F.R. § 73.3999.

4 We note that viewers in markets served by each of the CBS Stations filed complaints with the Commission
concerning the February 1, 2004 broadcast of the Super Bowl XXXVIII halftime show.

II. BACKGROUND

2. The halftime show in question was a live broadcast of music and choreography produced by MTV Networks (“MTV”), which was then a Viacom, Inc. subsidiary. The halftime show lasted approximately fifteen minutes and aired over the CBS Stations and other television stations affiliated with the CBS Television Network. The show received considerable notoriety due to an incident at the end of its musical finale, in which Justin Timberlake pulled off part of Janet Jackson’s bustier, exposing one of her breasts to the television audience.

3. Following the Super Bowl broadcast and the receipt of complaints, the Enforcement Bureau (“Bureau”) issued a letter of inquiry (“LOI”) to CBS, seeking information about the halftime show, followed by a letter requesting videotapes of the complete Super Bowl programming broadcast over the CBS Television Network stations on February 1, 2004, including the halftime show (collectively, the “Broadcast Videotape”).⁵ In response, CBS provided a videotape of the broadcast of the halftime show to the Bureau on February 3, 2004,⁶ an “interim response” to the Bureau’s inquiries on February 10, 2004,⁷ the Broadcast Videotape on February 14, 2004,⁸ and a complete response to the LOI on March 16, 2004.⁹

4. The script and Broadcast Videotape of the halftime show provided by CBS confirm that the show contained repeated sexual references, particularly in its opening and closing performances. The first song, “All For You,” performed by Janet Jackson, began with the following lines, referring to a man at a party:

All my girls at the party
Look at that body
Shakin’ that thing
Like I never did see
Got a nice package alright

⁵ See Letter from William D. Freedman, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, to Howard Jaeckel, Vice President and Associate General Counsel, CBS, dated February 2, 2004; Letter from William D. Freedman, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, to Robert Corn-Revere, Esquire, dated February 10, 2004.

⁶ See Letter from Robert Corn-Revere, Esquire to William D. Freedman, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, dated February 3, 2004.

⁷ Letter from Robert Corn-Revere, Esquire to William D. Freedman, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, dated February 10, 2004 (the “*CBS Interim Response*”).

⁸ Letter from James S. Blitz, Esquire to William D. Freedman, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, dated February 14, 2004.

⁹ Letter from Susanna M. Lowy, Esquire to William D. Freedman, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, dated March 16, 2004 (the “*CBS Response*”). Although many of CBS’s responses to the LOI’s inquiries are contained in both the *CBS Interim Response* and the *CBS Response*, for purposes of simplicity, unless otherwise noted, references herein will be to the latter. CBS requested confidential treatment of the bulk of the materials attached to its Response, including electronic mail and other documents relevant to the planning of the halftime show. We do not rule on CBS’s request at this time because it is unnecessary to do so for purposes of this Order. Consistent with the request, however, we limit ourselves to describing or characterizing the substance of the materials and providing record citations herein, rather than actually quoting the materials or otherwise incorporating them into the Order. The Confidential Appendix, however, contains quotations to various documents in the record.

Guess I'm gonna have to ride it tonight.¹⁰

These lyrics use slang terms to refer to a man's sexual organs and sexual intercourse and were repeated two more times during the song. Following that performance, P. Diddy and Nelly presented a medley of songs containing occasional references to sexual activities, emphasized by Nelly's crotch-grabbing gestures.¹¹ Then, after a medley by performer Kid Rock, Jackson reappeared for a performance of "Rhythm Nation" and then the closing song, "Rock Your Body," a duet in which she was joined by Justin Timberlake. During the finale, Timberlake urged her to allow him to "rock your body" and "just let me rock you 'til the break of day" while following her around the stage and, on several occasions, grabbing and rubbing up against her in a manner simulating sexual activity.¹² At the close of the song, while singing the lyrics, "gonna have you naked by the end of this song," Timberlake pulled off the right portion of Jackson's bustier, exposing her breast to the television audience.¹³

5. The Commission released its *NAL* on September 22, 2004, pursuant to section 503(b) of the Act and section 1.80 of the Commission's rules, finding that CBS apparently violated the federal restrictions regarding the broadcast of indecent material.¹⁴ We noted that our indecency analysis involves two basic determinations. The first determination is whether the material in question depicts or describes sexual or excretory organs or activities.¹⁵ We found that the broadcast material contained, *inter alia*, a performance by Jackson and Timberlake that culminated in the on-camera exposure of one of Jackson's breasts, thereby meeting the first standard.¹⁶ The second determination is whether the material is patently offensive as measured by contemporary community standards for the broadcast medium.¹⁷ We observed that, in our assessment of whether broadcast material is patently offensive, "the *full context* in which the material appeared is critically important."¹⁸ Three principal factors are significant to this contextual analysis: (1) the explicitness or graphic nature of the description or depiction of sexual or excretory organs or activities; (2) whether the material dwells on or repeats at length descriptions or depictions of sexual or excretory organs or activities; and (3) whether the material appears to pander or is used to

¹⁰ Broadcast Videotape. *See also CBS Response*, Ex. 9 at 7-10; www.azlyrics.com/lyrics/janetjackson/allforyou.html.

¹¹ These sexual references include the lyrics "I was like good gracious ass bodacious . . . I'm waiting for the right time to shoot my steam (you know)" and "[i]t's gettin' hot in here (so hot), so take off all your clothes (I am gettin' so hot)" in the Nelly song "Hot in Herre." Broadcast Videotape. *See also CBS Response*, Ex. 9 at 16, 18; www.lyricsstyle.com/n/nelly/hotinherre.html.

¹² Broadcast Videotape. *See also CBS Response*, Ex. 9 at 36-37; www.lyricsondemand.com/j/justintimberlakelyrics/rockyourbodylyrics.html.

¹³ Broadcast Videotape.

¹⁴ *See* 18 U.S.C. § 1464; 47 C.F.R. § 73.3999; and 47 U.S.C. § 503(b).

¹⁵ *See Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, Policy Statement, 16 FCC Rcd 7999, 8002, ¶ 7 (2001) ("*Indecency Policy Statement*").

¹⁶ *NAL*, 19 FCC Rcd at 19235, ¶ 11.

¹⁷ The "contemporary standards for the broadcast medium" criterion is that of an average broadcast listener and does not encompass any particular geographic area. *Indecency Policy Statement*, 16 FCC Rcd at 8002, ¶ 8 and n. 15. CBS suggests that we should rely on third-party public opinion polls to determine whether the material is patently offensive as measured by contemporary community standards for the broadcast medium. *Opposition* at 33-34. In determining whether material is patently offensive, we do not rely on polls, but instead apply the three-pronged contextual analysis described in the text. CBS provides no legal support for a departure from that approach.

¹⁸ *NAL*, 19 FCC Rcd at 19235, ¶ 12, quoting *Indecency Policy Statement*, 16 FCC Rcd at 8002, ¶ 9 (emphasis in original).

titillate or shock.¹⁹ In examining these three factors, we stated that we must weigh and balance them on a case-by-case basis to determine whether the broadcast material is patently offensive because “[e]ach indecency case presents its own particular mix of these, and possibly, other factors.”²⁰ We noted that, in particular cases, one or two factors may outweigh the others, either rendering the broadcast material patently offensive and consequently indecent²¹ or, alternatively, removing the broadcast from the realm of indecency.²²

6. The Commission examined all three factors in the NAL and determined that, in context and on balance, the halftime show is patently offensive as measured by contemporary community standards for the broadcast medium. The Commission determined that the broadcast of partial nudity in this instance was explicit and graphic and appeared to pander to, titillate and shock the viewing audience. Therefore, the Commission determined that the material was patently offensive as measured by contemporary community standards for the broadcast medium, even though the nudity was brief.²³

7. The Commission concluded, based upon its review of the facts and circumstances of this case, that CBS was apparently liable for a monetary forfeiture in the amount of \$550,000, calculated by applying the maximum forfeiture of \$27,500 to each CBS Station, for broadcasting indecent material in apparent violation of 18 U.S.C. § 1464 and section 73.3999 of the Commission’s rules.²⁴ In contrast, the Commission proposed no forfeiture against any licensee other than CBS. It did so based on its finding that no licensee of a non-CBS-owned CBS affiliate was involved in the selection, planning or approval of the material for the halftime show, nor could any such licensee reasonably have anticipated that Viacom’s production of the show would contain indecent material.²⁵ On November 5, 2004, CBS submitted its *Opposition* to the NAL.²⁶

¹⁹ *Indecency Policy Statement*, 16 FCC Rcd at 8002-15, ¶¶ 8-23.

²⁰ *NAL*, 19 FCC Rcd at 19235, ¶ 12, quoting *Indecency Policy Statement*, 16 FCC Rcd at 8003, ¶ 10.

²¹ *NAL*, 19 FCC Rcd at 19235, ¶ 12; *Indecency Policy Statement*, 16 FCC Rcd at 8009, ¶ 19 (citing *Tempe Radio, Inc. (KUPD-FM)*, 12 FCC Rcd 21828 (Mass Media Bur. 1997) (forfeiture paid), and *EZ New Orleans, Inc. (WEZB(FM))*, 12 FCC Rcd 4147 (Mass Media Bur. 1997) (forfeiture paid), which found that the extremely graphic or explicit nature of references to sex with children outweighed the fleeting nature of the references.

²² *NAL*, 19 FCC Rcd at 19235, ¶ 12; *Indecency Policy Statement*, 16 FCC Rcd at 8010, ¶ 20 (noting that “the manner and purpose of a presentation may well preclude an indecency determination even though other factors, such as explicitness, might weigh in favor of an indecency finding.”)

²³ *NAL*, 19 FCC Rcd at 19235-36, ¶¶ 12-14.

²⁴ *Id.* at 19236-40, ¶¶ 16-24. The Commission recently amended its rules to increase the maximum penalties to account for inflation since the last adjustment of the penalty rates. However, the new rates apply to violations that occur or continue after September 7, 2004, and therefore do not apply here. See *Amendment of Section 1.80(b) of the Commission’s Rules, Adjustment of Forfeiture Maxima to Reflect Inflation*, Order, 19 FCC Rcd 10945, 10946, ¶ 6 (2004).

²⁵ *Id.*, 19 FCC Rcd at 19240-41, ¶ 25.

²⁶ “*Opposition to Notice of Apparent Liability for Forfeiture*” by CBS, dated November 5, 2004 (“*Opposition*”). In addition to CBS’s *Opposition*, we also received filings from non-parties to this proceeding that we are treating as filings by amici curiae. One such filing is a “*Petition for Partial Reconsideration of Notice of Apparent Liability for Forfeiture*” submitted by Saga Quad States Communications, LLC, and Saga Broadcasting, LLC, which argues that the NAL improperly imposes a new requirement on network affiliate stations to employ delay technology to prescreen network feeds. The NAL urges such licensees to take reasonable precautions to prevent the broadcast of indecent programming over their stations, but this is not a new requirement. See *NAL*, 19 FCC Rcd at 19241, ¶ 25. See also *Complaints Against Various Licensees Regarding Their Broadcast of the Fox Network Program “Married by America”* on April 7, 2003, *Notice of Apparent Liability for Forfeiture*, 19 FCC Rcd 20191 (2004) (“*Married by America*”) (response pending); 47 C.F.R. § 73.658(e)(1) (prohibiting television stations from entering into

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III. DISCUSSION

8. CBS does not dispute that the halftime show included a segment in which Justin Timberlake pulls off a portion of Jackson's bustier to reveal her breast at the end of the performance of a song containing the lyrics quoted above.²⁷ CBS nonetheless argues that the material broadcast was not actionably indecent.²⁸ CBS also maintains that the broadcast of Jackson's breast was accidental, and therefore was not "willful" under section 503(b)(1)(B) of the Act.²⁹ CBS further argues that the Commission's indecency framework is unconstitutionally vague and overbroad, both on its face and as applied to the halftime show.³⁰ As discussed below, we reject CBS's arguments and find the broadcast indecent for the reasons set forth herein. We reject CBS's assertion that the material at issue is not indecent because it is not patently offensive. In addition, we reject CBS's interpretation of the term "willful" and also address specific circumstances indicating that: (1) CBS consciously omitted the actions necessary to ensure that actionably indecent material would not be aired; and (2) the performers' willful actions here were attributable to CBS under established principles of agency and respondeat superior. Finally, we reject CBS's constitutional arguments, as the courts have repeatedly upheld the constitutionality of the Commission's indecency framework and our analysis of the halftime show is consistent with that framework. We therefore conclude that the broadcast of this material by the Viacom Stations violated 18 U.S.C. § 1464 and our rule against indecent broadcasts between 6 a.m. and 10 p.m., and that the maximum statutory forfeiture is warranted.

9. *Indecency Analysis.* The indecency analysis undertaken in the *NAL* followed the approach that the Commission has consistently applied. First, the material alleged to be indecent must fall within the subject matter scope of our indecency definition, *i.e.*, "the material must describe or depict sexual or excretory organs or activities."³¹ The *NAL* properly concluded that the broadcast of an exposed female breast met this definition.³² The halftime show broadcast therefore warrants further scrutiny to determine

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arrangements with networks that restrict their right to reject programming that the stations reasonably believe to be unsatisfactory or unsuitable or contrary to the public interest). Another such filing by Litigation Recovery Trust ("LRT") is styled a "Petition for Reconsideration" but fails to meet the requirements of Section 1.106(b)(1) of our rules for petitions for reconsideration by non-parties. First, a petition for reconsideration of a Notice of Apparent Liability is not appropriate under Section 1.106(b)(1) because such action is only a notice, not a Commission decision that is subject to reconsideration. Furthermore, even if a petition for reconsideration were appropriate here, LRT does not make the showings required under that rule that a non-party "state with particularity the manner in which the person's interest are adversely affected by the action taken, and show good reason why it was not possible for him to participate in the earlier stages of the proceeding." 47 C.F.R. § 1.106(b)(1). In substance, LRT's filing is a supplement to a prior request for rulemaking on a matter that is outside the scope of, and is not affected by, this decision.

²⁷ *Opposition* at 11. CBS does take issue with the *NAL*'s statement that the nudity lasted for 19/32 of a second, stating that the actual time was 9/16 of a second. *Id.* at 11 n. 7. We accept CBS's determination as to the duration, but we find no practical difference here. We also note that the brevity of the image is considered in connection with just one of three contextual factors, and no single factor is dispositive. *See Indecency Policy Statement*, 16 FCC Rcd at 8003, ¶ 10 ("Each indecency case presents its own particular mix of these [three], and possibly other, factors, which must be balanced to ultimately determine whether the material is patently offensive and therefore indecent. No single factor generally provides the basis for an indecency finding.").

²⁸ *Opposition* at 13-34.

²⁹ *Id.* at 35-38.

³⁰ *Id.* at 44-77.

³¹ *Indecency Policy Statement*, 16 FCC Rcd at 8002, ¶ 7.

³² *NAL*, 19 FCC Rcd at 19235, ¶ 11.

whether or not it was patently offensive as measured by contemporary community standards for the broadcast medium.

10. As discussed above, in our assessment of whether broadcast material is patently offensive, “the *full context* in which the material appeared is critically important.”³³ In cases involving televised nudity, the contextual analysis necessarily involves an assessment of the entire segment or program, and not just the particular scene in which the nudity occurs.³⁴ Accordingly, in this case, our contextual analysis considers the entire halftime show, not just the final segment during which Jackson’s breast is uncovered. We find that, in context and on balance, the complained-of material is patently offensive as measured by contemporary community standards for the broadcast medium.

11. Turning to the first principal factor of our contextual analysis, we conclude that a video broadcast image of Timberlake pulling off part of Jackson’s bustier and exposing her bare breast, where the image of the nude breast is clear and recognizable to the average viewer, is graphic and explicit.³⁵ CBS maintains that none of the cases cited in the *NAL* to support the conclusion that the partial nudity in the halftime show was explicit and graphic involved a televised broadcast of a woman’s breast.³⁶ We reject CBS’s argument that our conclusion regarding this factor is flawed. The *NAL* correctly relied on *Young Broadcasting*, which supports the proposition that a scene showing nude sexual organs is graphic and explicit if the nudity is readily discernible.³⁷ In this case, although the camera shot is not a close-up, the nudity is readily discernible. Furthermore, Jackson and Timberlake, as the headline performers, are in the center of the screen, and Timberlake’s hand motion ripping off Jackson’s bustier draws the viewer’s attention to her exposed breast. CBS suggests that the fact that this nudity was not “planned and approved by [CBS]” is somehow relevant to whether it is explicit and graphic in nature.³⁸ However, CBS’s suggestion that planning or premeditation should be a factor in deciding whether a televised image is explicit or graphic lacks any basis in logic or law.³⁹ Rather, the first factor in our contextual analysis

³³ *Indecency Policy Statement*, 16 FCC Rcd at 8002, ¶ 9 (emphasis in original).

³⁴ See, e.g., *Young Broadcasting of San Francisco, Inc.*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 1751, 1755-57 (2004) (“*Young Broadcasting*”) (response pending) (Commission makes an assessment of the entire segment of a morning news program involving an interview of and demonstration by cast members from a “Puppetry of the Penis” stage production in which adult male nudity was aired for less than a second (¶¶ 11-13); and distinguishes an earlier case involving non-fleeting adult frontal nudity in a broadcast of *Schindler’s List* based on “the full context of its presentation, including the subject matter of the film [World War II and wartime atrocities], the manner of presentation, and the warnings that accompanied the broadcast of the film” (¶ 14)).

³⁵ We note that, although Jackson wore a piece of jewelry on her nipple, it only partially covered her nipple and did not cover her breast.

³⁶ *Opposition* at 21.

³⁷ *NAL*, 19 FCC Rcd at 19235, ¶ 13 and n. 42. CBS attempts to distinguish *Young Broadcasting* from this case. See *Opposition* at 19-20. However, CBS’s analysis focuses on the foreseeability of the nudity in that case as compared to this case. As discussed below, foreseeability and premeditation relate to whether the broadcast of indecent matter was willful, and not to whether the material is graphic and explicit.

³⁸ See *Opposition* at 25 n.35. See also *id.* at 22. We agree that the exposure of Jackson’s breast was not in the official script submitted by CBS, but CBS has not shown that it was unplanned. Clearly, the “costume reveal” that led to the exposure of the breast was at least planned by the performers (Jackson and Timberlake) and their choreographer, Gil Duldulao, who were hired by CBS for the halftime show. Timberlake’s Declaration disavows any knowledge on his part that the costume reveal would lead to exposure of Jackson’s breast, but Jackson’s statement does not address her knowledge or intentions, and Duldulao did not provide a statement. See *CBS Response*, Ex. 7 and Ex. 8.

³⁹ CBS compares this case to a decision that it claims involves programming that is “considerably more explicit and clearly premeditated,” in which the Commission imposed a base forfeiture rather than the maximum forfeiture imposed in this case. See *Opposition* at 22-23, citing *Married by America*. The appropriate level of the forfeiture is

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focuses on the explicitness of the broadcast from the viewer's or listener's standpoint. Notwithstanding CBS's claimed befuddlement at how the televised image of a man tearing off a woman's clothing to reveal her bare breast could be deemed explicit, we believe that conclusion is clearly warranted by the facts here and fully consistent with the case law.⁴⁰

12. The second principal factor in our contextual analysis is whether the material dwells on or repeats at length descriptions or depictions of sexual or excretory organs or activities. The *NAL* appropriately recognizes that the image of Jackson's uncovered breast during the halftime show is fleeting.⁴¹ However, "even relatively fleeting references may be found indecent where other factors contribute to a finding of patent offensiveness."⁴² In this case, even though we find that the partial nudity was fleeting, the brevity of the partial nudity is outweighed by the first and third factors of our contextual analysis.

13. Under the third principal factor of our analysis – whether the material appears to pander or is titillating or shocking – we examine how the material is presented in context.⁴³ The *NAL* found that "the manner of presentation of the complained-of material over each [CBS Station], for which Viacom failed to take adequate precautions, was pandering, titillating and shocking."⁴⁴ The *NAL* noted that the exposure of Jackson's breast followed "performances, song lyrics and choreography [that] discussed or simulated sexual activities."⁴⁵ Jackson's opening song contained repeated references to a man's "nice package" that she was "gonna have to ride . . . tonight" – slang references to male sexual organs and sexual intercourse. The P. Diddy/Nelly performance also contained sexual references, emphasized by Nelly's crotch-grabbing gestures. Likewise, the duet by Jackson and Timberlake of "Rock Your Body"

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best addressed in a subsequent section, but at this point we note that the case cited involved a program in which certain body parts were digitally obscured by pixilation to avoid a display of partial nudity such as that aired by CBS to a national audience in this case. Thus, that case is not a particularly useful precedent in determining whether the material at issue here is graphic and explicit.

⁴⁰ CBS argues that our recent dismissals of complaints about programming that we found not to be graphic or explicit requires a similar decision here. *Opposition* at 23-25, citing *KSAZ Licensee, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 15999 (2004), and *Complaints Against Various Broadcast Licensees Regarding Their Airing of the UPN Network Program "Buffy the Vampire Slayer" on November 20, 2001*, Memorandum Opinion and Order, 19 FCC Rcd 15995 (2004). Neither case is apposite here because neither program included nudity. The other cases cited by CBS are inapposite for the same reason. *See Opposition* at 23-24.

⁴¹ *See NAL*, 19 FCC Rcd at 19236, ¶ 14.

⁴² *Indecency Policy Statement*, 16 FCC Rcd at 8009, ¶ 19. *See also Young Broadcasting; Tempe Radio*, Notice of Apparent Liability, 12 FCC Rcd 21828 (Mass Media Bur. 1997) (paid); *LBJs Broadcasting*, Notice of Apparent Liability, 13 FCC Rcd. 20956 (Mass Media Bur. 1998) (paid).

⁴³ *Indecency Policy Statement*, 16 FCC Rcd at 8010, ¶20.

⁴⁴ *NAL*, 19 FCC Rcd at 19236 n. 44. The *NAL* stated that "the nudity here was designed to pander to, titillate and shock the viewing audience." *Id.* at ¶ 14. To the extent that the language in the *NAL* could be interpreted to suggest that the broadcaster's state of mind is a decisional factor, we wish to clarify that this is not the case. Our *Indecency Policy Statement* frames this factor as "whether the material appears to pander or is used to titillate, or whether the material appears to have been presented for its shock value." *Indecency Policy Statement*, 19 FCC Rcd at 8003, ¶ 10 (emphasis in original). In making this determination, we focus on the material that was broadcast and its manner of presentation, not on the state of mind of the broadcaster or performer. *See Young Broadcasting*, 19 FCC Rcd at 1755-57, ¶¶ 13-14.

⁴⁵ *NAL*, 19 FCC Rcd at 19236, ¶ 14.

contained repeated references to sexual activities⁴⁶ and choreography in which Timberlake grabbed Jackson, slapped her buttocks, and rubbed up against her in a manner simulating sexual activity. These sexually suggestive performances culminated in the spectacle of Timberlake ripping off a portion of Jackson's bustier and exposing her breast while he sang "gonna have you naked by the end of this song." Clearly, the nudity in this context was pandering, titillating and shocking to the viewing audience, particularly during a prime time broadcast of a sporting event that was marketed as family entertainment and contained no warning that it would include nudity.⁴⁷ Contrary to CBS's contention, we do evaluate the nudity in context. The offensive segment in question did not merely show a fleeting glimpse of a woman's breast, as CBS presents it. Rather, it showed a man tearing off a portion of a woman's clothing to reveal her naked breast during a highly sexualized performance and while he sang "gonna have you naked by the end of this song." From the viewer's standpoint, this nudity hardly seems "accidental," nor was it.⁴⁸ This broadcast thus presents a much different case than would, for example, a broadcast in which a woman's dress strap breaks, accidentally revealing her breast for a fraction of a second.

14. Accordingly, we conclude that the Super Bowl XXXVIII halftime show contained material that was graphic, explicit, pandering, titillating and shocking and, in context and on balance, was patently offensive under contemporary community standards for the broadcast medium and thus indecent. Although the patently offensive material was brief, its brevity is outweighed in this case by the first and third factors in our contextual analysis. The complained-of material was broadcast within the 6 a.m. to 10 p.m. time frame relevant to an indecency determination under Section 73.3999 of the Commission's rules,⁴⁹ and is therefore legally actionable.

15. *Whether Violation was "Willful."* CBS argues that, if it did air indecent programming, its violation was "accidental" rather than "willful" and therefore cannot be sanctioned under section 503(b)(1) of the Act. In support of this argument, CBS cites definitions of "willful" from criminal and copyright law cases.⁵⁰ These definitions, however, are inapposite. Rather than borrowing definitions from unrelated areas of law, the Commission appropriately applies the definition of "willful" that appears in the Communications Act. Section 312(f)(1) of the Act defines "willful" as "the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law.⁵¹ As

⁴⁶ Timberlake sang the lyrics: "I've been watching you, I like the way you move, so go 'head and girl just do that ass-shakin' thing you do . . . I wanna rock your body, let me rock your body." Broadcast Videotape. *See also CBS Response*, Ex. 9 at 36-37; <http://www.lyricsondemand.com/j/justintimberlakelyrics/rockyourbodylyrics.html>.

⁴⁷ Indeed, CBS appears to concede that it was shocking, but maintains that "the 'costume reveal' was as much a shock to Viacom as to everyone else." *Opposition* at iii.

⁴⁸ *See CBS Response* at Ex. 7 and Ex. 8. Whether this nudity was planned or foreseeable by CBS and the stations that broadcast it is a distinct issue that is addressed below in the discussion of the "willfulness" factor.

⁴⁹ 47 C.F.R. § 73.3999.

⁵⁰ *See Opposition* at 37-38.

⁵¹ The Conference Report to the 1982 amendment to the Act that added this definition stated: "Willful means that the licensee knew he was doing the act in question, regardless of whether there was an intent to violate the law." H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982). The Conference Report also makes it clear that this definition applies to section 503(b) of the Act as well as section 312. *See Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991). CBS initially acknowledges that "the Commission has held that in order to satisfy the willfulness requirement, the purported offender need not intend to violate the Act or an FCC rule, or even be aware the action in question constitutes a violation." *Opposition* at 36. Yet on the next page of its *Opposition* it urges us to apply criminal cases in which the scienter requirement has been held to require "an act done with a bad purpose" or an "evil motive." *Id.* at 37. Clearly, those cases have no application in interpreting the willfulness requirement in a regulatory statute authorizing the imposition of administrative sanctions. We disagree with CBS's contention that criminal law definitions of "willful" are apt because 18 U.S.C. § 1464 is a criminal statute. *Id.* In *Pacifica*, the Supreme Court declined to consider questions relating to possible application of section 1464 as a criminal statute in upholding a broadcast indecency forfeiture

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discussed in detail below, CBS acted willfully because it consciously and deliberately broadcast the halftime show, whether or not it intended to broadcast nudity, and because it consciously and deliberately failed to take reasonable precautions to ensure that no actionably indecent material was broadcast.⁵² CBS also is vicariously liable for the willful actions of the performers under the doctrine of respondeat superior.

16. The Commission's forfeiture authority was enacted "to impel broadcast licensees to become familiar with the terms of their licenses and the applicable Rules, and to adopt procedures, including periodic review of operations, which will insure that stations are operated in substantial compliance with their licenses and the Commission's Rules."⁵³ The obligation of licensees to adopt measures to ensure compliance with the Act and the Commission's rules has particular force when it comes to broadcasters' responsibility for the programming that they broadcast to the public. Under well-established principles of broadcast regulation, "[b]roadcast licensees must assume responsibility for all material which is broadcast through their facilities," and that "duty is personal to the licensee and may not be delegated."⁵⁴

17. CBS claims that it had no advance knowledge that Timberlake planned to tear off part of Jackson's clothing to reveal her breast. Even assuming that this claim is true, however, we do not believe that this relieves CBS from responsibility for the indecent material that it broadcast. Rather, the record reveals that CBS was acutely aware of the risk of unscripted indecent material in this production, but failed to take adequate precautions that were available to it to prevent that risk from materializing.

(...continued from previous page)

imposed by the Commission. *FCC v. Pacifica Foundation*, 438 U.S. 726, 739 n.13 (1978) ("the validity of the civil sanctions [authorized under the Act] is not linked to the validity of the criminal penalty."). Likewise, we reject CBS's suggestion that the First Amendment requires statutes imposing civil penalties on speech to be interpreted to include the same scienter requirement as those imposing criminal penalties. *Opposition* at 38, citing *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 77-78 (1994), *Smith v. California*, 361 U.S. 147 (1959), and *United States v. Reilly*, 2002 WL 31307170 (S.D.N.Y. 2002).

⁵² We note that application of this standard to CBS does not "impose a strict liability requirement on protected speech." *Opposition* at 38, citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). The Supreme Court held in *Gertz* that "the States should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual," so long as they do not impose liability without fault. *Id.* at 345-46. As discussed *infra*, CBS clearly is at fault for broadcasting actionably indecent material during the Super Bowl telecast. We also note that CBS's reliance on *Saxe v. State College*, 240 F.3d 200, 206 (3d Cir. 2001), as holding that willful indifference is a legally insufficient basis for punishing speech, is misplaced. *See Opposition* at 38. *Saxe* held that a school district policy prohibiting "harassing" speech was unconstitutionally overbroad because it was not limited to vulgar or lewd speech or school-sponsored speech, and was not necessary to prevent substantial disruption or interference with the rights of students or the conduct of the school. The court did not address the intent required to impose liability for expressive speech or conduct under the First Amendment.

⁵³ *Crowell-Collier Broadcasting Corp.*, Memorandum Opinion and Order, 44 FCC 2444, 2449 (1961) (violation due to erroneous advice from the station's competent engineering consultant warrants a forfeiture).

⁵⁴ *Report and Statement of Policy re: Commission en banc Programming Inquiry*, 44 FCC Rcd 2303, 2313 (1960). *See also Yale Broadcasting Co. v. FCC*, 478 F.2d 594 (D.C. Cir.), *cert. denied*, 414 U.S. 914 (1973) (affirmed action of Commission reminding broadcast licensees of their duty to have knowledge of the content of their programming and on the basis of this knowledge to evaluate the desirability of broadcasting music dealing with drug use); *Gaffney Broadcasting, Inc.*, 23 FCC 2d 912, 913 (1970) ("licensees are responsible for the selection and presentation of program material over their stations, including . . . acts or omissions of their employees"); *Alabama Educational Television Commission*, 50 FCC 2d 461, 464 (1975) (AETC lost its license in part because it failed to maintain exclusive authority over all of its programming decisions); *WCHS-AM-TV Corp.*, 8 FCC 2d 608, 609 (1967) (maintenance of control over programming is a most fundamental obligation of the licensee).

18. It is disingenuous for CBS to argue that “the ‘costume reveal’ was as much a shock to Viacom as to everyone else.”⁵⁵ CBS clearly recognized that the live broadcast of the Super Bowl halftime show posed a significant risk that indecent material would be aired. The extensive planning and preparation for the show highlighted this risk. CBS knew that MTV, the corporate affiliate that was producing the show, was seeking to push the envelope by, among other things, including sexually provocative performers and material.⁵⁶ In fact, the NFL expressed concerns about whether the planned halftime show might be heading in too risqué a direction and rebuffed MTV’s desire to feature one performer because of a prior incident in which the performer unexpectedly removed her clothes during a national telecast of an NFL event.⁵⁷ MTV sought to overcome the NFL’s objections to another performer by offering assurances that it would exercise control over her wardrobe and actions, despite its own doubts about its ability to do so.⁵⁸

19. CBS maintains that it selected Jackson and Timberlake “to minimize the possibility of the unexpected,”⁵⁹ but CBS was well aware that their selection did not obviate this risk. The NFL specifically expressed concerns to CBS about the costume that Jackson would wear during the halftime show.⁶⁰ Moreover, the NFL raised concerns about Timberlake’s scripted line “gonna have you naked by the end of this song” that anticipated the stunt resulting in the broadcast nudity.⁶¹ There were other warning signs as well. In a January 28, 2004 news item posted on MTV’s website, Jackson’s choreographer predicted that Jackson’s performance would include “some shocking moments” and said “I don’t think the Super Bowl has ever seen a performance like this . . .”⁶² Shortly before the game, one halftime show performer asked about the length of the audio delay, a question that MTV employees evidently recognized implied an intention to depart from the script.⁶³ Further, MTV learned the morning of the Super Bowl telecast of plans to use tearaway cheerleading outfits for dancers in another halftime performance in connection with a scripted line (“I wanna take my clothes off”) that is quite similar to Timberlake’s line (“gonna have you naked by the end of this song”).⁶⁴ The record reflects CBS’s awareness that there is always a risk that performers will ad-lib remarks or take unscripted actions, and that the risk level varies according to the nature of the performance.⁶⁵ In sum, there was a significant and

⁵⁵ *Opposition* at iii.

⁵⁶ See, e.g., *CBS Response*, App. B-C at Bates stamped pgs. 18, 176, 219, 314, 1175, 1229, 1456. See also *Super Bowl NAL*, 19 FCC Rcd at 19238-39 ¶ 19 (discussing MTV’s promotion of the sexually-provocative nature of the halftime show by, *inter alia*, posting on its website a news item entitled “Janet Jackson’s Super Bowl Show Promises ‘Shocking Moments,’” which quoted her choreographer Gil Duldulo’s prediction that her performance would include “some shocking moments.”). Confidential Appendix 1.

⁵⁷ See *CBS Response*, App. B at Bates stamped pgs. 72, 96, 195, 218-19. Confidential Appendix 2.

⁵⁸ See *CBS Response*, App. B at Bates stamped pgs. 123, 355, 447. Confidential Appendix 3.

⁵⁹ *Opposition* at 18. See *CBS Response* at 9 (stating that Jackson and Timberlake were “proven, experienced talent”).

⁶⁰ See *CBS Response*, App. B at Bates stamped p. 72. Confidential Appendix 4.

⁶¹ See *CBS Response*, App. B at Bates stamped pgs. 39, 452-54. Confidential Appendix 5. Cf. *CBS Radio License, Inc. (WLLD(FM))*, Notice of Apparent Liability for Monetary Forfeiture, 15 FCC Rcd 23881, 23883, ¶ 8 (Enf. Bur. 2000) (given licensee’s awareness of the actual language used in performers’ recordings, it should have taken precautions to avoid airing actionably indecent material during a live, unscripted broadcast).

⁶² See *Super Bowl NAL*, 19 FCC Rcd at 19238-39, ¶ 19; *CBS Response*, App. D at Bates stamped pgs. 2659.

⁶³ See *CBS Response*, App. B at Bates stamped p. 462. Confidential Appendix 6.

⁶⁴ See *CBS Response*, App. B at Bates stamped p. 458. Confidential Appendix 7.

⁶⁵ See *CBS Response*, App. B at Bates stamped pgs. 503-04, 511, 527. Confidential Appendix 5, 8. See also *supra*, ¶ 4. The risk of departures from the script was heightened here not only by the suggestive lyrics, but also by the fact that the line which occasioned Jackson’s nudity was the culminating one in the script; the record reflects both the performers’ and the producers’ desire for a high-impact grand finale to the show. Confidential Appendix 9.

foreseeable risk in a halftime show seeking to push the envelope and replete with sexual content that performers might depart from script and staging, and this is particularly true of Jackson and Timberlake given the sexually-provocative nature of their performance, the fact that it was promoted as “shocking,” and the fact that it culminated with the scripted line “gonna have you naked by the end of this song.”⁶⁶ Based on examination of the record, we conclude that CBS recognized the high risk that this broadcast raised of airing indecent material.⁶⁷

20. Examination of the record also reveals that CBS failed to take adequate precautions to prevent the airing of unscripted indecent material. Aware of the risk of visual and spoken deviations from the script and staging -- that something spontaneous might occur or be said -- CBS made a calculated decision. It chose to rely on a five-second audio delay that would enable it to bleep offensive language but would not enable it to block unscripted visual moments. Thus, it could not cut off Jackson’s “costume reveal” when it occurred – and it had no expectation that it would be able to block any indecent images.⁶⁸ Only *after* the Super Bowl halftime show – for the broadcast of the 2004 Grammy Awards – did CBS institute an audio *and* video delay “to ensure that no unexpected or unplanned video images would be broadcast.”⁶⁹ CBS asserts that the delay used for the 2004 Grammy Awards was “unprecedented.”⁷⁰ But CBS does not argue that use of a delay mechanism capable of editing video images during the Super Bowl halftime show would not have been feasible. The fact that use of such a delay mechanism would have been “far more technically complex and involved more broadcast standards staff to implement” than the delay that CBS actually used hardly excuses its omission under these circumstances.⁷¹ Furthermore, CBS also failed to adopt other precautions available to it. For example, MTV’s agreements with the performers did not require them to conform to the script or to CBS’s broadcast standards and practices, notwithstanding the fact that MTV’s agreement with the NFL contained provisions to this effect.⁷² In addition, the record contains no evidence that MTV or CBS communicated CBS’s broadcast standards and practices to Jackson, Timberlake, or Jackson’s choreographer before the show, despite the highly sexualized nature of the performances and the fact that

⁶⁶ See *Super Bowl NAL*, 19 FCC Rcd at 19237, ¶ 17 n.54, citing *Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards” Program*, 19 FCC Rcd 4975, 4979 (2004) (network could have anticipated that a recipient at a live award ceremony might use profanity because similar mishaps had occurred in the past). CBS points out that the *Golden Globe Awards Order* was released after the Super Bowl telecast, *Opposition* at 19, but the issue here is whether CBS could have anticipated an unscripted costume reveal, not whether it had notice of the *Golden Globe Awards Order*.

⁶⁷ See, e.g., *supra*, ¶¶ 2, 4 and n. 4.

⁶⁸ See *Opposition* at 5 (“Historically, a five-second delay has been adequate to preclude the broadcast of any spontaneous or unplanned audio material. With such an arrangement, an individual from the broadcast standards department monitors the transmission of a live event and manually ‘hits the button’ to delete any objectionable material before it is broadcast. Although both the audio and visual transmission is delayed, five seconds does not provide sufficient time to edit video images. Accordingly, the precaution of a five-second delay could not prevent the broadcast of the unexpected images at the end of the halftime show.”) (emphasis added). As indicated above, CBS also had reason to believe that its five-second audio delay might be inadequate to edit unscripted audio material during the halftime show. See note 63 *supra* and accompanying text.

⁶⁹ *CBS Response* at 5.

⁷⁰ *Id.* at 5, n.13.

⁷¹ *CBS Response* at 5, n.13.

⁷² *CBS Response*, App. B-C at Bates stamped pgs. 168-72, 431-34, 2152-2332, 2336-42, 2469. Confidential Appendix 10. CBS did not provide an executed agreement for either Jackson or Timberlake in response to the LOI, but none of the contract drafts provided by CBS refers to a script or to broadcast standards and practices. The executed agreement for Jackson’s choreographer likewise contains no such references.

MTV's contract with the NFL required MTV to communicate those standards and practices to all performers.⁷³

21. CBS also overstates the level of care it exercised in overseeing the halftime production. Critically, it failed to investigate Jackson's choreographer's "shocking moments" prediction, which was posted on MTV's website, despite CBS's concern about unscripted remarks or actions.⁷⁴ In addition, contrary to its contention,⁷⁵ each aspect of the halftime show was not reviewed in advance by CBS's Program Practices Department. As stated above, MTV learned for the first time on the morning of the Super Bowl telecast of plans for dancers to use tearaway cheerleading outfits to act out the line "I wanna take my clothes off."⁷⁶ It does not appear that these plans were reviewed by CBS's Program Practices Department because the rehearsals that CBS, MTV and NFL representatives reviewed occurred several days before the Super Bowl telecast, and the dancers were not in costume during the scene in question.⁷⁷

22. Under these circumstances, we believe that CBS can and should be held responsible for the patently offensive material that it broadcast to a nationwide audience. A contrary result would permit a broadcast licensee to stage a show that "pushes the envelope," send that show out over the air waves, knowingly taking the risk that performers will engage in offensive unscripted acts or use offensive unscripted language, and then disavow responsibility – leaving no one legally responsible for the result. We believe that these are fully appropriate circumstances for application of the "conscious and deliberate . . . omission" basis for finding "willfulness" incorporated by Congress into Section 503(b) of the Act.⁷⁸

⁷³ See Confidential Appendix 10. Because CBS's failure to take reasonable precautions to prevent the broadcast of actionably indecent material was conscious and deliberate, its reliance on *Mega Communications of New Britain Licensee, L.L.C.*, 19 FCC Rcd 11373 (Enf. Bur. 2004), is misplaced. See *Opposition* at 36, n.57 ("The same result should apply here, where Viacom took all reasonable precautions based on past experience—including inspecting *Ms. Jackson's costume*—but an unforeseeable violation nevertheless occurred."). The Bureau held in *Mega* that a licensee did not commit a willful violation of the Commission's antenna structure fencing requirements because it conducted regular inspections in compliance with those requirements and "the problem occurred shortly after an inspection by Mega." As the above discussion indicates, however, CBS consciously failed to prevent the airing of indecent material. Moreover, the *Mega* case is distinguishable because it involved actions by a third party, not the licensee. *Vernon Broadcasting, Inc.*, Memorandum Opinion and Order, 60 RR 2d 1275 (1986), illustrates this distinction. In *Vernon*, the Commission rescinded a forfeiture liability for a tower fencing violation as not willful, while affirming a liability for an unintentional violation of the public file rule. The distinction between the two situations was that the damage to the fence was caused by vandals, despite the station's regular process of inspections and repairs, whereas the public file violation arose from the station's own actions.

⁷⁴ See note 62 *supra* and accompanying text. CBS maintains that it interpreted the "shocking moments" quote innocently, stating that it believed the quote referred to Timberlake's surprise guest appearance, and that it "did not stand out because such hyperbolic language is not uncommon in the music world." *Opposition* at 7-8. As the Commission has indicated, CBS's explanation lacks credibility. See *NAL*, 19 FCC Rcd at 19239, n.64 ("at the start of the halftime segment, MTV included an onscreen credit for Timberlake, hardly a disclosure that would be made ten minutes before his appearance, had his participation in the program been the 'shocking moments' that it had publicized for days on its Internet site."). CBS's explanation also is dubious in light of the fact that the quote referred to "moments" in the plural, whereas it would have been expected to refer to a "moment" if it only concerned Timberlake's appearance. CBS has never provided a statement from Jackson's choreographer to explain what he meant by the quote. But even accepting CBS's argument that the choreographer's comment may have been innocent hyperbole, it should at least have caused CBS to look into the matter, given the level of concern at CBS and the NFL about the edgy lyrics and the possibility of inappropriate script departures. CBS gives no indication that it did so.

⁷⁵ *Opposition* at 4. See *CBS Response* at 9-10.

⁷⁶ See *CBS Response*, App. B at Bates stamped p. 458.

⁷⁷ See *CBS Response* at 9, App. B at Videotapes 6, 8 (Jackson/Timberlake Dress Rehearsal).

⁷⁸ 47 U.S.C. § 503(b)(1); 47 U.S.C. § 312(f).

Indeed, given the nondelegable nature of broadcast licensees' responsibility for programming and the means available to but declined by CBS to reduce the risk of the broadcast of indecent programming, it is difficult to conceive of a more appropriate context in which to apply that standard.

23. Further, CBS is legally responsible here for another reason; it is fully responsible for the actions of Jackson, Timberlake, and Jackson's choreographer under the doctrine of respondeat superior. "It is well established that traditional vicarious liability rules ordinarily make principals or employers vicariously liable for acts of their agents or employees in the scope of their authority or employment."⁷⁹ The Commission has long held licensees responsible for the unauthorized acts of their agents under this doctrine.⁸⁰ Respondeat superior subjects a principal to vicarious liability when its agent-employee commits a tort while acting within the scope of employment.⁸¹ Whether an agent is an employee for purposes of respondeat superior depends on whether the agent is subject to the principal's control or right to control the performance of the work.⁸² An agent-employee acts within the scope of employment when performing work assigned by the employer or engaging in a course of conduct subject to the employer's control.⁸³

24. It is appropriate to impose vicarious responsibility on CBS for the willful actions of Jackson, Timberlake, and Jackson's choreographer under the doctrine of respondeat superior. Even assuming arguendo that the corporate officers and other corporate employees of CBS and MTV did not act willfully within the meaning of section 503(b)(1), there is no question that the performers did. Timberlake's declaration acknowledges a premeditated plan for him to tear off part of Jackson's clothing during the performance.⁸⁴ Jackson, Timberlake, and Jackson's choreographer were CBS agents for the halftime show performance; Jackson and Timberlake entered into agreements with MTV (MTV and CBS at the time were both Viacom subsidiaries) to perform during the halftime show, and Gil Duldulao contractually agreed to choreograph the dance.⁸⁵ Based on examination of the record, we also believe that the three were CBS employees for purposes of applying the principle of respondeat superior. CBS had the right to control, and in fact exercised considerable control over, the halftime show:

Each aspect of the halftime show was scripted in advance and a script of the halftime show was reviewed by the CBS Program Practices Department. In addition, employees of CBS,

⁷⁹ *Meyer v. Holley*, 537 U.S. 280, 285 (2003) (citations omitted).

⁸⁰ See *Dial-a-Page, Inc.*, 8 FCC Rcd 2767 (1993), *recon. den.*, 10 FCC Rcd 8825 (1995) (rule violation resulting from employee error was fully attributable to licensee under doctrine of respondeat superior and "willful" within the meaning of § 503(b)(1)); *Wagenvoord Broadcasting Co.*, 35 FCC 2d 361 (1972); *Eure Family Ltd. Partnership*, 17 FCC Rcd 7042, 7044 ¶ 7 (Enf. Bur. 2002) ("it is a basic tenet of agency law that the actions of an employee or contractor are imputed to the employer and 'the Commission has consistently refused to excuse licensees from forfeiture penalties where actions of employees or independent contractors have resulted in violations.'").

⁸¹ *Restatement (Second) of Agency* § 219(1) (1957) (2nd Restatement). See also *Restatement (Third) of Agency* § 7.07 (T.D. No. 5 2004) (3rd Restatement).

⁸² 2nd Restatement § 220. See also 3rd Restatement § 7.07.

⁸³ 2nd Restatement § 228.

⁸⁴ *CBS Response* at Att. 8 ("At the end of the song, I attempted to perform a 'costume reveal' by removing a portion of Ms. Jackson's costume and revealing the undergarment beneath. I had neither the intention nor the knowledge that the reveal could expose her right breast. The decision to add the 'costume reveal' to the finale was made by Ms. Jackson and her choreographer after final rehearsals for the Halftime Show. They informed me just before the performance began.").

⁸⁵ See *CBS Response*, App. B-C at Bates stamped pgs. 168-72, 431-34, 2152-2332, 2336-42; 2nd Restatement § 1 ("Agency is a legal concept which depends upon the existence of required factual elements: the manifestation by the principal that the agent shall act for him, the agent's acceptance of the undertaking and the understanding of the parties that the principal is to be in control of the undertaking."), cited in *Meyer v. Holley*, 537 U.S. at 286.

MTV, and the NFL attended two full run-throughs of the halftime show on Thursday, January 29 to review the production. The run-throughs were videotaped, and reviewed by representatives of CBS and the NFL. MTV producers then used the tape to individually review the rehearsal performances with the talent to instruct them on changes to be made in the actual performance on Super Bowl Sunday. Based on these procedures, certain changes were made to the show. For example, the costume worn by one of the dancers during the run-throughs was considered to be too revealing, and she was instructed to change it before the final show. There was also concern about some of the language, and changes were suggested. . . . Because Ms. Jackson was not in costume during the run-throughs, an executive producer subsequently checked to make sure that Ms. Jackson's wardrobe would conform to broadcast standards during the actual performance.⁸⁶

25. Thus, CBS exercised control over all aspects of the performers' conduct in the performance of the halftime show, including the script, staging and wardrobe used during the Jackson-Timberlake performance. Other factual indicia of control are present as well. CBS (through MTV) provided the set and set elements for the performance and dictated its time and place, as well as the time and place of production and press-related activities.⁸⁷ Many courts have held entertainers to be employees for respondeat superior and other purposes under similar circumstances.⁸⁸ Finally, the performers' actions were clearly within the scope of their employment. In this regard, the determining factor is not whether their actions were authorized by CBS but whether the performance was subject to CBS's control.⁸⁹ Put differently, their conduct was incident to the performance rather than "an

⁸⁶ *CBS Response* at 9-10. Although CBS had the right to exercise control over the halftime show, and in fact exercised considerable control, there were, as discussed above, significant lapses in the level of care that it exercised in overseeing the halftime production. See para. 17-22. Those lapses in supervision do not, however, negate the fact that the performances were subject to CBS's control and that CBS was thus vicariously responsible for the performers' actions within the scope of their employment under the doctrine of respondeat superior. See note 87 *infra*.

⁸⁷ *Id.* at Bates-stamped pgs. 168-72, 431-34, 2336-42. See 2nd Restatement § 220; 3rd Restatement § 7.07 (relevant factual indicia of control include "whether the agent or the principal supplies the tools and other instrumentalities required for the work and the place in which to perform it").

⁸⁸ See *P.T. Barnum's Nightclub v. Duhamell*, 766 N.E.2d 729 (Ind.App. 2002) (referring to 2nd Restatement factors in affirming denial of summary judgment as to whether male exotic dancer was an employee for respondeat superior purposes where "the Club exercised some degree of control over Ajishegiri's work, particularly with regard to work hours, conditions, and regulations, and was in the business of displaying adult entertainers (primarily female), but did not dictate the stylistic aspects of Ajishegiri's performance"); *White v. Frenkel*, 615 So.2d 535, 538-40 (La. App. 3 Cir. 1993) (professional wrestler was employee for respondeat superior purposes where, *inter alia*, promoter controlled who would win and who would lose wrestler's matches and had total control over who, where, and when wrestler wrestled); *Jeffcoat v. State Dept. of Labor*, 732 P.2d 1073, 1075-78 (Alaska 1987) (dancer was employee for purposes of state labor statute where, *inter alia*, club exercised some control over costumes and dances and total control over music and dancers' working hours); *Jack Hammer Assoc. v. Delmy Productions, Inc.*, 499 N.Y.S.2d 418, 419-20 (1st Dept. 1986) (actor was employee for purposes of determining availability of workers' compensation benefits where actor entered into a written contract for a stipulated sum for a term certain, time and place for his work was determined by production company, actor had to perform in a certain number of shows at specified times, and he had to follow a script and was subject to supervision of play's director). New York state courts have consistently held entertainers to be employees of the producers who engage them. See *Jack Hammer Assoc.*, 499 N.Y.S.2d at 419-20; *Challis v. Nat'l Producing Co.*, 88 N.Y.S.2d 731 (3d Dept. 1949) (circus clown); *Berman v. Barone*, 88 N.Y.S.2d 327, 328 (3d Dept. 1949) (ballet dancer and variety artist). See also *In re Sims*, 602 N.Y.S.2d 225 (3d Dept. 1993) (finding a sufficient degree of direction and control by a conductor who hired musicians for imposition of respondeat superior liability although supervision was not direct). Here, the performers' agreements contain choice-of-law provisions specifying New York law. *CBS Response* at Bates-stamped pgs. 168-72, 431-34, 2336-42.

⁸⁹ 2nd Restatement § 228.

independent course of conduct intended to serve no purpose of the employer.”⁹⁰ Accordingly, the performers’ willful actions are fully attributable to CBS under the doctrine of respondeat superior irrespective of whether the performers’ actions were authorized by CBS.

26. *Amount of Forfeiture.* CBS offers a variety of arguments that the forfeiture proposed in the *NAL* is excessive or unfair. First, it contends that it is unfair to impose a forfeiture on it, when no forfeiture was imposed on those affiliates of the CBS Television Network that are not owned by CBS.⁹¹ Second, CBS argues that the *NAL* improperly cites “the history of recent indecent broadcasts by CBS owned radio stations” with a footnote to cases that are not completely adjudicated.⁹² Third, CBS maintains that the forfeiture is excessive in relation to the duration of the nude scene and in light of CBS’s precautionary measures.⁹³ Fourth, CBS argues that it had no prior notice that a brief scene of partial nudity constituted actionable indecency and thus should not be subject to any forfeiture.⁹⁴

27. We conclude that CBS’s arguments do not justify a reduction in the amount of the proposed forfeiture. The *NAL* proposed no forfeiture against CBS Television Network affiliate stations that are not owned by Viacom because there is no evidence that the licensees of any of those stations played any role in the selection, planning or approval of the halftime show or that they could have reasonably anticipated that CBS’s production of the halftime show would include partial nudity. CBS has not provided any contrary evidence. In contrast, CBS admits that it was closely involved in the production of the halftime show, and that its MTV affiliate produced it.

28. With respect to the *NAL*’s reference to the history of indecent broadcasts by CBS’s radio stations, we note that those cases have been resolved by a Consent Decree in which CBS admitted to certain violations, and the Commission agreed not to use that admission against CBS in any other proceeding, including this one.⁹⁵ Accordingly, we no longer rely on that history of indecent broadcasts in reaching our determination here. Nevertheless, we remain convinced that the upward adjustment to the statutory maximum is appropriate in light of all of the factors enumerated in section 503(b)(2)(D) of the Act, particularly the circumstances involving the preparation, execution and promotion of the halftime show by CBS, the gravity of the violation in light of the nationwide audience for the indecent broadcast,

⁹⁰ 3rd Restatement § 7.07 (“an employee’s conduct is outside the scope of employment when it occurs within an independent course of conduct intended to serve no purpose of the employer.”). *See also id.* (“Alternative formulations avoid the use of motive or intention to determine whether an employee’s tortious conduct falls within the scope of employment. These tests vary somewhat in how they articulate the requisite tie between the tortfeasor’s employment and the tort. In general, such a tie is present only when the tort is a generally foreseeable consequence of the enterprise undertaken by the employer or is incident to it.”).

⁹¹ *Opposition* at 14.

⁹² *Id.* at 39-40. CBS relies on section 504(c) of the Act, which provides that the Commission may not use the issuance of a notice of apparent liability in any other proceeding involving that person unless the forfeiture has been paid or there is a final court order for the payment of the forfeiture. CBS argues that the Commission not only must ignore cases in which there has been no final adjudication, but that it must consider CBS’s long record of compliance with broadcast standards. *Id.* at 42.

⁹³ *Id.* at 41-43.

⁹⁴ *Id.* at 43.

⁹⁵ *See Viacom Inc.*, Order, 19 FCC Rcd 23100 (2004), *petition for recon. pending*. In light of that Consent Decree, entered into after the *NAL*, we conclude that CBS’s history of past offenses is not relevant to our analysis. We note, however, that we disagree with, and have previously rejected, CBS’s interpretation of section 504(c). We have made it clear that the Commission may rely on the underlying facts that provide the basis for a notice of apparent liability in a separate case. *See Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 15 FCC Rcd 303, 304-05, ¶¶ 3-5 (1999) (“*Forfeiture Policy Statement*”), *recon. denied*, 17 FCC Rcd 303 (1999).

and CBS's ability to pay.⁹⁶ The crux of CBS's defense is that the blame lies with the performers who planned and carried out the costume reveal that resulted in the exposure of Jackson's breast. However, CBS's attempt to place blame on the performers in question is unavailing; as discussed above, the performers were acting as CBS's agents and CBS is responsible for their actions within the scope of their employment. In addition, CBS planned almost every element of the halftime show. In the course of doing so, it brushed off warning signs of the potential for actionably indecent behavior and failed to take adequate precautions to prevent the airing of indecent material. As a result of its decisions, an enormous nationwide audience,⁹⁷ including numerous children, was subjected without warning to the offensive spectacle of a man tearing off a woman's clothing on stage in the midst of a sexually charged performance. Finally, regarding the element of ability to pay and financial disincentives to violate the Act and rules,⁹⁸ we find that CBS's size and resources, without question, support an upward adjustment to the maximum statutory forfeiture of \$550,000 because a lesser amount would not serve as a significant penalty or deterrent to a company of its size and resources.⁹⁹

29. We also reject CBS's claim that it lacked prior notice that a brief scene of partial nudity might result in a forfeiture. Our rule against the broadcast of indecent material outside of the safe harbor hours has been in effect since 1993,¹⁰⁰ and our criteria for determining whether material is indecent were clearly spelled out in the *Policy Statement* issued in 2001. Furthermore, the *Young Broadcasting* decision, holding that a brief display of male frontal nudity was an apparent violation of that rule, was released shortly before the subject Super Bowl broadcast.¹⁰¹ Thus, CBS was on notice that the broadcast of partial nudity could violate the indecency rule and statute. CBS tries to liken its situation to that of NBC in the *Golden Globe Order*, where we declined to impose a forfeiture because we overruled precedent that had specifically held that isolated expletives were not actionably indecent.¹⁰² We have never held, however, that fleeting nudity is not actionably indecent. On the contrary, as discussed above, we held that fleeting nudity was indecent in *Young Broadcasting* before the Super Bowl broadcast at issue here. The fact that this case is not identical to *Young Broadcasting* (or, indeed, any other case) certainly does not preclude us from imposing a forfeiture. The facts of most indecency cases are not identical to any that precede them. For example, the Commission has not been confronted before this case with a broadcast where a male performer ripped off the clothing of a female performer to reveal her breast in the midst of a song containing repeated sexual references and a dance containing simulated sexual activities. But any argument that CBS lacked adequate notice that such a performance would run afoul of the Commission's indecency regulations is groundless. The Commission is applying an established standard

⁹⁶ See 47 U.S.C. § 503(b)(2)(D) (the Commission "shall take into account the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require"); *NAL*, 19 FCC Rcd at 19237, ¶ 17.

⁹⁷ See http://www.usatoday.com/sports/football/super/2004-02-02-ratings_x.htm (stating that Super Bowl XXXVIII was "most-watched Super Bowl in history" with estimated 143.6 million viewers and 41.3 national rating).

⁹⁸ See 47 C.F.R. § 1.80, Note to Paragraph (b)(4), Section II, Upward Adjustment Criterion No. 2.

⁹⁹ See "Viacom Takes Big Write-Down, Creating a Loss," *New York Times*, Feb. 25, 2005, at C1 (reporting that Viacom, Inc. took a non-cash charge for 2004 to write down the value of its assets by 27%, to \$49 billion, and that the company's revenue for the final quarter of 2004 was \$6.3 billion); "While Shares Fell, Viacom Paid Three \$160 Million," *New York Times*, April 16, 2005, at C1 (reporting that the company's top three executives received a total of \$160 million in compensation for 2004).

¹⁰⁰ See *Enforcement of Prohibitions Against Broadcast Indecency*, Report and Order, 8 FCC Rcd 704 (1993), modified, 10 FCC Rcd 10558 (1995). CBS, Inc. and Infinity Broadcasting Corporation, both of which became Viacom, Inc. subsidiaries, submitted comments in that rulemaking proceeding. *Id.*, 8 FCC Rcd at 712.

¹⁰¹ *Young Broadcasting*, 19 FCC Rcd at 1751 (release date of January 27, 2004).

¹⁰² *Opposition* at 19, 27-28.

to the facts of a new case and is not overruling precedent. Thus, it is entirely lawful and appropriate to impose a forfeiture when we determine that the licensee has violated that standard.¹⁰³

30. *Constitutional Issues.* CBS offers a number of arguments attacking the constitutional underpinnings of the Commission's indecency framework. We find no merit in those arguments.

31. We reject CBS's arguments that the Commission's indecency standard is vague, overbroad, and vests the Commission with excessive discretion.¹⁰⁴ Courts have upheld the indecency standard applied in the *NAL* and in this *Order* against facial vagueness and overbreadth challenges.¹⁰⁵ The D.C. Circuit also has rejected the argument that the Commission's indecency standard is overbroad because it may encompass material with serious merit.¹⁰⁶ We do not believe that requiring broadcasters to exercise care to prevent a televised depiction of naked sexual organs prior to 10 p.m. unduly "chills" exercise of their First Amendment rights. As the D.C. Circuit observed, "some degree of self-censorship is inevitable and not necessarily undesirable so long as proper standards are available."¹⁰⁷

32. We also disagree with CBS that the *NAL* is inconsistent with the Supreme Court's *Pacifica* decision.¹⁰⁸ *Pacifica* stressed the importance of contextual analysis such as that reflected in this *Order*.¹⁰⁹ Accordingly, we do not read *Pacifica* as precluding an indecency finding based on a brief depiction of partial nudity. The Supreme Court specifically stated that it had not decided whether an occasional expletive in a different setting (e.g., a two-way radio conversation between a cab driver and a dispatcher, or a telecast of an Elizabethan comedy) would justify any sanction.¹¹⁰ The Court's emphasis on the narrowness of its holding was meant to highlight the "all-important" role of context, not to deprive

¹⁰³ As we find CBS legally responsible for the indecent broadcast based on both its own willful omission and its vicarious liability for the willful acts of its agents under the principle of respondeat superior, we need not address whether it could also be held responsible under Section 503(b)(1)(D) without a showing of willfulness.

¹⁰⁴ *Opposition* at 65-77.

¹⁰⁵ See *ACT III*, 58 F.3d at 659 (upholding the Commission's indecency definition against facial vagueness and overbreadth challenges). CBS's arguments about the Commission's discretion focus on the Commission's investigatory practices in cases where a complaint is based on a description of allegedly offensive programming, and not supported by a tape or a transcript. *Opposition* at 74-76. However, those arguments have nothing to do with this case, in which there was no dispute about what was broadcast and in which CBS issued a public apology to viewers for the violation of its broadcast standards. Similarly, CBS's contention about delay in the Commission's enforcement process (*Opposition* at 76-77) is irrelevant to this case. We also note that the D.C. Circuit has previously rejected this argument. *Action for Children's Television v. FCC*, 59 F.3d 1249, 1261-62 (D.C. Cir. 1995) ("*ACT IV*"), *cert. denied*, 516 U.S. 1072 (1996).

¹⁰⁶ *Action for Children's Television v. FCC*, 852 F.2d 1332, 1339 (D.C. Cir. 1988) ("*ACT I*") ("serious merit" need not, in every instance, immunize material from FCC channeling authority").

¹⁰⁷ *ACT IV*, 59 F.3d at 1261; see *ACT III*, 58 F.3d at 666 ("Whatever chilling effect may be said to inhere in the regulation of indecent speech, these have existed ever since the Supreme Court first upheld the FCC's enforcement of section 1464 of the Radio Act.").

¹⁰⁸ *Opposition* at 44-53. In making this argument, CBS generally ignores the specific context of this case, preferring instead to opine about live television coverage of political and other events and even to lament "the end of live broadcasting as we know it." *Id.* at 48. We reiterate that our decision is limited to the specific context of this case, which involves a Super Bowl halftime entertainment show that was produced by CBS, using performers selected and paid by CBS. For the reasons stated in the *NAL* and in this *Order*, there is ample support for our conclusion that CBS failed to take reasonable precautions to ensure that no actionably indecent material was broadcast in this context.

¹⁰⁹ *Pacifica*, 438 U.S. at 742 ("indecency is largely a function of context – it cannot be adequately judged in the abstract").

¹¹⁰ *Id.*, 438 at 750; see *id.* at 760-61 (Powell, J., concurring).

the Commission of power to regulate broadcast indecency except in situations involving extended or repetitious expletives or depictions of sexual or excretory organs or activities.¹¹¹

33. CBS also claims that the constitutional validity of our indecency enforcement practice has been undermined by a changed legal and technological landscape, citing the Supreme Court's decisions in *United States v. Playboy Entertainment Group, Inc.*,¹¹² *Reno v. ACLU*,¹¹³ and *Denver Area Educational Telecommunications Consortium v. FCC*,¹¹⁴ and pointing to the pervasiveness of cable and satellite television, and the development of online media and media recording technology (e.g., videocassette recorders, DVD recorders and personal video recorders featuring time-shifting technology) and the V-chip.¹¹⁵ Again, we disagree. In striking down as unconstitutional an Internet indecency standard, the Supreme Court expressly recognized in *Reno* the "special justifications for regulation of the broadcast media," citing *Red Lion* and *Pacifica*.¹¹⁶ Moreover, in *Denver Area*, the Court addressed the constitutionality of a Commission order implementing provisions of the 1992 Cable Television Consumer Protection and Competition Act that concerned indecent and obscene cable programming, not over-the-air broadcasting. We find nothing in that opinion that undermines the constitutionality of our framework for enforcing our rule against the broadcast of indecent material outside the safe harbor hours.

34. Furthermore, CBS's arguments about new technologies have no apparent application to this case. The V-chip technology cannot be utilized to block sporting events such as the Super Bowl because sporting events are not rated.¹¹⁷ Nevertheless, even if the V-chip could be used to block sporting events, based on CBS's representations it appears that CBS would not have rated the Super Bowl halftime show as inappropriate for children.

35. Finally, we address CBS's dire warnings that imposing sanctions in this case will have a chilling effect on live coverage of public events, such as national political conventions and presidential scandals, and "violates the Commission's own pledge" to "take no action which would inhibit broadcast

¹¹¹ *Id.* at 750. The D.C. Circuit upheld the Commission's interpretation of *Pacifica* as not imposing such limits. See *ACT I*, 852 F.2d at 1338 (upholding the Commission's decision to depart from its prior policy of acting only in cases involving "the repeated use, for shock value, of words similar to those satirized in the Carlin 'Filthy Words' monologue. . . . The FCC rationally determined that its former policy could yield anomalous, even arbitrary, results.").

¹¹² 529 U.S. 803 (2000).

¹¹³ 521 U.S. 844 (1997).

¹¹⁴ 518 U.S. 717 (1996).

¹¹⁵ *Opposition* at 53-61.

¹¹⁶ Similarly, in *Playboy*, the Court distinguished broadcast services from cable due to differences in the nature of those media. See *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. at 815.

¹¹⁷ See *Implementation of Section 551 of the Telecommunications Act of 1996*, Report and Order, 13 FCC Rcd 8232, 8242-43, ¶ 21 (1998) (news programming, sports programming and advertisements are not included in the V-chip ratings system). Outside of the context of exempt programming such as sports programming, we agree that the V-chip is an important protection, but it does not eliminate the need for enforcing our indecency rule or undermine the constitutionality of that rule. We note that last year, CBS and the other major networks announced their participation with the Advertising Council in an educational campaign designed to improve awareness of the V-chip. The announcement stated that less than 10 percent of all parents are using the V-chip and 80 percent of all parents who currently own a television set with a V-chip are not aware that they have it. See News Release, "The Advertising Council and Four Major Television Networks Announce Unprecedented Partnership to Educate Parents About the V-Chip," http://www.adcouncil.org/about/news_033004 (March 30, 2004). In addition, numerous television sets in U.S. households lack V-chips.

journalism.”¹¹⁸ While we are sensitive to the impact of our decisions on speech and, in particular, on live news coverage, we do not believe that CBS’s fears about the chilling effect of our decision here are well-founded. As discussed in detail above, this case involves a staged show planned by CBS and its affiliates, under circumstances where they had the means to exercise control and good reasons to take precautionary measures. These circumstances are obviously completely different from live coverage of breaking news events, which are not controlled by broadcasters, and this decision in no way suggests that we are imposing strict liability for such coverage or, indeed, any other programming.

36. *Conclusion.* Under section 503(b)(1)(B) of the Act, any person who is determined by the Commission to have willfully failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a monetary forfeiture penalty.¹¹⁹ In order to impose such a forfeiture penalty, the Commission must issue a notice of apparent liability, the notice must be received, and the person against whom the notice has been issued must have an opportunity to show, in writing, why no such forfeiture penalty should be imposed.¹²⁰ The Commission will then issue a forfeiture if it finds by a preponderance of the evidence that the person has violated the Act or a Commission rule. For the reasons set forth above, we conclude under this standard that CBS is liable for a forfeiture for its willful violation of 18 U.S.C. § 1464 and section 73.3999 of the Commission’s rules.

37. The Commission’s *Forfeiture Policy Statement* sets a base forfeiture amount of \$7,000 for transmission of indecent materials.¹²¹ The *Forfeiture Policy Statement* also specifies that the Commission shall adjust a forfeiture based upon consideration of the factors enumerated in section 503(b)(2)(D) of the Act, 47 U.S.C. § 503(b)(2)(D), such as “the nature, circumstances, extent and gravity of the violation, and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.”¹²² In this case, taking all of these factors into consideration, for the reasons set forth above, we find that the *NAL* properly proposed the statutory maximum forfeiture of \$550,000 against CBS.

IV. ORDERING CLAUSES

38. Accordingly, IT IS ORDERED THAT, pursuant to section 503(b) of the Act¹²³, and sections 0.311 and 1.80(f)(4) of the Commission’s Rules¹²⁴, CBS Corporation IS LIABLE FOR A MONETARY FORFEITURE in the amount of \$550,000 for willfully violating 18 U.S.C. § 1464 and section 73.3999 of the Commission’s rules.

39. Payment of the forfeiture shall be made in the manner provided for in section 1.80 of the Commission’s rules within 30 days of the release of this *Order*. If the forfeiture is not paid within the period specified, the case may be referred to the Department of Justice for collection pursuant to section 504(a) of the Act.¹²⁵ Payment of the forfeiture must be made by check or similar instrument, payable to

¹¹⁸ *Opposition* at 53, quoting *Pacifica Reconsideration Order*, 59 FCC 2d at 893. See also *Opposition* at ix, x, 46, 48-53.

¹¹⁹ 47 U.S.C. § 503(b)(1)(B); 47 C.F.R. § 1.80(a)(1).

¹²⁰ 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(f).

¹²¹ *Forfeiture Policy Statement*, 12 FCC Rcd at 17113.

¹²² *Id.*, 12 FCC Rcd at 17100-01, ¶ 27.

¹²³ 47 U.S.C. § 503(b).

¹²⁴ 47 C.F.R. §§ 0.311, 1.80(f)(4).

¹²⁵ 47 U.S.C. § 504(a).

the order of the Federal Communications Commission. The payment must include the NAL/Acct. No. referenced above and the FRN(s) referenced in the Appendix. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 358340, Pittsburgh, PA 15251-8340. Payment by overnight mail may be sent to Mellon Bank/LB 358340, 500 Ross Street, Room 1540670, Pittsburgh, PA 15251. Payment by wire transfer may be made to ABA Number 043000261, receiving bank Mellon Bank, and account number 911-6106.

40. Requests for payment under an installment plan should be sent to: Associate Managing Director - Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.¹²⁶

41. IT IS FURTHER ORDERED THAT a copy of this FORFEITURE ORDER shall be sent by Certified Mail, Return Receipt Requested to CBS Corporation, 2000 K Street, N.W., Suite 725, Washington, DC 20006, and to its counsel, Robert Corn-Revere, Esquire, Davis Wright Tremaine LLP, 1500 K Street, N.W., Washington, DC 20005.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

¹²⁶ See 47 C.F.R. § 1.1914.

APPENDIX

CBS-OWNED
CBS TELEVISION NETWORK AFFILIATES

Licensee	FCC Registration Number	Call Sign	Community of License	Facility ID No.
CBS Stations Group of Texas L.P.	0001767078	KEYE-TV	Austin, TX	33691
Viacom Inc.	0003612447	WJZ-TV	Baltimore, MD	25455
Viacom Inc.	0003612447	WBZ-TV	Boston, MA	25456
CBS Broadcasting Inc.	0003482189	WBBM-TV	Chicago, IL	9617
CBS Stations Group of Texas L.P.	0001767078	KTVT	Ft. Worth, TX	23422
CBS Television Stations Inc.	0003482189	KCNC-TV	Denver, CO	47903
CBS Broadcasting Inc.	0003482189	WFRV-TV	Green Bay, WI	9635
CBS Broadcasting Inc.	0003482189	WJMN-TV	Escanaba, MI	9630
CBS Broadcasting Inc.	0003482189	WWJ-TV	Detroit, MI	72123
CBS Broadcasting Inc.	0003482189	KCBS-TV	Los Angeles, CA	9628
CBS Television Stations Inc.	0003482189	WFOR-TV	Miami, FL	47902
CBS Broadcasting Inc.	0003482189	WCCO-TV	Minneapolis, MN	9629
CBS Broadcasting Inc.	0003482189	KCCO-TV	Alexandria, MN	9632
CBS Broadcasting Inc.	0003482189	KCCW-TV	Walker, MN	9640
CBS Broadcasting Inc.	0003482189	KDKA-TV	Pittsburgh, PA	25454
CBS Broadcasting Inc.	0003482189	KYW-TV	Philadelphia, PA	25453
CBS Broadcasting Inc.	0003482189	WCBS-TV	New York, NY	9610
KUTV Holdings, Inc.	0004499273	KUTV	Salt Lake City, UT	35823
KUTV Holdings, Inc.	0004499273	KUSG	St. George, UT	35822
CBS Broadcasting Inc.	0003482189	KPIX-TV	San Francisco, CA	25452

**STATEMENT OF
CHAIRMAN KEVIN J. MARTIN**

Re: Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show; Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005; Complaints Against Various Television Licensees Concerning Their December 31, 2004 Broadcast of the Program "Without A Trace"

Congress has long prohibited the broadcasting of indecent and profane material and the courts have upheld challenges to these standards. But the number of complaints received by the Commission has risen year after year. They have grown from hundreds, to hundreds of thousands. And the number of programs that trigger these complaints continues to increase as well. I share the concerns of the public - and of parents, in particular - that are voiced in these complaints.

I believe the Commission has a legal responsibility to respond to them and resolve them in a consistent and effective manner. So I am pleased that with the decisions released today the Commission is resolving hundreds of thousands of complaints against various broadcast licensees related to their televising of 49 different programs. These decisions, taken both individually and as a whole, demonstrate the Commission's continued commitment to enforcing the law prohibiting the airing of obscene, indecent and profane material.

Additionally, the Commission today affirms its initial finding that the broadcast of the Super Bowl XXXVIII Halftime Show was actionably indecent. We appropriately reject the argument that CBS continues to make that this material is not indecent. That argument runs counter to Commission precedent and common sense.

**STATEMENT OF
COMMISSIONER MICHAEL J. COPPS**

Re: Complaints Regarding Various Television Broadcasts Between January 1, 2002 and March 12, 2005, Notices of Apparent Liability and Memorandum Opinion and Order

Complaints Against Various Television Licensees Concerning Their December 31, 2004 Broadcast of the Program "Without A Trace", Notice of Apparent Liability

Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast Of The Super Bowl XXXVII Halftime Show, Forfeiture Order

In the past, the Commission too often addressed indecency complaints with little discussion or analysis, relying instead on generalized pronouncements. Such an approach served neither aggrieved citizens nor the broadcast industry. Today, the Commission not only moves forward to address a number of pending complaints, but does so in a manner that better analyzes each broadcast and explains how the Commission determines whether a particular broadcast is indecent. Although it may never be possible to provide 100 percent certain guidance because we must always take into account specific and often-differing contexts, the approach in today's orders can help to develop such guidance and to establish precedents. This measured process, common in jurisprudence, may not satisfy those who clamor for immediate certainty in an uncertain world, but it may just be the best way to develop workable rules of the road.

Today's Orders highlight two additional issues with which the Commission must come to terms. First, it is time for the Commission to look at indecency in the broader context of its decisions on media consolidation. In 2003 the FCC sought to weaken its remaining media concentration safeguards without even considering whether there is a link between increasing media consolidation and increasing indecency. Such links have been shown in studies and testified to by a variety of expert witnesses. The record clearly demonstrates that an overwhelming number of the Commission's indecency citations have gone to a few huge media conglomerates. One recent study showed that the four largest radio station groups which controlled just under half the radio audience were responsible for a whopping 96 percent of the indecency fines levied by the FCC from 2000 to 2003.

One of the reasons for the huge volume of complaints about excessive sex and graphic violence in the programming we are fed may be that people feel increasingly divorced from their "local" media. They believe the media no longer respond to their local communities. As media conglomerates grow ever larger and station control moves farther away from the local community, community standards seem to count for less when programming decisions are made. Years ago we had independent programming created from a diversity of sources. Networks would then decide which programming to distribute. Then local affiliates would independently decide whether to air that programming. This provided some real checks and balances. Nowadays so many of these decisions are made by vertically-integrated conglomerates headquartered far away from the communities they are supposed to be serving—entities that all too often control both the distribution *and* the production content of the programming.

If heightened media consolidation is indeed a source for the violence and indecency that upset so many parents, shouldn't the Commission be cranking that into its decisions on further loosening of the ownership rules? I hope the Commission, before voting again on loosening its media concentration protections, will finally take a serious look at this link and amass a credible body of evidence and not act again without the facts, as it did in 2003.

Second, a number of these complaints concern graphic broadcast violence. The Commission states that it has taken comment on this issue in another docket. It is time for us to step up to the plate and tackle the issue of violence in the media. The U.S. Surgeon General, the American Academy of Pediatrics, the American Psychological Association, the American Medical Association, and countless other medical and scientific organizations that have studied this issue have reached the same conclusion: exposure to graphic and excessive media violence has harmful effects on the physical and mental health of our children. We need to complete this proceeding.

**STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN
CONCURRING**

Re: Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show, Forfeiture Order

I have sworn an oath to uphold the Constitution¹ and to carry out the laws adopted by Congress.² Trying to find a balance between these obligations has been challenging in many of the indecency cases that I have decided. I believe it is our duty to regulate the broadcast of indecent material to the fullest extent permissible by the Constitution because safeguarding the well-being of our children is a compelling national interest.³ I therefore have supported efforts to step up our enforcement of indecency laws since I joined the Commission.

The Commission's authority to regulate indecency over the public airwaves was narrowly upheld by the Supreme Court with the admonition that we should exercise that authority with the utmost restraint, lest we inhibit constitutional rights and transgress constitutional limitations on government regulation of protected speech.⁴ Given the Court's guidance in *Pacifica*, the Commission has repeatedly stated that we would judiciously walk a "tightrope" in exercising our regulatory authority.⁵ Hence, within this legal context, a rational and principled "restrained enforcement policy" is not a matter of mere regulatory convenience. It is a constitutional requirement.⁶

Accordingly, I concur with today's Super Bowl Order, but concur in part and dissent in part with the companion Omnibus Order⁷ because, while in some ways today's Omnibus decision goes too far, in other ways it does not go far enough. Significantly, it abruptly departs from our precedents by adopting a new, weaker enforcement mechanism that arbitrarily fails to assess fines against broadcasters who have aired indecent material. Additionally, while today's Omnibus decision appropriately identifies violations of our indecency laws, not every instance determined to be indecent meets that standard.

We have previously sought to identify all broadcasters who have aired indecent material, and hold them accountable. In the Omnibus Order, however, the Commission inexplicably fines only the licensee whose broadcast of indecent material was the subject of a viewer's complaint, even though we know millions of other Americans were exposed to the offending broadcast. I cannot find anywhere in

¹ U.S. CONST., amend. I.

² Congress has specifically forbidden the broadcast of obscene, indecent or profane language. 18 U.S.C. § 1464. It has also forbidden censorship. 47 U.S.C. § 326.

³ See, e.g., *N.Y. v. Ferber*, 458 U.S. 747, 756-57 (1982).

⁴ See *FCC v. Pacifica Foundation*, 438 U.S. 726, 750 (1978) (emphasizing the "narrowness" of the Court's holding); *Action for Children's Television v. FCC*, 852 F.2d 1332, 1344 (D.C. Cir. 1988) ("*ACT I*") ("Broadcast material that is indecent but not obscene is protected by the [F]irst [A]mendment.").

⁵ See Brief for Petitioner, FCC, 1978 WL 206838 at *9.

⁶ *ACT I*, *supra* note 4, at 1344 ("the FCC may regulate [indecent] material only with due respect for the high value our Constitution places on freedom and choice in what the people say and hear."); *Id.* at 1340 n.14 ("[T]he potentially chilling effect of the FCC's generic definition of indecency will be tempered by the Commission's restrained enforcement policy.").

⁷ *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, Notices of Apparent Liability and Memorandum Opinion and Order (decided March 15, 2006) (hereinafter "*Omnibus Order*").

the law that Congress told us to apply indecency regulations only to those stations against which a complaint was specifically lodged. The law requires us to prohibit the broadcast of indecent material, period. This means that we must enforce the law anywhere we determine it has been violated. It is willful blindness to decide, with respect to network broadcasts we know aired nationwide, that we will only enforce the law against the local station that happens to be the target of viewer complaints. How can we impose a fine solely on certain local broadcasters, despite having repeatedly said that the Commission applies a national indecency standard – not a local one?⁸

The failure to enforce the rules against some stations but not others is not what the courts had in mind when they counseled restraint. In fact, the Supreme Court’s decision in *Pacifica* was based on the uniquely pervasive characteristics of broadcast media.⁹ It is patently arbitrary to hold some stations but not others accountable for the same broadcast. We recognized this just two years ago in *Married By America*.¹⁰ The Commission simply inquired who aired the indecent broadcast and fined all of those stations that did so.

In the *Super Bowl XXXVIII Halftime Show* decision, we held only those stations owned and operated by the CBS network responsible, under the theory that the affiliates did not expect the incident and it was primarily the network’s fault.¹¹ I dissented in part to that case because I believed we needed to apply the same sanction to every station that aired the offending material. I raise similar concerns today, in the context of the Omnibus Order.

The Commission is constitutionally obligated to decide broadcast indecency and profanity cases based on the “contemporary community standard,” which is “that of the average broadcast viewer or listener.” The Commission has explained the “contemporary community standard,” as follows:

We rely on our collective experience and knowledge, developed through constant interaction with lawmakers, courts, broadcasters, public interest groups and ordinary citizens, to keep abreast of contemporary community standards for the broadcast medium.¹²

I am concerned that the Omnibus Order overreaches with its expansion of the scope of indecency and profanity law, without first doing what is necessary to determine the appropriate contemporary community standard.

⁸ See, e.g., *In re Sagittarius Broadcasting Corporation*, Memorandum Opinion and Order, 7 FCC Rcd 6873, 6876 (1992) (subsequent history omitted).

⁹ See *Pacifica Found.*, 438 U.S. at 748-49 (recognizing the “uniquely pervasive presence” of broadcast media “in the lives of all Americans”). In today’s Order, paragraph 10, the Commission relies upon the same rationale.

¹⁰ See *Complaints Against Various Licensees Regarding Their Broadcast of the Fox Television Network Program “Married by America” on April 7, 2003*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 20191, 20196 (2004) (proposing a \$7,000 forfeiture against each Fox Station and Fox Affiliate station); *reconsideration pending*. See also *Clear Channel Broadcast Licenses, Inc.*, 19 FCC Rcd 6773, 6779 (2004) (proposing a \$495,000 fine based on a “per utterance” calculation, and directing an investigation into stations owned by other licensees that broadcast the indecent program). In the instant Omnibus Order, however, the Commission inexplicably fines only the licensee whose broadcast of indecent material was actually the subject of a viewer’s complaint to the Commission. *Id.* at ¶ 71.

¹¹ See *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).

¹² *In re Infinity Radio License, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 5022, 5026 (2004).

The Omnibus Order builds on one of the most difficult cases we have ever decided, the *Golden Globe Awards* case,¹³ and stretches it beyond the limits of our precedents and constitutional authority. The precedent set in that case has been contested by numerous broadcasters, constitutional scholars and public interest groups who have asked us to revisit and clarify our reasoning and decision. Rather than reexamining that case, the majority uses the decision as a springboard to add new words to the pantheon of those deemed to be inherently sexual or excretory, and consequently indecent and profane, irrespective of their common meaning or of a fleeting and isolated use. By failing to address the many serious concerns raised in the reconsideration petitions filed in the *Golden Globe Awards* proceeding, before prohibiting the use of additional words, the Commission falls short of meeting the constitutional standard and walking the tightrope of a restrained enforcement policy.

This approach endangers the very authority we so delicately retain to enforce broadcast decency rules. If the Commission in its zeal oversteps and finds our authority circumscribed by the courts, we may forever lose the ability to protect children from the airing of indecent material, barring an unlikely constitutional amendment setting limitations on the First Amendment freedoms.

The perilous course taken today is evident in the approach to the acclaimed Martin Scorsese documentary, “The Blues: Godfathers and Sons.” It is clear from a common sense viewing of the program that coarse language is a part of the culture of the individuals being portrayed. To accurately reflect their viewpoint and emotions about blues music requires airing of certain material that, if prohibited, would undercut the ability of the filmmaker to convey the reality of the subject of the documentary. This contextual reasoning is consistent with our decisions in *Saving Private Ryan*¹⁴ and *Schindler’s List*.¹⁵

The Commission has repeatedly reaffirmed, and the courts have consistently underscored, the importance of content *and* context. The majority’s decision today dangerously departs from those precedents. It is certain to strike fear in the hearts of news and documentary makers, and broadcasters that air them, which could chill the future expression of constitutionally protected speech.

We should be mindful of Justice Harlan’s observation in *Cohen v. California*.¹⁶ Writing for the Court, he observed:

[W]ords are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.¹⁷

¹³ *In re Complaints Against Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards” Program*, Memorandum Opinion and Order, 19 FCC Rcd 4975 (2004); *petitions for stay and reconsideration pending*.

¹⁴ *In the Matter of Complaints Against Various Television Licensees Regarding Their Broad. on November 11, 2004, of the ABC Television Network’s Presentation of the Film, “Saving Private Ryan,”* Memorandum Opinion and Order, 20 FCC Rcd 4507, 4513 (2005) (“Deleting all [indecent] language or inserting milder language or bleeping sounds into the film would have altered the nature of the artistic work and diminished the power, realism and immediacy of the film experience for viewers.”). See also *Peter Branton*, Letter by Direction of the Commission, 6 FCC Rcd 610 (1991) (concluding that repeated use of the f-word in a recorded news interview program not indecent in context).

¹⁵ *In the Matter of WPBN/WTOM License Subsidiary, Inc.*, 15 FCC Rcd 1838 (2000).

¹⁶ 403 U.S. 15 (1971).

¹⁷ *Id.* at 26 (“We cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process.”).

Given all of these considerations, I find that the Omnibus Order, while reaching some appropriate conclusions both in identifying indecent material and in dismissing complaints, is in some ways dangerously off the mark. I cannot agree that it offers a coherent, principled long-term framework that is rooted in common sense. In fact, it may put at risk the very authority to protect children that it exercises so vigorously.

**STATEMENT OF
COMMISSIONER DEBORAH TAYLOR TATE**

Re: Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show, Forfeiture Order; Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, Notices of Apparent Liability and Memorandum Opinion and Order; Complaints Against Various Television Licensees Concerning Their December 31, 2004 Broadcast of the Program "Without A Trace", Notice of Apparent Liability for Forfeiture

Today marks my first opportunity as a member of the Federal Communications Commission to uphold our responsibility to enforce the federal statute prohibiting the airing of obscene, indecent or profane language.¹ To be clear – I take this responsibility very seriously. Not only is this the law, but it also is the right thing to do.

One of the bedrock principles of the Communications Act of 1934, as amended, is that the airwaves belong to the public. Much like public spaces and national landmarks, these are scarce and finite resources that must be preserved for the benefit of all Americans. If numbers are any indication, many Americans are not happy about the way that their airwaves are being utilized. The number of complaints filed with the FCC reached over one million in 2004. Indeed, since taking office in January 2006, I have received hundreds of personal e-mails from people all over this country who are unhappy with the content to which they – and, in particular, their families – are subjected.

I have applauded those cable and DBS providers for the tools they have provided to help parents and other concerned citizens filter out objectionable content. Parental controls incorporated into cable and DBS set-top boxes, along with the V-Chip, make it possible to block programming based upon its content rating. However, these tools, even when used properly, are not a complete solution. One of the main reasons for that is because much of the content broadcast, including live sporting events and commercials, are not rated under the two systems currently in use.

I also believe that consumers have an important role to play as well. Caregivers – parents, in particular – need to take an active role in monitoring the content to which children are exposed. Even the most diligent parent, however, cannot be expected to protect their children from indecent material broadcast during live sporting events or in commercials that appear during what is marketed to be “appropriate” programming.

Today, we are making significant strides toward addressing the backlog of indecency complaints before this agency. The rules are simple – you break them and we will enforce the law, just as we are doing today. Both the public and the broadcasters deserve prompt and timely resolution of complaints as they are filed, and I am glad to see us act to resolve these complaints. At the same time, however, I would like to raise a few concerns regarding the complaints we address in these decisions.

First, I would like to discuss the complaint regarding the 6:30 p.m. Eastern Daylight Time airing of an episode of *The Simpsons*. The *Order* concludes that this segment is not indecent, in part because of the fact that *The Simpsons* is a cartoon. Generally speaking, cartoons appeal to children, though some may cater to both children and adults simultaneously. Nevertheless, the fact remains that children were extremely likely to have been in the viewing audience when this scene was broadcast. Indeed, the marketing is aimed at children. If the scene had involved real actors in living color, at 5:30 p.m. Central

¹ See 18 U.S.C. § 1464.

Standard Time, I wonder if our decision would have been different? One might argue that the cartoon medium may be a more insidious means of exposing young people to such content. By their very nature, cartoons do not accurately portray reality, and in this instance the use of animation may well serve to present that material in a more flattering light than it would if it were depicted through live video. I stop short of disagreeing with our decision in this case, but note that the animated nature of the broadcast, in my opinion, may be cause for taking an even closer look in the context of our indecency analysis.

Second, our conclusion regarding the 9:00 p.m. Central Standard Time airing of an episode of *Medium* in which a woman is shot at point-blank range in the face by her husband gives me pause. While I agree with the result in this case, I question our conclusion that the sequence constitutes violence *per se* and therefore falls outside the scope of the Commission's definition of indecency. Without question, this scene is violent, graphically so. Moreover, it is presented in a way that appears clearly designed to maximize its shock value. And therein lies my concern. One of the primary ways that this scene shocks is that it leads the viewer to believe that the action is headed in one direction – through dialogue and actions which suggest that interaction of a sexual nature is about to occur – and then abruptly erupts in another – the brutally violent shooting of a wife by her husband, in the head, at point-blank range. Even though the Commission's authority under Section 1464 is limited to indecent, obscene, and profane content, and thus does not extend to violent matter, the use of violence as the “punch line” of titillating sexual innuendo should not insulate broadcast licensees from our authority. To the contrary, the use of sexual innuendo may, depending on the specific case, subject a licensee to potential forfeiture, regardless of the overall violent nature of the sequence in which such sexual innuendo is used.

* * *

Finally, I would like to express my hope and belief that the problem of indecent material is one that can be solved. Programmers, artists, writers, broadcasters, networks, advertisers, parents, public interest groups, and, yes, even Commissioners can protect two of our country's most valuable resources: the public airwaves and our children's minds. We must take a stand against programming that robs our children of their innocence and constitutes an unwarranted intrusion into our homes. By working together, we should promote the creation of programming that is not just entertaining, but also positive, educational, healthful, and, perhaps, even inspiring.