Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Complaints Against Various Television Licensees Concerning Their December 31, 2004 Broadcast of the Program *Without a Trace*	File No. EB-05-IH-0035

OPPOSITION TO NOTICE OF APPARENT LIABILITY FOR FORFEITURE OF 93 LOCAL TELEVISION BROADCAST STATIONS AFFILIATED WITH THE CBS TELEVISION NETWORK

May 5, 2006

SUMMARY

The Emmy-winning CBS crime drama *Without a Trace* is watched by 17 to 23 million people in any given week. Its "Our Sons and Daughters" episode (the "Episode") dealt with the sensitive issue of dangerous teenage sexuality as a product of parental inattention and was rated TV-14 ("parents strongly cautioned"). It included two flashback scenes that brought home to the viewer the reality of the dangerous behavior on which the Episode was based. The flashbacks lasted less than a minute and depicted actors portraying high school students drinking alcohol, smoking and in sexually suggestive positions. The flashbacks contained no nudity or coarse language and depicted no sex acts. As the Parents Television Council has noted, the "episode's theme does not glorify or glamorize teen orgies or promiscuity; quite the opposite."

Without regard to the serious nature of this one-hour Episode and the importance of its sensitive subject, the Commission found "indecent" 20 seconds of imagery within the flashbacks. Focusing exclusively on the fact that the flashbacks depicted teenagers, the Commission proposed a fine of $3.35 million—the largest indecency fine in FCC history—against CBS and 95 of its affiliates. In this opposition, 93 of the local broadcast television stations against which these statutory maximum fines were proposed (the "Affiliates") urge the Commission to vacate that notice.

The Affiliates take their responsibility to their communities very seriously, and they work hard to ensure that their programming meets the standards of the communities they are licensed to serve. It is equally an essential part of their mission to present programming that touches on issues of societal concern, even if it occasionally may be uncomfortable for some audience members. This broadcast was fully consistent with the Commission's policies and the standards of the communities in which it was broadcast. In fact, across all 93 markets and 43.5 million television households served by the Affiliates, only eight viewers wrote to stations to complain about the Episode after its first airing in 2003. Only 17 viewers wrote to stations after the broadcast that was the subject of the notice.

The Episode was not indecent. It was not presented to "pander, titillate or shock" local audiences; it was a serious drama that was built upon an important societal issue. The 20 seconds on which the Commission based its indecency finding did not

"dwell on or repeat at length descriptions of sexual organs"—in fact, there was no nudity at all. It was not "explicit or graphic"—to the contrary, the impressionistic flashback sequences only implied the risky sexual behavior that was the overall subject of the Episode. And the fact that the flashbacks depicted involved teenagers cannot, by that fact alone, convert non-indecent material into content that the Commission may find indecent. The Commission's imposition of any fines, let alone maximum fines, cannot be squared with its approval, in decisions released the same day as the notice, of either the infinitely more explicit discussion of teenage sexual practices and parental inattention in an episode of *Oprah*, or a scene of sexuality held not to be indecent in *Alias*. If the Commission had considered the flashback sequence fully in context and taken the Episode as a whole, as it must do, it would have rejected claims that the Episode was indecent.

The inconsistency of the Commission's decisions and the arbitrariness of its standard have made it impossible for broadcasters to conform to the shifting mandates of federal law. A broadcaster comparing the *Without a Trace* and *Oprah* decisions can only understand the Commission to instruct that the topic of teenage sexuality is not entirely proscribed, but that it may be discussed only in the U.S. Government-approved manner. The Commission is without authority to offer such a lesson.

The regime of content regulation that has produced this decision is inconsistent with the First Amendment and Section 326 of the Communications Act. In determining that the flashbacks go "well beyond what the story line could reasonably be said to require," the Commission impermissibly overruled the editorial judgment of the producers of the Episode. The Commission, moreover, may not rely on "contemporary community standards for the broadcast medium" as a cornerstone of its regulation because that standard is unworkably vague. And the Commission's 1970s-era radio standard cannot justifiably be applied to today's highly evolved television marketplace, which is characterized by the widespread availability of blocking technologies and an audience that increasingly receives television signals alongside cable and satellite programming. The availability of blocking technologies establishes that the current form of content regulation for indecency is no longer the least restrictive means for facilitating parents' supervision of their children, the sole rationale for regulating indecency.

The notice should be vacated.

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INTRODUCTION

In response to an online campaign by a special interest group challenging a few seconds of the "Our Sons and Daughters" episode of the acclaimed hour-long CBS drama *Without a Trace*, the Commission issued a Notice of Apparent Liability for broadcasting indecent content directed to virtually every CBS television network affiliate in the Central and Mountain time zones.[1]

The Notice is based on an arbitrary and erroneous application of the Commission's indecency policy, and the forfeitures proposed in the Notice are unsupportable by precedent. Moreover, as this proceeding demonstrates, the Commission's current indecency policy and enforcement scheme, as applied in this and related cases and on their face, violate the First Amendment. For these reasons, the licensees of 93 of the 96 local television stations affiliated with the CBS television

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[1] Notice of Apparent Liability for Forfeiture, *Complaints Against Various Television Licensees Concerning Their December 31, 2004 Broadcast of the Program "Without a Trace,"* File No. EB-05-IH-0035, FCC 06-18 (rel. Mar. 15, 2006) (the "Notice").

network that were named in the Notice (the "Affiliates") respectfully request that the Commission vacate the Notice.[2]

It should be apparent, but must nonetheless be explicitly stated, that the Notice has been directed to a group of local broadcasters that take their responsibilities to their communities of license very seriously. The Affiliates – who operate stations from Sitka, Alaska to Greenville, Mississippi and 91 communities in between – work hard to ensure that the programming they broadcast meets the standards of the communities that they are licensed to serve. It is, however, an equally essential part of local broadcasters' mission to present to viewers programming dealing in various ways with serious issues of societal concern. Some of these issues, like the subject matter of the program at issue here, may be controversial in ways that some viewers may find uncomfortable. That difficulty, however, does not mean that good-faith attempts to deal with such serious matters in television programming should be held to violate federal law on the basis of

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[2] This Objection originally was due to be filed on April 14, 2006. The Affiliates filed a Freedom of Information Act ("FOIA") request for copies of the complaints on which the Notice was based on March 17, 2006. A response to the Affiliates' FOIA request was due on April 14, 2006, and could be extended until April 28, 2006. *See* 47 C.F.R. § 0.461(g) (requiring the Commission to respond to FOIA requests within 20 business days and permitting the Commission to extend the time to respond under certain circumstances for 10 additional business days). Accordingly, the Affiliates moved to extend the time to respond to the Notice until May 5, 2006, to permit the Commission to produce copies of the complaints and to allow the Affiliates to review the complaints before filing this Opposition. *See* CBS Television Network Affiliates Ass'n, Motion for Extension of Time, File No. EB-05-IH-0035 (filed Apr. 6, 2006). The Enforcement Bureau granted that request.

On May 4, 2006, the Affiliates received word that they would receive copies of the complaints on May 5, 2006, the date this Opposition is being filed. As of this filing, the Affiliates have not received this material. But even if they had, there would have been no opportunity to thoroughly review the complaints, and the Affiliates respectfully reserve the right to supplement this Opposition, if necessary, once those complaints can be evaluated.

less than a minute of content taken out of context and played repeatedly on activists' websites to encourage email campaigns to the Commission.

Television broadcasters are today uniquely positioned to fulfill their multifaceted responsibilities to their communities. Program ratings, blocking technologies and other measures the industry has voluntarily embraced can assist parents in guiding their children's television viewing. These developments also make it easier for broadcasters to present programming that deals with issues of public concern even when those issues, and the programming touching upon them, might not be seen by parents as appropriate for the youngest children in the broadcasters' audiences. The "Our Sons and Daughters" episode of *Without a Trace* may be as uncomfortable for some audience members as the topic it addresses, but its broadcast was consistent with the Commission's policies and the standards of the communities in which it was broadcast. Accordingly, the Notice should be vacated.

THE PROGRAM

Without a Trace is a weekly, one-hour drama that focuses on the activities of the New York Missing Persons Squad of the Federal Bureau of Investigation. The Emmy-winning series was conceived in part as a vehicle that could touch upon many pressing matters facing American society. For example, the program routinely depicts the adverse consequences of drug and alcohol addiction, suicide, sexual abuse, and gang violence. Episodes of the series often close with a profile of actual missing persons, or with a reference to social services available to those affected by some of the problems at issue, such as a suicide help line. The series has received numerous accolades and awards from both media groups and civil rights organizations. In its first year, the series received two Emmy Awards. It has been nominated for Screen Actors Guild awards for

two years running, and for Emmys over the past three years. Its actors have also been recognized at the NAACP Image Awards and the GLAAD Media Awards. It is generally one of the top 10 most viewed television programs in the country, with a weekly audience that typically ranges from 17 to 23 million people.

"Our Sons and Daughters," the December 31, 2004 episode of *Without a Trace* (the "Episode"), which first aired on November 6, 2003, focused in part on particular adverse consequences of parents' lack of involvement in the lives of their children. The Episode depicted an FBI search for a missing teenage boy and its investigation into the possible rape of a teenage girl. During the course of the investigation, agents learned that some of the students from the local high school depicted in the program attended parties involving drugs, alcohol, and sexual activities.

The Episode explored the consequences of several students' involvement in these parties. The program included two flashbacks reflecting one student's recollection of a recent party. The flashbacks showed students – clothed or wearing underwear but never naked – kissing, smoking, drinking alcohol, or pressing against one another. The two flashback scenes collectively occupy no more than fifty-five seconds of the one-hour Episode, of which no more than twenty seconds contain material alleged in the Notice to be indecent.[3] The flashback scenes did not include any nudity or coarse language, and it showed no overt sexual activities.

The flashbacks were set in a context that was decidedly negative and were intended to cast the teenagers' behavior in an unambiguously adverse light. Although the

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[3] In the *Notice*, the Commission identifies the specific depictions that it believes to be indecent. *Notice* at ¶ 11. The scenes, which occupy fifty-five seconds of the one-hour program, also contain depictions of characters walking around the party, smoking, drinking, or kissing, none of which the Commission alleges to be indecent.

flashbacks implied sexual activity that was essential to the storyline, the Episode depicted no instances of clear sexual contact or intercourse, and it revealed no sexual organs. In the context of the Episode, it is apparent that the conduct resulted from parental inattention to the daily lives of these students. The Episode emphasizes that this inattention, and the conduct it permitted, led to serious adverse consequences for several participants.

Because the Episode included mature subject matter (violence, underage alcohol use, and implied sexuality), the program carried a V-chip rating of TV-14 ("Parents Strongly Cautioned"). This rating indicates that "[p]arents are strongly urged to exercise greater care in monitoring this program and are cautioned against letting children under the age of 14 watch unattended."[4] The TV-14 rating was also displayed on-screen at the beginning of the program and was distributed to the relevant electronic and printed programming guide services.

The advocacy group Parents Television Council ("PTC") apparently received the important message contained in this drama. That group has acknowledged that the "episode's theme does not glorify or glamorize teen orgies or promiscuity; quite the opposite."[5] But PTC disapproved of the twenty seconds of material that the producers included to underscore the reality and nature of the dangerous behavior in which the teenagers were involved, and it launched an online campaign to generate complaints regarding the Affiliates' broadcast of the Episode. In response to this

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[4] TV Parental Guidelines Monitoring Board, "Understanding the TV Ratings," *available at* http://www.tvguidelines.org/ratings.asp.

[5] Aubree Bowling, "Worst Family TV Shows of the Week," Parents Television Council, *available at* http://www.parentstv.org/ptc/publications/bw/2005/0102worst.asp (Jan. 2, 2005).

orchestrated effort to challenge a few seconds in an otherwise admittedly socially positive television program, and without providing notice to or requesting comment from the Affiliates, the Commission issued a Notice finding the Episode indecent and proposing maximum forfeitures for an unprecedented $3.35 million in total fines against the Affiliates and the CBS Network.[6]

I. THE DECEMBER 31, 2004 BROADCAST OF *WITHOUT A TRACE* WAS NOT INDECENT.

The Notice reflects a clear concern that the content of the Episode related to teenage sexuality. The Notice found that "the scene is all the more shocking because it depicts minors engaged in sexual activities," noted that the "scene is not shot as clinical or educational material," and held that the scene "goes well beyond what the story line could reasonably be said to require."[7] To reach the conclusion that the Episode is indecent, the Notice improperly focused its inquiry: First, the Notice completely disregarded the larger context in which the material appeared and focused simply on whether "a child watching the program could easily discern that the teenagers shown in the scene were engaging in sexual activities."[8] Second, in proposing the maximum forfeiture against each Affiliate, the Notice departed from the factors the Communications Act expressly requires it to weigh.[9] Instead, a single terse paragraph

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6 On the same day, the Commission released decisions concerning thirty-nine other programs that had been the subject of indecency complaints. Most of those decisions were contained in an Omnibus Notice addressing each program in summary fashion. *See Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, Notices of Apparent Liability & Mem. Op. & Order, FCC 06-17 (rel. Mar. 15, 2006) ("Omnibus Notice").

7 *Notice* at ¶¶ 15, 13.

8 *Notice* at ¶ 13.

9 47 U.S.C. § 503(b)(2)(D). *See* Section II(B), *infra.*

focused almost exclusively on the conclusion that "the material graphically depicts teenage boys and girls" in a "sexually charged" scene.[10]

The Commission cannot, however, convert content that is, at most, suggestive into actionable indecency simply because the content involves teenagers. Rather, the Commission must consistently apply existing precedent and fully consider the overall context created in the Episode. As shown below, application of precedent and appropriate consideration of context demonstrates that the Episode was not, in fact, indecent.

A. The Episode Does Not Satisfy Any of the Commission's Criteria for a Finding of Actionable Indecency.

The Episode in question does not satisfy any of the Commission's criteria for finding that broadcast material is indecent. The Notice, quoting from the Commission's 2001 policy statement, *Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*,[11] described those criteria by explaining:

> Indecency findings involve at least two fundamental determinations. First, the material alleged to be indecent must fall within the subject matter scope of our indecency definition – that is, the material must describe or depict sexual or excretory organs or activities. . . . Second, the broadcast must be *patently offensive* as measured by contemporary community standards for the broadcast medium.[12]

First, it is clear that the Episode does not "describe or depict sexual or excretory organs or activities" within the meaning of the Commission's rules. Rather, the

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10 *Notice* at ¶ 18.

11 Policy Statement, 16 FCC Rcd. 7999 (2001) ("Industry Guidance") (emphasis in original).

12 *Notice* at ¶ 4 (quoting *Id.* at 8002 ¶¶ 7-8).

scenes depict a dangerous social setting in which sexual activity could occur, but no such activity is actually "depicted."[13] If the particular scenes involved in this program can be held to constitute description or depiction of sexual activity, then any kissing or any reference to sexuality in any television program would be sufficient to make that program subject to indecency regulation. The Commission may not cast its net that widely. Because the scenes do not "depict" sexual activity, the Commission's inquiry should have ended there.

Second, the Episode cannot legitimately be considered "patently offensive" as measured by contemporary community standards for the broadcast medium. In considering whether material is "patently offensive," the Commission has repeatedly emphasized that "the *full context* in which the material appeared is critically important."[14] In considering patent offensiveness, the Commission has said that it must make three key determinations, always giving full and serious consideration to the overall context in which material appears. This Episode, on its face, satisfies none of these three criteria.

1. The Description Is Not Explicit or Graphic.

To evaluate patent offensiveness under its indecency precedent, the Commission must first consider "the explicitness or graphic nature of the description."[15] While portions of the Episode that contain depictions alleged in the Notice to be indecent – which together last only twenty seconds – convey to the viewer the sense that the teenage sexual activities at issue are likely to occur, these few seconds are neither explicit nor graphic; in fact, the scene only implicitly suggests risky behavior.

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13 *See KSAZ Licensee, Inc.*, 19 FCC Rcd. 15999, 16000-01 (2004).

14 *Notice* at ¶ 5 (quoting *Industry Guidance* at 8002 ¶ 9) (emphasis in original).

15 *Id.* (citing *Industry Guidance* at 8002-15 ¶¶ 8-23).

The Commission's conclusion that the Episode is explicit and graphic[16] is flatly inconsistent with other decisions, including the *Alias* decision released on the same day as the Notice.[17] *Alias* involved a scene in which a couple is depicted in bed, "kissing, caressing, and rubbing up against each other," accompanied by off-camera music.[18] Emphasizing that "[t]he scene involves no display of sexual organs and contains no sexually graphic language,"[19] the Commission found that this material in *Alias* did "not depict sexual activities in a graphic or explicit way."[20] But the characters shown in the flashback scenes in the Episode likewise are shown "kissing, caressing, and rubbing up against each other," with no display of sexual organs or use of graphic language.[21] Indeed, the very words used to describe the *Alias* material could have been used to describe the Episode here. A standard that permits the Commission to fine one licensee for broadcasting certain material and dismiss complaints against another for the broadcast of material that is substantially no different is, of course, at best arbitrary and at worst no standard at all.

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16 *See Notice* at ¶ 13.

17 *Omnibus Notice* at ¶¶ 147-52. *See also Omnibus Notice* at ¶¶ 173-179 (finding an episode of the *Oprah Winfrey Show* non-indecent, despite a description of teen sexual activities that was extended and markedly more graphic than the few seconds of *Without a Trace* material identified in the Notice).

18 *Id.* at ¶ 147.

19 *Id.* at ¶ 149.

20 *Id.*

21 *See also Complaint Against Various Broadcast Licensees Regarding Their Airing of the UPN Network Program "Buffy the Vampire Slayer" on November 20, 2001*, Mem. Op. & Order, 19 FCC Rcd. 15,995, 15,998 ¶ 6 (2004) (a scene "depicting Buffy kissing and straddling Spike shortly after fighting with him" was not "sufficiently graphic or explicit to be deemed indecent"); *Omnibus Notice* at ¶¶ 153-159 (*Will and Grace*) (touching of Grace's breasts by male and female characters, and extended discussion of her breasts, were not indecent).

The Notice did not even attempt to distinguish *Alias*, and its explanation for its decision with respect to the Episode effectively conceded that this case is far different from many others in which it has made findings of indecency. Rather than explain the difference, the Commission relied on its opinion that "a child watching the program could easily discern that the teenagers shown in the scene were engaging in sexual activities."[22] It did not, however, ask this question of *Alias* or of any other program in the *Omnibus Notice*.

The Commission's recent *Married By America* decision found that a program including pixilated nudity and sexual activity was still indecent because the pixilation was insufficient to obscure the nudity and alleged sexual activity.[23] In that decision, the Commission noted that "even a child would have" been able to see the nudity and sexual activity through the pixilation.[24] There is no indication in the *Married By America* decision that the Commission intended improperly to use this language as anything other than a rhetorical tool with the limited purpose of warning broadcasters that pixilation that was insufficient to obscure unambiguous nudity and sexual activity would not shield them from an indecency finding.[25]

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22 *Notice* at ¶ 13.

23 *Complaints Against Various Licensees Regarding Their Broadcast of the Fox Television Program "Married by America" on April 7, 2003*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd. 20,191, ¶ 10 (2004). Oppositions filed in this proceeding on December 3, 2004 remain pending.

24 *Id.*

25 If this "even a child" standard used by the Commission in its analysis of the Episode fully applied to all television programming, it is difficult to see where the line between permissible and indecent programming could be drawn. If a program becomes indecent simply because a hypothetical child might conclude that sexual activities were occurring, complaints against *Alias*, *Buffy*, and many of the other programs found non-

Married By America used the "even a child" rhetoric to criticize the physical insufficiency of the pixilation used in the program. The decision cannot be read, however, to warn that the Commission would apply the standard of a child to the *substance* of programming to find material indecent that *suggested*, but did not show, sexual activity, simply because a child would understand that the material pertained to sex. If *Married By America* were extended that far, it could mean that the mere suggestion in a television program that sexual activity might occur between two people would be enough to subject a broadcaster to an enforcement action. Under this standard, a sitcom showing a man and a woman kissing, followed by a cut to a commercial, could well be sufficient to make the material indecent if it were possible for a 17-year-old to imagine that the kissing might be intended to imply subsequent off-screen sexual activity.

The Affiliates disagree that any viewer, whether a child or not, could discern specific instances of sexual behavior in the Episode, but this subjective and vague test simply does not change the reality that the content does not meet the graphic display standard.[26] And the "discernible by a child" test, in any event, expressly runs afoul of the

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indecent in the *Omnibus Notice* would have been resolved differently. Finding this program indecent while approving the content in those other proceedings is arbitrary.

See also Omnibus Notice at ¶¶ 166-72 (commercial for Golden Hotel and Casino) (finding non-indecent the depiction of a man jumping into bed with ten casino-costumed women who are hugging him that ends with a view of that same man, disheveled, shirt opened, covered with lipstick). Clearly, the same precocious child who is able to recognize the implication of sexual activity in the Episode could infer that some sexual activity had occurred in the commercial.

[26] The Episode was rated TV-14, warning that some content might be unsuitable for children younger than 14. Parents of children below that age therefore received ample notice that the programming might not be suitable for younger viewers, and parents who wished to prevent their children from viewing such content had a clear opportunity to do so. As described below, even if such parents were unable to personally supervise their children's television viewing, they could have used the V-chip or other technologies to prevent children from viewing programming carrying a TV-14 rating. *See* § IV(C), *infra*.

Supreme Court's admonition that the government may not promulgate regulation of speech content that has the effect of "reduc[ing] the adult population . . . to [viewing] only what is fit for children."[27] This standard, in short, could not form the basis for a finding of indecency, let alone convert content of the kind involved here from "suggestive," which it may well have been, to "explicit" within the meaning of the FCC's indecency policy.

2. The Episode Does Not Dwell On Or Repeat Descriptions of Sexual Organs or Activities.

Second, the Commission's precedent requires it to consider "whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities."[28] The Commission's determination that "apparent sexual intercourse" is depicted in the Episode[29] is wholly subjective, is unsupported by a review of the Episode itself, and is, in our view, incorrect.

In its effort to find the Episode indecent, the Commission fails to explain how the allegedly indecent portions of the two complained-of scenes can comprise only twenty seconds out of a sixty-minute program and yet still "dwell[] on or repeat[] at length" descriptions of sexual activity. Even if these scenes did contain "descriptions of sexual . . . organs or activities" – which they do not – the Commission cannot reasonably conclude that such descriptions are "repeated at length" in this short period of time.

The Commission's past decisions have found that sexual descriptions are "repeated at length" only when the treatment of the sexual material was truly extensive in

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27 *Butler v. Michigan*, 352 U.S. 380, 383-84 (1957).

28 *Notice* at ¶ 5 (citing *Industry Guidance* at 8002-15 ¶¶ 8-23).

29 *Notice* at ¶ 14.

the context of the overall work. For instance, the Commission found that sexual descriptions in a radio program were repeated at length when extended sexual references were found in several skits and repeated throughout the entire program segment.[30] Sexual discussions in the comedy series *Coupling* were "sustained and repeated" because they were found throughout the relevant episodes.[31] In the *Omnibus Notice*, too, the Commission found that an episode of *The Family Guy* titled "And The Weiner Is..." "repeated at length" sexual descriptions when the entire episode included extensive discussion of the cartoon son's penis, "show[ed] the cartoon father's and mother's reactions" to the topic, and used euphemisms such as "wang" and "little banana."[32]

To be sure, in very egregious cases, the Commission has found brief but extremely graphic sexual descriptions to be indecent notwithstanding their fleeting nature.[33] In such cases, however, the Commission has generally been straightforward in its analysis, explicitly proscribing such programming despite the fact that the offending material is admittedly not repeated at length. It found, for example, that a dialogue that "graphically depict[ed] a sadistic act of simulated anal sodomy with an infant and explicitly discusse[d] a person's sexual arousal in response to that act" was indecent notwithstanding that the material was not repeated at length.[34] The Commission does not

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30 *Clear Channel Broadcasting Licenses, Inc.*, 19 FCC Rcd. 1768, 1773 (2004).

31 *NBC Telemundo License Co.*, 19 FCC Rcd. 23,025 23,027 ¶ 7 (2004) (finding material non-indecent for other reasons).

32 *Omnibus Notice* at ¶ 202 (finding material non-indecent for other reasons).

33 *See Industry Guidance* at ¶ 19.

34 *Rubber City Radio Group*, 17 FCC Rcd. 14,745, 14,747 ¶ 7 (2002). *See also Entercom Sacramento License, LLC*, 19 FCC Rcd. 20,129, 20,133 ¶ 11 (2004); *Tempe Radio, Inc. (KUPD-FM)*, 12 FCC Rcd. 21,828 (1997).

claim that the material in the *Without a Trace* episode approaches this level of explicitness, and this line of cases thus cannot provide support for the result here.

The two short segments that are the subject of the Notice are edited in an impressionistic style. As a part of the producers' effort to increase the viewer's sense that the party being depicted is out of control, the camera does not focus on any particular individual for more than a second or two, and it is difficult for a viewer to have more than a general sense of the party's activity. The editing of these scenes intentionally makes it difficult to isolate any specific activity, and it does not dwell on any depiction. The Episode therefore does not qualify as indecent under the second prong of the Commission's "patent offensiveness" standard.

3. The Episode Does Not Pander To, Titillate, or Shock The Audience.

The final step of the Commission's patent offensiveness analysis considers "whether the material panders to, titillates, or shocks the audience."[35] As to this factor, the Notice finds that the flashback "goes well beyond what the story line could reasonably be said to require" and is "all the more shocking because it depicts minors engaged in sexual activities."[36] The Notice, like virtually all of the Commission's recent indecency decisions, repeats the terms "pandering" and "titillating" by rote, but does not

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35 *Notice* at ¶ 5 (citing *Industry Guidance* at 8002-15 ¶¶ 8-23).

36 *Id.* at ¶ 15. What is more troubling, we suggest, is the Commission's view that it is entitled to make any judgment about what the "story line reasonably may require." The Commission is not permitted to sit in the role of producer or editor, and is not free to second-guess the good faith judgments made by directors and producers of content as to what is necessary to effectuate the purposes of the artistic presentation.

give any consideration to the actual meaning of those words, or to the Episode's context or social merit.[37]

As we have noted, even the Parents Television Council disagrees with the judgment made here by the Commission. PTC found that the "episode's theme does not glorify or glamorize teen orgies or promiscuity; quite the opposite."[38] The episode was clearly intended to address serious social issues in a context that condemns, not exalts, the dangerous behavior engaged in by the characters depicted in the two brief party scenes. To be sure, it may have been intended to shock its audience into a consideration of the consequences of uncontrolled teenage sexuality and the parental inattentiveness that permitted it – the program, after all, was a cautionary tale intended to make parents aware of the realities of the behavior it depicted. But the "shock" here related to the subject matter, which concerned a mature and relevant social issue, not the manner in which the content was visually displayed.

The Commission's *Saving Private Ryan* decision is highly instructive in this regard. In that case, the Commission emphasized that "contextual considerations are

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[37] In its indecency decisions, the Commission repeats these words without definition or explanation. As a matter of linguistics, however, these terms are simply inconsistent with the assertions for which the Commission uses them as support. For instance, the Supreme Court has defined "pandering" as "the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers." *Pinkus v. United States*, 436 U.S. 293 (1978). The Affiliates are clearly not in that business, and neither they nor the CBS Television Network has ever advertised *Without a Trace* in a sexual context.

[38] Aubree Bowling, "Worst Family TV Shows of the Week," Parents Television Council, *available at* http://www.parentstv.org/ptc/publications/bw/2005/0102worst.asp (Jan. 2, 2005).

important in evaluating" the material.[39] Finding that *Private Ryan*, a war film, did not "pander, titillate or shock," the FCC's decision emphasized that the program "realistically reflect[ed] the soldiers' strong human reactions to, and, often, revulsion at, those unspeakable conditions and the peril in which they find themselves."[40] Editing the film to avoid coarse language "would have altered the nature of the artistic work and diminished the power, realism and immediacy of the film experience for viewers."[41] Although the Episode was, of course, very different in tone and subject from *Private Ryan*, the application of this analysis consistently to *Without a Trace* requires a finding that the material, in context, cannot be found to "pander, titillate, or shock."

In its *Omnibus Notice*, released concurrently with the *Without a Trace* Notice, the Commission explained in detail how, as is true in this situation, the third prong of the patent offensiveness analysis can outweigh the other two, giving rise to a finding that the content in question is not actionably indecent. Describing another program with a similar subject and much more explicit content, the Commission wrote:

> The program segment focuses on the "secret lives" of many teenagers. Through guests – parents, teenagers, and others – serious discussions take place about the disturbing, secret teenage behavior portrayed in the movie "Thirteen." Guests speak of serious, potentially harmful behaviors of teens – such as drug use, drinking, self-mutilation, and sexual activity, how teenagers hide those behaviors from their parents, and how parents might recognize and address those behaviors with their teens. The material is not presented in a vulgar manner and is not used to pander to or titillate the audience. Rather, it is designed to inform viewers about an important topic. To the extent that the material is

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

40 *Id.* at ¶ 14.

41 *Id.*

> shocking, it is due to the existence of such practices among teenagers rather than the vulgarity or explicitness of the sexual depictions or descriptions. It would have been difficult to educate parents regarding teenagers' sexual activities without at least briefly describing those activities and alerting parents to little known terms (*i.e.*, "salad tossing," "rainbow party") that many teenagers use to refer to them. . . .
>
> As we have previously stated, "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. . . ."[42]

That analysis related to an episode of the *Oprah Winfrey Show* in which a guest detailed at length graphic sexual terms such as "tossed salad"[43] and "rainbow party."[44] The Commission found that the content in *Oprah* – which was far more explicit than the few seconds of *Without a Trace* that are the subject of this Notice – was not indecent because, notwithstanding its explicitness, the overall context of the program made it clear that the purpose of the program was to "inform viewers about an important topic." The Commission was bound to apply the same analysis to the *Without a Trace* episode, and to reach the same conclusion. The producers were entitled to make the editorial and artistic judgment that "[i]t would have been difficult to educate parents regarding teenagers' sexual activities" without the brief flashback scenes in the Episode and the reality that those scenes provided.[45] For purposes of indecency policy, there is

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[42] *Omnibus Notice* at ¶ 178 (citing *King Broadcasting Co. (KING-TV)*, Mem. Op. & Order, 5 FCC Rcd 2791 ¶ 13 (1990).

[43] The program included an explanation that the term referred to "oral anal sex."

[44] The program included an explanation that the term referred to "a gathering where oral sex is performed [and where] all of the girls put on lipstick and each one puts her mouth around the penis of the gentleman or gentlemen who are there to receive favors and makes a mark in a different place on the penis."

[45] The Commission's "Oprah Winfrey" analysis is supported by earlier indecency decisions. *See, e.g., Complaints Against Fox Television Stations, Inc. Regarding Its*

and can be no principled distinction between the explicit discussion found "important" in *Oprah* and the dramatization held "titillating and shocking" in *Without a Trace*. And it is equally important that the Notice did not even attempt to articulate such a distinction. A broadcaster considering these two decisions can only understand the Commission to instruct that the topic of teenage sexuality is not entirely proscribed, but that it may be discussed only in the U.S. Government-approved manner. The Commission is without authority to offer such a lesson.

As an hour-long drama depicting kidnapping and murder, and portraying underage sexual activity in a decidedly negative light, the Episode does not and could not be found to "pander to, titillate, or shock" any reasonable viewer. In that context, and in light of contemporaneous Commission indecency decisions exculpating material that is a great deal more explicit than anything contained in the Episode, the Commission should reconsider its conclusion and hold that nothing in this Episode was intended to pander to, titillate, or shock the audience.

B. The Commission Must Consider the Episode As a Whole to Fully Assess The Challenged Content in Context.

As the Commission repeats in each of its indecency decisions, a serious consideration of the context in which allegedly indecent material appears is critically important.[46] The Commission has also emphasized that its finding that material has "social, scientific or artistic value . . . may militate against" a finding that the material is

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Broadcast of the "Keen Eddie" Program on June 10, 2003, Mem. Op. & Order, 19 FCC Rcd. 23,063, 23,063-64 ¶ 3 (2004) (noting that the Commission has "repeatedly held that subject matter alone is not a basis for an indecency determination" and that the fact that "some viewers may have found the subject matter . . . to be offensive" is not dispositive).

46 *See, e.g.*, *Saving Private Ryan* at ¶ 13.

patently offensive.[47] More broadly, it is well established that the Commission cannot condemn programming of serious social merit simply because the programming happens to concern sexual topics, even if the sexuality involves teenagers.[48] The Commission has recognized, for instance, that full frontal nudity in the important film *Schindler's List* was not indecent.[49] Similarly, nudity in *Catch 22*, a film "the primary theme of which was the horrors of war," was not patently offensive.[50] The *Without a Trace* episode – which included no nudity at all – was similarly of social value and, although a small portion of its content related to sexuality, it cannot be found to be patently offensive.

In this connection, it bears emphasis that the "indecency analysis" in the Notice occupied only a few paragraphs – less than a half page of text – and contained virtually none of the nuanced discussion of the Episode that is required by the Constitution when the government restricts speech.[51] As the Commission has observed, "the First Amendment is a critical constitutional limitation that demands that, in indecency determinations, we proceed cautiously and with appropriate restraint."[52]

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47 *Saving Private Ryan* at ¶ 11.

48 *See, e.g., Peter Branton*, Letter, 6 FCC Rcd. 610 (1991); *Omnibus Notice* at ¶ 178 (*Oprah Winfrey Show*).

49 *WPBN/WTOM License Subsidiary, Inc.*, 15 FCC Rcd. 1838 (2000) ("Schindler's List").

50 Letter from Norman Goldstein, Chief, Complaints & Political Programming Branch, Enforcement Division, Mass Media Bureau, FCC, to David Molina, No. 1800C1-TRW (May 26, 1999) ("Catch 22").

51 *Notice* at ¶¶ 12-16.

52 *Notice* at ¶ 3 (citing *Action for Children's Television v. FCC*, 852 F.2d 1332, 1344, 1340 n. 14 (1988) ("ACT I") (stating that "[b]roadcast material that is indecent but not obscene is protected by the First Amendment; the FCC may regulate such material only with due respect for the high value our Constitution places on freedom and choice in what people may say and hear," and that any "potential chilling effect of the FCC's

The Commission has routinely stated that considering the context in which challenged material appears is "critically important,"[53] but the Notice made no attempt at all to consider the broader context in which the content was presented – an exploration of the risks of parental disregard of the "secret lives" of their teenagers. The only mention made in the Notice of context is in one sentence: "The December 31, 2004 episode at issue concerns an FBI investigation into the disappearance and possible rape of a high school student."[54] Although in context the Episode integrates into the drama the important social problem of parental neglect, that fact is simply not mentioned or addressed in the Notice.

In fact, any principled consideration of whether a television program is indecent *must consider the work as a whole*.[55] It is inherently unreliable to assess "context" while focusing solely on one brief, isolated segment of a one-hour television program. Indeed, the Commission does consider programs as a whole in cases in which it finds programs *not* to be indecent. In *Private Ryan*, for example, the Commission found that the use of expletives is "integral to the film's objective of conveying the horrors of war," and that deleting the expletives "would have altered the nature of the

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generic definition of indecency will be tempered by the Commission's restrained enforcement policy.")).

53 *See, e.g., Notice* at ¶ 5; *Industry Guidance* at 8002.

54 *Notice* at ¶ 11. This statement amplifies the Commission's lack of attention to the program as a whole, which, in contrast to the one-sentence summary in the Notice, involved an investigation into two distinct events: the disappearance of a male student, and the possible rape of a female student with whom the male was romantically involved.

55 It has long been established as a matter of First Amendment law that a work must be "taken as a whole" in connection with an obscenity analysis. *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 124 S. Ct. 2783, 2798 (2004); *Roth v. United States*, 354 U.S. 476, 489 (1957). This requirement must apply even more strongly to the consideration of indecent, rather than obscene, speech – unlike obscenity, indecent speech is constitutionally protected.

artistic work and diminished the power, realism and immediacy of the film experience for viewers."[56] In considering the broadcast of the film *Schindler's List*, the Commission assessed the "full context of its presentation . . . including the subject matter of the film, the manner of its presentation, and the warnings that accompanied the broadcast of this film. . . ."[57] This is the appropriate scope of analysis, particularly for a television program of "social, scientific or artistic value."[58] Without an assessment of the program as a whole, minor visual elements may be used to render an entire program as indecent in violation of federal law.

The need for this concrete recognition of the meaning of "context" is particularly acute here. The Commission, while claiming that it considered context, focused solely on the isolated content of a 20-second segment of a one-hour dramatic work. The Notice expends 17 sentences in its description and analysis of this 20-second segment while spending fewer than 20 words in describing the hour-long program itself. The Commission did not, in fact, "fully consider" the context of the Episode as a whole. Had it done so, it would have focused on the clear pro-social cautionary message of the Episode and the important role of the flashback scenes in communicating the reality and immediacy of the dangerous activities that were the subject of the program as a whole. This analysis would have led inexorably to the correct finding that the Episode cannot be considered actionably indecent.

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56 *Saving Private Ryan*, ¶ 14.

57 *Schindler's List*, ¶ 13.

58 *Saving Private Ryan*, ¶ 11.

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The Commission's brief *Without a Trace* analysis failed to consider the full context of the program, did not follow the Commission's established precedent and contemporaneous decisions, and inappropriately penalized the programmer and broadcasters for dealing with a controversial topic. The Commission did so because the producers of this Episode chose to communicate their points to the audience in a manner of which the Commission disapproved. The Notice's attempt to apply a standard based on whether a child would be able to discern material that is depicted or suggested lacks any factual predicate. For these reasons, the program was improvidently found to be actionable under the indecency rules, and the Notice should therefore be vacated.

II. THE FORFEITURES PROPOSED IN THE NOTICE WERE INAPPROPRIATE AND EXCESSIVE.

Even if the Commission were correct that the Episode is actionably indecent, the forfeitures proposed against the Affiliates and other broadcasters in the Notice were wholly inappropriate. The imposition of any forfeiture under these circumstances is directly contrary to the precedent the Commission recognized in the *Omnibus Notice* and in its *Golden Globe* decision against penalizing licensees for violating standards that were not clearly established at the time of broadcast. For this and other reasons, even if a forfeiture were appropriate, the maximum $32,500 per station forfeitures proposed in the Notice are arbitrary and capricious.

A. Imposing Any Forfeiture Is Inappropriate.

1. A Forfeiture Would Violate Established Precedent.

In the *Omnibus Notice*, the Commission reiterated its policy against imposing forfeitures in cases in which "the licensee was not on notice at the time of the

broadcast that we would deem the relevant material indecent or profane."[59] As the Commission's 2004 *Golden Globe* decision noted, "But for the fact that existing precedent would have permitted this broadcast, it would be appropriate to initiate a forfeiture proceeding against NBC and other licensees that broadcast the program prior to 10 p.m. Given, however, that Commission and staff precedent prior to our decision today permitted the broadcast at issue, and that we take a new approach to profanity, [the network] and its affiliates necessarily did not have the requisite notice to justify a penalty."[60]

The Commission has been enforcing 18 U.S.C. § 1464, the indecency statute, for decades. Before March 15, 2006, the Commission had never imposed an indecency forfeiture for content involving neither nudity nor coarse language. Indeed, in its recent *Austin Powers* decision, the Commission considered dispositive its observation that characters' "sexual and/or excretory organs were covered by bedclothes, household objects, or pixilation . . . and none of the material cited in the complaints actually depicted sexual or excretory organs."[61]

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59 *Omnibus Notice* at ¶ 4; *see id.* at ¶ 111.

60 *Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, Mem. Op. & Order, 19 FCC Rcd. 4975, 4981 ¶ 15 (2004).

61 *Complaints by Parents Television Council Against Various Broadcast Licensees*, 20 FCC Rcd 1920, 1927 ¶ 9 (2005). The Commission only reversed this longstanding policy in decisions issued after the Episode's December 31, 2004 air date. *See Omnibus Notice* at ¶¶ 22-32, 33-42 ("The Surreal Life 2" and "Con El Corazón En La Mano"). *But see Omnibus Notice* at ¶¶ 227-229 (finding that a Minnesota Vikings player who "pretended to 'moon' the crowd," and therefore suggested the display of – but did not actually show – a sexual or excretory organ did not engage in indecent conduct, in part because "he remained . . . clothed at all times").

Even the Commission's "Married By America" decision, which is currently under review, contained no indication that the content of the Episode would be considered

In sum, the Affiliates and other licensees that aired the Episode could not have known that the Commission would subsequently find a visual depiction involving no nudity or coarse language, particularly in a program addressing a matter of significant social importance, to be indecent. Nor could they have predicted that the Commission would apply a standardless "discernible by a child" test by which to evaluate the content of television programming. Accordingly, under the standard established by *Golden Globe* and the *Omnibus Notice*, no forfeiture should issue here.[62]

2. Affiliates Had Ample Reason To Believe That The Episode Was Not Indecent.

Not only did the Commission issue the Notice only after the *second* airing of the episode in question, but it did so in a context in which virtually all licensees had no reason to believe that the Episode had ever been considered by the Commission or staff to raise questions of indecency. In fact, the lack of any significant local community controversy or publicized negative reaction after the first broadcast of the episode in question reasonably led broadcasters to believe that the Episode was fully consistent with community standards.

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indecent. There, the Commission found the programming indecent and emphasized that the nudity and sexual activity were obvious because it was possible to see through the pixilation that was used. In the present case, no nudity or explicit sexual activity is visible, and so pixilation was completely unnecessary. *See Complaints Against Various Licensees Regarding Their Broadcast of the Fox Television Program "Married by America" on April 7, 2003*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd. 20,191 (2004).

[62] The Commission also notes that it may permissibly issue fines against affiliates, in addition to the originating network, because "the program is prerecorded, and CBS and its affiliates could have edited or declined the content prior to broadcast." Notice, ¶ 18. The Commission should be aware, however, that affiliates cannot rely on an opportunity to pre-screen or edit prime-time programming.

With regard to that first broadcast, only CBS and one affiliate received notice that a complaint had been filed with the Commission. Virtually all Affiliates therefore had no notice of any sort that an issue had been raised in connection with this broadcast. Even the one affiliate that received any inquiry at all from the Commission relating to the first airing of the broadcast could only have assumed that any concerns the Commission had were satisfied because the Commission terminated the inquiry as to that station as a part of a larger consent decree between the network and the Commission.[63] Because the Commission never released its letter of inquiry publicly as to either that affiliate or CBS, of course, no other broadcaster became aware that any issues had been raised with respect to this program.

Similarly, there was no suggestion from the Affiliates' viewers that the first broadcast of this Episode created any cause for concern. When the program was first aired on November 6, 2003, the Affiliates collectively received only eight adverse communications[64] from the approximately 43.5 million television households in the Affiliates' service areas – a dearth of complaints clearly insufficient to put any of the Affiliates on notice that the programming might be considered indecent in their communities. (Even the second broadcast of the Episode resulted in only 17 expressions of concern from viewers in the 93 local communities served by the Affiliates.)

Indeed, the lack of adverse reaction to the first airing of the Episode provided strong evidence that viewers had no such concerns. Other programs have produced dramatic amounts of viewer correspondence (the premiere of the *Book of*

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63 *Viacom, Inc.*, Order, 19 FCC Rcd. 23,100 (2004). Since that consent decree did not even mention this program, few parties would have been aware of its potential significance.

64 Declaration of Joy Barksdale (attached hereto as Attachment A).

Daniel, for example, apparently generated thousands of pieces of correspondence to local affiliates), and viewers are not hesitant to contact local stations when they are displeased by a station's programming. Here, although a large number of complaints would not demonstrate that material did, in fact, violate contemporary community standards, the fact that viewers generally did *not* contact stations to complain about the Episode is strong evidence that the Episode could not reasonably be found to violate the standards of any community in which it was broadcast or of the nation as a whole.

Because the Affiliates received virtually no indication from the Commission and no signals from the viewers in their communities that there was any concern about indecency associated with the first airing of the Episode, and because then-existing Commission decisions clearly indicated that the Episode did not include material that would have been considered indecent, it was wholly inappropriate for the Commission to impose any forfeiture – let alone the statutory maximum – in this proceeding.

B. The Commission's Proposal of An Inappropriately Large Forfeiture Was Arbitrary and Capricious.

In contrast to the vast majority of indecency cases considered by the Commission, the Episode involves a socially responsible discussion of an important societal problem. It raises parental awareness of the need to protect teenagers from destructive behavior and, in context, is neither indecent nor the "egregious" display that is portrayed in the Notice. Under applicable law, the statutory maximum forfeiture is to be reserved for circumstances that evidence flagrant violations of well-established indecency rules. Even if the Commission were to find the Episode actionably indecent and that a forfeiture is warranted, this is clearly not such a circumstance, and the

Commission's decision to apply the statutory maximum forfeiture here was arbitrary and capricious.

Section 503(b)(2)(D) of the Communications Act *requires* the Commission to consider a number of factors in determining the amount of a forfeiture, including the existence of a "repeated or continuous violation," a "substantial or economic gain derived from the violation," an "intentional violation," and the licensee's "history of overall compliance."[65] None of these issues was considered by the Commission. Instead of analyzing each factor for each station before determining the appropriate amount, the Commission summarily imposed the maximum forfeiture because "the material graphically depicts teenage boys and girls," "the scene is highly sexually charged," and "it focuses on sex among children."[66] But, just as the fact that actors depicting teenagers are involved cannot transform suggestive content into indecent content, the Commission cannot unilaterally amend Section 503 to include "depiction of teenagers" in the forfeiture calculation simply because it does not approve of the substance of the program at issue.

The $32,500 per station forfeitures issued in this case are absolutely inconsistent with Commission precedent. Stations airing an episode of Fox's reality television show "Married by America" that featured digitally obscured nudity and "strippers in various sexual situations," for instance, received forfeitures in the base

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65 47 U.S.C. § 503(b)(2)(D).

66 *Notice* at ¶ 18. This failure to analyze the statutory factors is part and parcel of the FCC's refusal to send letters of inquiry regarding the December 31, 2004 broadcast of the Episode to *any* of the Affiliates to permit them to provide the required individual evidence.

amount of $7,000.[67] Other recent forfeitures, in far more explicit and sexually oriented cases than this, were similarly restrained: The Commission proposed base, and not maximum, forfeitures for radio discussions of a porn star engaging in "fisting," and of women describing oral sex.[68] For programming that the Commission characterized as including four instances of "jokes involving anal sex, oral sex, excretory activities, and sexual intercourse with a child present," the Commission proposed a forfeiture of $5,625 per violation – *less* than the base forfeiture amount.[69] The Commission has imposed forfeitures near the base level in scores of indecency cases, most of which involve far more graphic, and far less socially redeeming, content than is at issue here. In addition, each of the Affiliates has an exceptional record of compliance with the Commission's indecency policy. The decision to impose the statutory maximum forfeiture in this case, then, is arbitrary, capricious, and inconsistent with established precedent.

III. THE FINDINGS OF THE NOTICE ARE PROCEDURALLY INVALID AND SHOULD BE VACATED.

The Notice should be vacated because the process that led to its issuance failed to comply with the basic procedural requirements that the Commission has established for indecency cases. The Commission's policy is that it acts only on "documented complaints . . . received from the public,"[70] and that such complaints must generally include: "(1) a full or partial tape or transcript or significant excerpts of the

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67 *Married by America* at ¶¶ 1, 2.

68 *Emmis FM License Corp.*, Forfeiture Order, 17 FCC Rcd. 493 (2002), *recon. denied*, 17 FCC Rcd. 18,343 (2002), *review denied*, 19 FCC Rcd. 6452 (2004), *rescinded under consent decree*, 19 FCC Rcd. 16,003 (2004).

69 *Edmund Dinis*, Notice of Apparent Liability for Forfeiture, 17 FCC Rcd. 24,890 (2002).

70 *Industry Guidance* at ¶ 24.

program; (2) the date and time of the broadcast; and (3) the call sign of the station involved."[71] "If a complaint does not contain [this] supporting material . . . it is usually dismissed by a letter to the complainant advising of the deficiency."[72] The Notice concerning the Episode reflects an abrupt departure from this policy, as well as an abandonment of the procedure articulated in *Industry Guidance*.

A. The Mass Emails Received By the Commission Were Inadequate To Constitute True Complaints.

In issuing the Notice regarding the December 31, 2004 broadcast of the Episode, the Commission acted on the basis of a mass email campaign, rather than on the basis of a true complaint.[73] The Commission's longstanding policy, conceding the imprudence of punishing a local station for airing content to which no actual viewer or listener objected, has been that it will not issue a forfeiture against any station that was not the subject of a "complaint" by a viewer in its community of license.[74] As the *Omnibus Notice* explained, the Commission's "commitment to an appropriately

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71 *Id.*

72 *Id.*

73 As noted earlier, the Affiliates have not yet received the Commission's response to their FOIA request. This analysis thus will be supplemented when copies of the complaints that underlie the Notice are analyzed. For purposes of this analysis, however, it appears certain that virtually all of the "complaints" on which the Commission relies are form emails generated by the PTC website. *See* https://www.parentstv.org/ptc/action/withoutatrace/main.asp (PTC form complaint for the Episode); https://www.parentstv.org/ptc/action/withoutatrace/tellafriend2.asp (PTC "tell a friend" form encouraging users to "remember there is strength in numbers" and to email friends to encourage them to file "complaints" with the Commission about the Episode; http://www.parentstv.org/ptc/news/2005/indecency_bandc3.htm (reproducing article reporting that PTC members filed 138,000 complaints in January 2005).

74 *Omnibus Notice* at ¶¶ 32, 42, and 86.

restrained enforcement policy . . . justifies this . . . approach towards the imposition of forfeiture penalties."[75]

But what appears to be a series of form emails generated by an online advocacy group does not constitute the "documented complaints . . . received from the public" required by Commission's precedent.[76] One automatically generated complaint, submitted to the Commission many times, surely does not constitute "numerous complaints," as claimed by the Notice.[77] Until 2004, the Commission acknowledged this point and treated multiple identical complaints as a single complaint. It was not until the Commission sought to dramatically expand the scope of its indecency regime that it began to artificially inflate the complaint tally by counting the same complaint many times.[78]

Under the Commission's "appropriately restrained" approach, which provides for the dismissal of insufficient complaints, emails that are automatically generated from a web site clearly do not support an FCC enforcement action.[79] There is

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75 *Id.*

76 *Industry Guidance* at ¶ 24.

77 *Notice* at ¶ 10.

78 *See* Adam Thierer, "Examining the FCC's Complaint-Driven Broadcast Indecency Enforcement Process," Progress Freedom Found., 12.22 Progress on Point 7-8 (Nov. 2005), available at http://www.pff.org/issues-pubs/pops/pop12.22indecencyenforcement.pdf ("[S]ince the first quarter of 2004, the FCC has been counting *identical* indecency complaints multiple times according to how many Commissioner's offices and other divisions receive the complaints. Consequently, some indecency complaints might be inflated by a factor of 6 or 7 because the agency could be counting the same complaint multiple times. . . .") (emphasis in original).

79 The Parents Television Council form complaints, and not individualized complaints from concerned viewers of a type that would realistically call for Commission review, account for the vast majority of the indecency complaints received annually by the Commission. According to a study by the industry periodical *MediaWeek*, 99.8 percent of the indecency complaints filed in 2003 originated with the PTC. Similarly,

no record evidence that any of the authors of the mass emails on which the Commission relied actually reside in the communities of license of any of the Affiliates, or that any of the complainants even watched the Episode that is the subject of the Notice.[80] Moreover, by relying on mass emails from the PTC to determine which programs contain material warranting an investigation, rather than using independent discretion, the Commission has effectively delegated its responsibility to an advocacy group, a course that is plainly impermissible.

Regardless of the content of the form-generated emails received by the Commission, however, the Affiliates' analysis of direct viewer communications that they received is highly instructive. The fact that only 17 actual negative viewer communications were sent to any of the Affiliates in 93 markets, serving an aggregate 43.5 million television homes, is compelling evidence that viewers in overwhelming measure did not consider the program indecent, and that the email campaign that was focused on the Commission cannot constitute an actionable "complaint" against the Affiliates.[81]

B. The Forfeitures Proposed Against Satellite Stations Were Improper.

In addition, the forfeitures proposed in the Notice against satellite stations constitute impermissible double-counting or are otherwise invalid and should be vacated. It has been long settled that satellite stations "primarily rebroadcast the programming of

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99.9 percent of the complaints received by the Commission concerning the Super Bowl XXXVIII halftime show were generated by the PTC. Todd Shields, "Activists Dominate Content Complaints," Media Week (Dec. 6, 2004).

[80] There also is no showing that any of the senders of these mass email complaints received the Episode over the air rather than as part of a complement of channels provided by a multichannel video programming distributor.

[81] Declaration of Joy Barksdale (attached hereto as Attachment A).

parent stations rather than originate programming."[82] For this reason, the Commission has for many purposes long considered satellite stations to be merely a part of their parent station.[83] Fourteen of the Affiliates' stations that have been issued forfeitures by this Notice are, in fact, satellite stations.[84] The inclusion of those stations in the Notice of Apparent Liability is directly contrary to precedent.

As a practical matter, a satellite station is little more than an extension of the signal of the parent station, and no independent programming judgments are made about what it broadcasts. Satellites generally reach areas of small population, otherwise unable to support a television service. In most cases, the total population served by a parent station and its satellites is far less than the audience of a single major market station. To penalize both a parent and satellite for a single violation – in effect to make it more expensive to operate these stations serving sparsely populated areas that would otherwise receive no service – simply serves no public interest benefit. Accordingly, forfeitures against the satellite stations should be dismissed.

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82 *Television Satellite Stations Review of Policy & Rules*, Second Further Notice of Proposed Rulemaking, 6 FCC Rcd. 5010, ¶ 3 (1991). *Accord Review of the Commission's Regulations Governing Television Broadcasting*, 14 FCC Rcd. 12,903, 12,943 ¶ 90 (1999).

83 For example, satellite stations are generally exempt from the FCC's broadcast ownership restrictions. *See 2002 Biennial Regulatory Review*, 18 FCC Rcd. 13,620, 13,710 ¶ 233 (2003).

84 The satellite stations licensed to one of the Affiliates and listed in the notice are: KVTV(TV), Laredo, TX; KBIM-TV, Roswell, NM; KBTX-TV, Bryan, TX; KGIN(TV), Grand Island, NE; KBSH-TV, Hays, KS; WHLT(TV), Hattiesburg, MS; KXMA-TV, Dickinson, ND; KXMB-TV, Bismarck, ND; KXMD-TV, Williston, ND; KSTF(TV), Gering, NE; KCLO(TV), Rapid City, SD; KPLO-TV, Reliance, SD; KREZ-TV, Durango, CO; and KYTX(TV), Nacogdoches, TX.

IV. THE COMMISSION'S SCHEME FOR REGULATING TELEVISION INDECENCY VIOLATES THE FIRST AMENDMENT.

The Notice should be vacated because the expanded indecency policy on which it is based is unconstitutional, both as it is applied against the Affiliates in this case and on its face. The current indecency policy is, at its core, a makeshift, standardless attempt to improperly regulate protected speech in a manner that is inconsistent with the First Amendment, the Communications Act, and Supreme Court precedent.

The Communications Act of 1934 forbids the Commission to take any action that would "interfere with the right of free speech by means of radio communication."[85] Notwithstanding this general prohibition, the Supreme Court in 1978 issued what the Court later called an "emphatically narrow"[86] decision in *FCC v. Pacifica Foundation*, permitting the Commission to regulate radio indecency.[87] The U.S. Court of Appeals for the D.C. Circuit later limited the scope of the Commission's authority to regulate indecent content, emphasizing in a series of lawsuits brought by a coalition of broadcasters, industry associations, and public interest groups (referred to in decisions by reference to the first named plaintiff, the group Action for Children's Television ("ACT")) that the First Amendment does not permit the Commission to impose an outright ban on indecent speech.[88]

Under the First Amendment, content-based regulation of speech such as the Commission's indecency standard must satisfy the so-called strict scrutiny standard –

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85 47 U.S.C. § 326.

86 *Sable Communications of California v. FCC*, 492 U.S. 115, 126 (1989).

87 438 U.S. 726 (1978).

88 *Action for Children's Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991) ("ACT II").

that is, the governmental action must be the most narrowly tailored means available to the government to accomplish a compelling purpose.[89] The Commission has asserted that its purpose in regulating broadcast indecency is "supporting parental supervision of children and more generally [protecting] children's well being."[90] In the fourth ACT case, the D.C. Circuit found that the Commission's indecency policy was not the most narrowly tailored means for accomplishing this goal, and required it to permit indecent broadcasts between the "safe harbor" hours of 10 p.m. and 6 a.m., when it was believed that most children would not be in the audience.[91] But the principle enunciated in *ACT* remains

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89 *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000).

Competing media sources today – cable, satellite and Internet – are reshaping the notion of media choice, and the audience treats them virtually interchangeably. The day is long past when over-the-air broadcasting dominated viewing patterns and habits or could be described as the sole pervasive medium available to American television consumers. For those reasons, and because the widespread availability of blocking technologies eviscerates the notion that broadcasting is uniquely accessible to children, there is simply no justification for holding the Commission's indecency regime to a different standard of review than would apply to any other established medium.

The Commission's indecency policy would fail to survive even the less rigorous intermediate scrutiny standard, which requires a showing that the regulation furthers an important governmental objective unrelated to the suppression of speech, that the law is narrowly tailored, and that ample alternative means of communication remain. The FCC states that its goal is to "support[] parental supervision of children," but its indecency policy is not generally targeted toward that goal. Instead, it is a narrowly focused regime intended to prevent indecent speech from being received by children. That goal is plainly "related to the suppression of speech." Moreover, as we will show, the measure is not narrowly tailored because there are several less restrictive means by which the Commission could pursue its goal. Further, "channeling" speech to time slots when fewer viewers – whether children or adults – are in the audience is not an adequate alternative means of communication. This is particularly true in the time zones under consideration here, given that no part of Central or Mountain time zone prime time falls within the safe harbor.

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

91 *Id.* At least five broadcast television stations that aired the Episode after 10 p.m., and within the FCC's "safe harbor" hours for indecency regulation, were inadvertently included in the Notice. The proposed forfeitures were cancelled after the licensees

vital: The Commission may only regulate if it can demonstrate that its regulatory scheme is the most narrowly tailored way to achieve its goals.

Moreover, although the Supreme Court's 1978 decision in *Pacifica* permitted the Commission to regulate indecency in radio broadcasts, that case did not address indecency regulation in the television context; indeed, the *Pacifica* court acknowledged the relevance of differences between television and radio.[92] Beginning with the already limited scope of regulation approved in *Pacifica*, the ACT cases in the D.C. Circuit significantly reduced the scope of the Commission's authority in this area. And the regime upheld in *Pacifica* has long since been eclipsed by technology and market developments. Even if that regime was permissible in 1978, it is no longer the most narrowly tailored way to protect children from being exposed to broadcast indecency in the television medium, and it is therefore invalid under the First Amendment.

A. The Commission's Television Indecency Policy Facially Violates The Principles Set Out in *Reno v. ACLU.*

As discussed above, the Commission's indecency policy is premised on a determination whether the material at issue is patently offensive, "as measured by contemporary community standards for the broadcast medium."[93] The Commission has defined this standard by stating:

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informed the Commission of its error. *Complaints Against Various Television Licensees Concerning Their December 31, 2004 Broadcast of the Program "Without A Trace,"* Order, File No. EB-05-0035, DA 06-675 (rel. Mar. 28, 2006).

92 *Pacifica*, 438 U.S. at 750 (emphasis added) (acknowledging that the "content of program in which the language is used will also affect the composition of the audience, and *differences between radio, television, and perhaps closed-circuit transmissions, may also be relevant*" to the amount of permissible regulation).

93 *Industry Guidance* at ¶ 8.

> The determination as to whether certain programming is patently offensive is not a local one and does not encompass any particular geographic area. Rather, the standard is that of an average broadcast viewer or listener and not the sensibilities of any individual complainant.[94]

The Commission's standard, then, is a national one that is not tied to a particular broadcaster's community of license and that is not based on any specific viewer or group of viewers.

The Supreme Court recently invalidated a strikingly similar set of "contemporary community standards" in *Reno v. ACLU*.[95] In that decision, the Supreme Court struck down the Communications Decency Act's ("CDA") national indecency standard, which Congress proposed to use to restrict indecent content on the Internet. The Supreme Court rejected the CDA and its "contemporary community standards" as unworkably vague and inconsistent with the First Amendment. The Court found that the content-based regulation of speech contained in the CDA was of particular concern when coupled with the vagueness of the standard by which it would be enforced because it created an "obvious chilling effect on free speech."[96] Moreover, the Court emphasized that the CDA was unconstitutional because:

> In order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another. That burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.[97]

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94 *WPBN/WTOM License Subsidiary, Inc. (WPBN-TV and WTOM-TV)*, 15 FCC Rcd. 1838, 1841 (2000).

95 521 U.S. 844 (1997).

96 *Id.* at 871-72.

97 *Id.* at 874.

The invalidated CDA "contemporary community standards" are nearly identical to the standards used by the Commission for indecency cases, and the Supreme Court's rationale in *Reno* applies in toto to the Commission's broadcast indecency policy. Just as the CDA violated the First Amendment by applying an unquantifiable national standard to an inherently local medium,[98] the Commission's indecency standard is equally impermissible.

Hamling v. United States, on which the Commission relies in support of its national standard, is not to the contrary.[99] *Hamling* emphasizes that it is of paramount importance that "material is judged neither on the basis of a decisionmaker's personal opinion, nor by its effect on a particularly sensitive or insensitive person or group."[100] In that case, the Court, quoting *Miller v. California*, emphasizes that a national standard would be both "hypothetical" and "unascertainable."[101]

A comparison of the decisions issued by the Commission on March 15, 2006 demonstrates that the *Hamling* court was right to be cautious of an "unascertainable" national standard. There can be no principled, decisionally significant distinction between the sexuality displayed in *Alias*, which the Commission found non-indecent, and the content of *Without a Trace*, which earned the program the highest indecency fine in history. It is similarly impossible to distinguish between the content of

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98 *See, e.g., Amendment of Section 73.202(b)*, 17 FCC Rcd. 7222, 7224 (2002) ("[I]t is the licensee's primary obligation to serve the needs and interests of the community to which it is licensed.").

99 418 U.S. 87 (1974). *See Notice* at ¶ 4, n.8.

100 *Id.* at 107.

101 *Id.* at 104 (quoting *Miller v. California*, 413 U.S. 15, 31 (1973)). To the extent that the Commission believes that *Hamling* is inconsistent with *Reno*, the much more recent *Reno* decision controls. *See also* Section IV(C), *infra.*

Without a Trace and that of the *Oprah Winfrey Show* found not to be indecent in the *Omnibus Order*. Both programs discussed teenage sexuality in order to raise awareness about the risks of parental inattentiveness. The former program was found to be indecent and, on the same day, the latter program was found not to be indecent – even though its description of particular teenage sex acts was dramatically more explicit than anything even implied in *Without a Trace*. Indeed, while the Commission lauded Oprah's explicit discussion of teenage sex practices, the Commission used the Episode's comparably serious treatment of teen sexuality as an aggravating factor in its cursory forfeiture analysis.

As the *Reno* Court warned, a vague standard "provoke[s] uncertainty among speakers" and prevents speakers from knowing what conduct is to be prohibited.[102] The Court also emphasized that, in the context of content-based regulation of speech, "[t]he vagueness of such a regulation raises special First Amendment concerns because of the obvious chilling effect on free speech."[103] Like the unprecedented forfeitures proposed in the Notice, the Supreme Court held that the severe penalties of the CDA raised serious constitutional problems because they "may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images."[104]

The Supreme Court's concern is manifestly applicable in the context of the Commission's errant indecency policy, and there are many instances of chilling effect caused directly by the Commission's failure to properly limit the scope of its

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102 *Id.* at 871.

103 *Id.* at 871-72.

104 *Id.* at 872.

enforcement. For example, although the film *Saving Private Ryan* was aired for two years without incident – and the Enforcement Bureau had formally found airings of the film in both years not to be indecent[105] – the Commission's subsequent release of indecency decisions that were unduly restrictive and potentially inconsistent with past cases caused many broadcasters to be justifiably wary of airing it again. When the network and the film's producer decided not to edit coarse language from the film because it would destroy the artistic merit of the work, 66 affiliates declined to air the program rather than risk indecency fines.[106]

Public broadcasters, too, have recently shown that the Commission's indecency policy has imposed a serious chilling effect on the speech of that broadcasting community.[107] For instance, public broadcasters have had to consider whether to edit a *Frontline* documentary about the Al Qaeda terrorist network, which included a videotape of the second plane crashing into the World Trade Center and an expletive uttered by a horrified onlooker; an *Antiques Roadshow* segment involving a famous 50-year-old lithograph of a nude celebrity; and an episode of *NOVA* that contained dramatic footage from the Iraq war in which a soldier, enraged after watching a bomb exploding near a

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105 *See* Letter from Charles W. Kelley, Chief, Investigations and Hearings Division, Enforcement Bureau, to Mr. and Mrs. John Schmeling, Jr., File No. EB-02-IH-0838 (Dec.19, 2002); Letter from Charles W. Kelley, Chief, Investigations and Hearings Division, Enforcement Bureau, to Tim Wildmon, Vice President, American Family Association, File No. EB-02-IH-0085 (Jun. 7, 2002).

106 Suzanne Goldenberg, *Fearful TV fails Private Ryan: Spielberg film boycotted as Janet Jackson episode and the morality vote expose censorship threat*, The Guardian 20 (Nov. 12, 2004).

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

convoy, used the word "fuck" as an intensifier when informing his commander that a nearby Iraqi was lying.[108]

In the month since the Notice was issued, broadcasters from across the country have acknowledged that the inconsistency of the Commission's indecency policy makes it impossible to predict what speech might next be considered indecent. Rather than risk the debilitating forfeitures proposed in the Notice, many broadcasters will be forced to choose to remain silent on controversial issues of public concern.[109] Such a result is simply not consistent with the First Amendment or *Pacifica*.

1. The Commission Has Never Explained Its Standard for Television.

The root of the problem posed by the Commission's indecency action is its ongoing failure to define "contemporary community standards for the broadcast medium." Every one of its decisions includes a rote recitation of language that provides no information at all about how the Commission measures the relevant community's standards. Indeed, it is unclear whether the Commission defines that community to

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[108] *Id.* at 4-5.

[109] *See, e.g.*, Bill Carter, *WB, Worried About Drawing Federal Fines, Censors Itself*, New York Times E1 (Mar. 23, 2006). Of course, the chilling effect of the 2004 indecency decisions has been well-documented. *See, e.g.*, L. Smith, *Profanity Rules Bother News Shows*, Los Angeles Times, May 6, 2004, at C1 (describing local stations curtailing live coverage of Pat Tillman funeral because of language concerns); J. Davies, *Fine-Warn Broadcasters Toe a Shifting Line*, San Diego Union-Tribune, May 29, 2004, at A-1 (describing editing of "50-year-old lithograph of a nude celebrity" on *Antiques Roadshow*); S. Collins, *Pulled into a Very Wide Net: Unusual Suspects Have Joined the Censor's Target List*, Los Angeles Times, March 28, 2004, at E26 (describing decision to obscure the glimpse of an 80-year-old patient's breast in an operating room drama).

include all Americans, or to include only the twelve percent of Americans who do not receive their television programming via cable or satellite.[110]

Today, 88 percent of viewers of broadcast television pay monthly fees to receive that broadcast programming – and a substantial amount of other content – via cable or satellite on at least one receiver in their homes. The Commission has no evidence that, as they move seamlessly from broadcast to cable and satellite program services, viewers are adjusting their expectations about the acceptability of the content they will encounter, and there is no reason to posit that they regard these sources as anything other than interchangeable for most purposes. That being the case, the Commission cannot justify a definition of "community standards for the broadcast medium" that excludes any consideration of the very significant amount of time viewers spend watching cable and satellite-based content.

Nor is the Commission qualified to act as the surrogate for some actual community. It once claimed to rely on its "collective experience and knowledge, developed through constant interaction with lawmakers, courts, broadcasters, public interest groups, and ordinary citizens,"[111] but, as we have stated, the Commission's most recent interaction with courts on indecency was over ten years ago, and no court has *ever* passed judgment on a television indecency enforcement action. Neither has the Commission explained how any casual interactions that it has had with legislators, broadcasters, or "ordinary citizens" could have informed it sufficiently to develop the

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

111 *Infinity Radio License, Inc.*, 19 FCC Rcd. 5022, 5026 (2004).

compelling and thorough understanding of contemporary community standards that is required to channel First Amendment-protected speech.

The Commission has never attempted to measure the standards of that purported community. Indeed, the Commission has rebuffed suggestions that it consider quantitative measures of community standards in its indecency decisions,[112] and its members have instead relied on their own gut reactions in establishing the standards by which all broadcasters are judged. An enforcement regime that subjects broadcasters to the subjective standards of a putative community, but which prevents broadcasters from identifying that community or actually measuring its standards, is unsupportable.

Even if the Commission were qualified to judge community standards, it has not even said whether a particular number of indecency complaints would suggest that a particular program violated them or, if the violation is not measured by number of complaints, how the Commission might objectively measure what content would be acceptable in any community.[113] As a result, the Commission has no ability to make decisions that accurately reflect the standards of any audience. More importantly, the baseless nature of the Commission's approach prevents any licensee from challenging the

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112 *See, e.g., Entercom Sacramento*, 19 FCC Rcd. 20,129, 20,135 ¶ 13 (2004) (rejecting ratings as a proxy for community acceptance); *Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show*, File No. EB-04-IH-0011, FCC 06-19, at ¶ 5 n.17 (Mar. 15, 2006) (rejecting "third-party public opinion polls" of members of the community as viable measures of community standards, and instead relying on the Commission's own *ad hoc* views concerning such standards).

113 Defining "community standards" solely by the particular tastes of those who choose to engage in the filing of mass complaints, of course, raises its own constitutional issues. *See Reno*, 521 U.S. at 844 (statute "would confer broad powers of censorship, in the form of a 'heckler's veto,' upon any opponent of indecent speech who might simply log on and inform the would-be discoursers that his 17-year-old child . . . would be present.").

Commission's indecency determinations on the basis that the content believed indecent by the Commission did not, in fact, violate the standards of that licensee's community.

To the extent that imperfect measures of the standards of the American people exist, however, they consistently indicate that the Commission's view of certain content as indecent is off the mark. For example, a recent survey conducted by TV Watch revealed that only twelve percent of the respondents believed that the government should regulate television indecency.[114] Because the majority of the country -- and, presumably, the majority of the individuals in the Commission's "contemporary community" -- oppose broadcast indecency regulation altogether, the Commission can hardly claim that it is faithfully applying "contemporary community standards" in its indecency decisions.

2. The Commission Has Never Consistently Applied Its Indecency Standard.

Moreover, ever since the Commission articulated its intent to apply "contemporary community standards for the broadcast medium" in regulating indecency, its effort to implement those standards has produced only decades of inconsistent indecency decisions, compounded by a lack of consideration for technological developments in the television industry (including the establishment of a universal

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[114] TV Watch, "Survey: More Likely to Find an Adult Who Believes in Alien Abductions Than a Voter Who Wants the Feds to Pick What's on TV," Press Release (Mar. 31, 2006), available at http://www.televisionwatch.org/site/apps/nl/content2.asp?c=dhLPK0PHLuF&b=1129333&ct=2133849.

The Commission engages in indecency regulation without considering the standards of most Americans. The Commission's indecency decisions, for instance, appear to misapprehend the manner in which Americans use language that is considered indecent for purposes of broadcast television. *See, e.g.*, Jocelyn Noveck, "Poll: Americans See, Hear More Profanity," Associated Press, *reprinted in* Washington Post Online (Mar. 28, 2006), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/03/28/AR2006032801046_pf.html.

industry ratings code, the broad availability of blocking technologies, and the fact that 88 percent of television viewers obtain their broadcast television through cable and satellite systems).

Indeed, the Commission was unable on March 15 to release a set of decisions that were consistent with *each other*, let alone with the body of indecency decisions that purportedly guide broadcasters. We have already discussed the inconsistency of the Commission's treatment of the *Oprah Winfrey Show*, *Alias*, and *Without a Trace*. Under the Commission's application of its baseless standard, the word "bullshit" (used as a synonym for "nonsense") is indecent because its use "invariably invokes a coarse excretory image,"[115] whereas the term "pissed off" (meaning "annoyed") is a "coarse expression," but, "in the context presented, [is] not sufficiently vulgar, graphic, or explicit to support a finding of patent offensiveness."[116] While the Commission finds "bullshit," used in a context wholly unrelated to excretory activity in an *NYPD Blue* episode to be indecent,[117] it upholds more extensive profanity in the film *Saving Private Ryan* on the theory that, in that work, editing "would have altered the nature of the artistic work and diminished the power, realism and immediacy of the film experience for viewers."[118] While finding *NYPD Blue* indecent, the Commission inexplicably found extended and graphic discussions of "salad tossing"[119] and "rainbow

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115 *Omnibus Notice* at ¶ 91 (emphasis added).

116 *Id.* at ¶ 197 (emphasis added).

117 *Id.* at ¶ 131.

118 *Saving Private Ryan*, 20 FCC Rcd. at 4513 ¶ 14.

119 "[O]ral anal sex."

parties"[120] as permissible under "contemporary community standards for the broadcast medium."[121]

When the Supreme Court narrowly approved indecency regulation in *Pacifica*, Justice Brennan expressed his fear that the Commission might use that authority to subjectively penalize protected speech. The Court and the Constitution require a consistent, objective standard in order to prevent the Commission from doing precisely what it has done in March 15 decisions:[122] penalizing speech of which it disapproves[123] while permitting similar speech that it favors.[124]

The Commission has never offered any principled explanation of what its indecency standard actually means. The Commission agreed as a part of a settlement in the *United States v. Evergreen Media Corp.*[125] that, "[w]ithin nine months of the date of this Agreement, the Commission shall publish industry guidance relating to its caselaw interpreting 18 U.S.C. § 1464 and the Commission's enforcement policies with respect to broadcast indecency." Nearly seven years after that settlement, the Commission released

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120 "[A] gathering where oral sex is performed [and where] all of the girls put on lipstick and each one puts her mouth around the penis of the gentleman or gentlemen who are there to receive favors and makes a mark in a different place on the penis."

121 *Omnibus Notice* at ¶ 178-79 ("Oprah").

122 Similarly to its decision in this case, the Commission engaged in prohibited censorship in its "NYPD Blue" decision. There, the FCC found that the word "bullshit" should have been deleted from an episode of that drama because, "[w]hile we recognize that the expletives may have made some contribution to the authentic feel of the program, we believe that purpose could have been fulfilled and all viewpoints expressed without the broadcast of expletives." *Omnibus Notice* at ¶ 134.

123 *See generally Notice*; *Omnibus Notice* at ¶¶ 72-86 ("The Blues: Godfathers and Sons").

124 *See Omnibus Notice* at ¶¶ 173-179 ("Oprah"), 147-152 ("Alias"); *Saving Private Ryan*, 20 FCC Rcd. 4507, 4513 ¶ 14 (2005).

125 Civ. No. 92-C-5600 (N.D. Ill, E. Div. 1994).

Industry Guidance, which simply summarized existing decisions, some of which the Commission soon disregarded. The Commission's continued inability to define the standards by which the broadcasting industry must make daily and, indeed, hourly programming decisions fatally undermines the constitutionality of the Commission's current indecency policy.

B. As Applied In The Notice, The Commission's Indecency Policy Is Unconstitutional.

The standardless nature of the Commission's indecency decisions inevitably have led it to the content-based decisionmaking of the Notice, which constitutes little more than a subjective *ipse dixit* overruling of the creative and editorial judgment of the producers of *Without a Trace* and the broadcasters that aired it. The Commission invaded constitutionally protected territory, and violated the non-censorship provision of the Communications Act,[126] when it based its decision to propose a forfeiture on its belief that "the depictions of sexual activity . . . go[] well beyond what the story line could reasonably be said to require."[127] Indeed, the Commission acts completely outside of its authority when it offers any opinion about – let alone bases its decision on – its own private judgments about artistic value or necessity.[128]

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126 47 U.S.C. § 326 (forbidding the Commission to take any action that would "interfere with the right of free speech by means of radio communication").

127 *Notice* at ¶ 15.

128 *See, e.g., Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 650 (1994) (Although "the Commission may inquire of licensees what they have done to determine the needs of the community they propose to serve, the Commission may not impose upon them its private notions of what the public ought to hear."); *Hubbard Broadcasting, Inc.*, 48 F.C.C.2d 517, 520 (1974) (The Commission "has no authority and, in fact, is barred by the First Amendment and [Section 326] from interfering with the free exercise of journalistic judgment.").

Even if it were possible to discern from the patchwork of indecency decisions anything other than an arbitrary and subjective assertion of government power to decide what ideas may be broadcast and in what form, it is well-settled that the Commission is simply not empowered to make or review editorial decisions. As the Supreme Court has noted in the news context, "editing is what editors are for; and editing is selection and choice of material. That editors—newspaper or broadcast—can and do abuse this power is beyond doubt, but that is no reason to deny the discretion Congress provided. Calculated risks of abuse are taken in order to preserve higher values."[129]

The Commission apparently recognized in the Notice that its "contemporary community standards for the broadcast medium" are so imprecise that it could not follow its own precedent and enforce them against CBS affiliates whose viewers did not complain about the Episode. It therefore decided to change course and, despite the fact that virtually none of the *stations* received legitimate viewer objections to the Episode, made a limited retreat by proposing forfeitures against only those affiliates for which the *Commission* received a "complaint" – presumably an automatically generated email from the PTC web site. But the whole premise of our system of speech regulation is that the most effective and important content might be the kind that produces objections or to which an audience has immediate reactions. The presence of visceral, or even well-thought-out, objections to such speech cannot serve to create a basis for banning or channeling it.[130] That is particularly true in this context, where

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[129] *Columbia Broadcasting Sys., Inc. v. Democratic National Ctte.*, 412 U.S. 94, 124-25 (1973).

[130] *Playboy*, 529 U.S. at 825 ("the perception that the regulation in question is not a major one because the speech is not very important" cannot insulate a restriction on speech from First Amendment scrutiny).

programs can be subjected to organized letter and email campaigns from individuals who may or may not have viewed the material in question or reside in a particular broadcast community. Without measurable and real standards to guide its indecency enforcement, the Commission cannot avoid creating an inconsistent body of precedent or impermissibly imposing their own subjective views about permissible speech on the American public.

By arbitrarily designating certain disfavored content as indecent and other preferred content as permissible, and by concocting a brief and conclusory "analysis" to support its desired conclusions, the Commission has implemented an enforcement policy that is so vague and standardless that it simply cannot be sustained under the First Amendment's demanding requirements.

C. The Commission's Indecency Policy Is Not The Least Restrictive Means To Protect Children From Speech of Which Their Parents Disapprove.

The burden on adult speech caused by the Commission's arbitrary and overbroad indecency enforcement "is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve."[131] To use anything less than the most narrowly tailored method of imposing content-sensitive restrictions on speech "would be to restrict speech without an adequate justification, a course the First Amendment does not permit."[132]

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131 *Reno*, 521 U.S. at 874.

132 *Id.*

Indeed, the Court's "emphatically narrow" decision in *Pacifica*[133] was premised on two factual findings that no longer support the Commission's regulation of broadcast indecency: "(1) the pervasiveness of broadcast media in the lives of Americans, and (2) the unique accessibility of broadcast programming to children."[134] As the Court noted in *Reno*, the decision in *Pacifica* to uphold indecency regulation was based solely on "special justifications for regulation of the broadcast media," such as the uniquely "invasive" nature of broadcast programming.[135] Although video programming is still a pervasive presence in American society, the same "conditions that prevailed when Congress first authorized regulation of the broadcast spectrum"[136] and that existed in 1978 are simply not applicable nearly thirty years later.

Today, new technological means exist for the government to protect children without requiring virtually all broadcast programming to match the maturity level of a child.[137] All entertainment programming on broadcast television today includes

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133 *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). *See Sable Communications of California v. FCC*, 492 U.S. 115, 126 (1989).

134 *Pacifica*, 438 U.S. at 748-50.

135 *Id.* at 868.

136 *Id.* at 870.

137 *See Butler v. Michigan*, 352 U.S. 380, 383-84 (1957) (finding it unconstitutional for a speech regulation that is not narrowly tailored to "reduce the adult population . . . to [viewing] only what is fit for children"). *See also Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 252 (2002); *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 814 (2000) ("[T]he objective of shielding children does not suffice to support a blanket ban if the protection can be accomplished by a less restrictive alternative."); *Reno v. American Civil Liberties Union*, 521 U.S. 844, 875 (1997) ("[T]he governmental interest in protecting children from harmful materials . . . does not justify an unnecessarily broad suppression of speech addressed to adults."); *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 130-31 (1989) (striking down a ban on "dial-a-porn" messages that had "the invalid effect of limiting the content of adult telephone conversations to that which is suitable for children to hear").

parental guidance ratings that identify the age group for which the program is most appropriate and describe whether any adult content is presented.[138] Parents who choose to restrict their children's viewing[139] can use the V-chips included in their television sets to restrict the programming that their children can watch based on this rating.[140] They can also use equipment such as a cable or satellite "lockbox,"[141] or third-party equipment such as TiVo Inc.'s newly announced KidZone product, which has received support from the Parents Television Council and other groups,[142] to limit the programming available to their children.[143]

It is no answer to say that regulation is still required because people do not avail themselves of these tools in sufficient numbers. Failure to use the available controls

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138 TV Parental Guidelines Monitoring Board, "Understanding the TV Ratings," *available at* http://www.tvguidelines.org/ratings.asp.

139 A recent report by the Progress and Freedom Foundation emphasized that most parents use a combination of tools to guide their children's television viewing. For instance, in addition to using the V-chip and other tools, almost all parents monitor or impose rules on their children's exposure to television and other media. Adam Thierer, "Parents Have Many Tools to Combat Objectionable Media Content," Progress & Freedom Found., 13.9 Progress on Point (Apr. 2006), available at http://www.pff.org/issues-pubs/pops/pop13.9contenttools.pdf.

140 *See* Telecommunications Act of 1996, § 551, Pub. L. No. 104-104, 110 Stat. 56 (1996); 47 C.F.R. §§ 15.120, 73.682.

141 *See* 47 U.S.C. § 560 (requiring cable and satellite providers to offer "lockboxes" to subscribers).

142 TiVo Inc., "TiVo Announces New Enhancement to TiVo KidZone," Press Release (Mar. 14, 2006), *available at* http://sev.prnewswire.com/computer-electronics/20060314/SFTU10114032006-1.html (explaining that KidZone can be used to select specific programs available for children's viewing, or to restrict viewing to specific lists of programming, such as programming approved by PTC or shows meeting the Commission's standard for educational and informational programming).

143 The Supreme Court has invalidated indecency regulations in other media based on the availability of other alternatives for shielding children from indecent speech. *See, e.g., Ashcroft v. ACLU*, 542 U.S. 656, 667 (2004); *Playboy*, 529 U.S. at 821, 823-27; *Denver Area Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 756-59 (1996).

reflects the reality that, for many, the content available to them and their children is not unacceptable – that is, that the content is consistent with the "contemporary community standards for the broadcast medium" that are supposedly the Commission's decisional touchstone. Indeed, when the Supreme Court invalidated the Child Online Protection Act in *Ashcroft v. ACLU*,[144] it based its finding that the statute was not the least restrictive means of protecting children on the availability of filtering and blocking technologies in the marketplace. The Court in *Ashcroft* did not inquire about the extent to which parents actually chose to use such technologies. Similarly, the fact that parents do not overwhelmingly choose to block their children's viewing of broadcast television does not mean that the Commission's indecency policy remains the least restrictive means for protecting children.

The members of the Commission have frequently recognized the value and importance of these technological measures.[145] The Commission erred in not considering the V-chip rating for this program, which was disclosed to the Commission by CBS, or other less-restrictive means by which the Commission could have fulfilled its statutory goals, in assessing whether a forfeiture was appropriate here.

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144 542 U.S. 656 (2004).

145 Commissioner Tate, for instance, "applaud[ed] the industry [for] develop[ing] more tools for parents in developing parental controls." In recent remarks, she emphasized that parents have tools available to them to "block and limit objectionable material," but also acknowledged that "sometimes [parents] must turn the TV off." Comm. Daily 5 (Apr. 12, 2006).

In recent remarks at the National Cable Show, Commissioner Adelstein advocated that the Commission adopt "the least-restrictive means of protecting our children from indecency." John M. Higgins, "Kneuer: Much Work To Be Done in Analog to Digital," Broadcasting & Cable Online, http://www.broadcastingcable.com/article/CA6323801.html (Apr. 10, 2006).

CONCLUSION

In its Notice proposing forfeitures against CBS-affiliated local television broadcasters for airing an allegedly indecent episode of the drama "Without a Trace," as in other recent indecency decisions, the Commission departed from its constitutionally mandated commitment to exercise restraint in enforcing its indecency regulations. It has concocted a weak and specious analysis to find that the Episode in question is indecent, and it has not followed established precedent with regard to either the enforcement procedures it implements or the magnitude of the forfeiture it proposes.

The Commission has compounded these flaws by applying the arbitrary and baseless "contemporary community standards of the broadcast medium" test, a standard that has never been reliably and objectively defined and applied by the Commission. Without considering the context of the material it regulates, the Commission has used this standard to penalize programming with which it disagrees, while permitting the broadcast of similar programming that it favors.

In so doing, the Commission has departed from constitutionally permissible regulatory territory and has proposed a forfeiture against local broadcasters

for airing a socially responsible, important treatment of a significant public issue. That proposed forfeiture is unsupported by the record and by the Commission's own indecency standards. The Notice should therefore be vacated.

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Station KXII(TV), Sherman, Texas
Station WIBW-TV, Topeka, Kansas
Station WIFR (TV), Freeport, Illinois
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May 5, 2006

ATTACHMENT A

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	File No. EB-05-IH-0035
Complaints Against Various Television Licensees Concerning Their December 31, 2004 Broadcast of the Program *Without a Trace*	)	

DECLARATION OF JOY BARKSDALE

1. My name is Joy Barksdale. I am a Paralegal Specialist at the law firm of Covington & Burling. I am over the age of eighteen and am competent to make this declaration.

2. In connection with the accompanying Opposition to the above-captioned Notice of Apparent Liability for Forfeiture, I surveyed each of the 93 television stations affiliated with the CBS Television Network that is a signatory to the Opposition (the "Affiliates") to determine whether any of the Affiliates has received written comments and suggestions from the public concerning the "Our Sons and Daughters" episode of the program *Without a Trace*.

3. Specifically, I requested that the Affiliates review all records of written comments and suggestions received from the public that are maintained by each station in the ordinary course of business to determine the number of such comments and suggestions each station received concerning the airing of this episode on both November 6, 2003 and December 31, 2004.

Licensee	NAL Account Number	Call Sign and Community of License
Reiten Television, Inc.	200632080071	KXMA-TV Dickinson, ND KXMB-TV Bismarck, ND KXMC-TV Minot, ND KXMD-TV Williston, ND
Saga Broadcasting, LLC	200632080072	WXVT (TV) Greenville, MS
Saga Quad States Communications, LLC	200632080073	KOAM-TV Pittsburg, KS
Sagamore Hill Broadcasting of Wyoming/Northern Colorado, LLC	200632080074	KGWN-TV Cheyenne, WY KSTF (TV) Gering, NE
Television Wisconsin, Inc.	200632080075	WISC-TV Madison, WI
United Communications Corp.	200632080076	KEYC-TV Mankato, MN
WAFB License Subsidiary LLC	200632080077	WAFB (TV) Baton Rouge, LA
Waitt Broadcasting, Inc.	200632080078	KMEG (TV) Sioux City, IA
WCBI-TV, LLC	200632080079	WCBI-TV Columbus, MS
WDJT-TV Limited Partnership	200632080080	WDJT-TV Milwaukee, WI
WMDN, Inc.	200632080081	WMDN (TV) Meridian, MS
WWL-TV, Inc.	200632080083	WWL-TV New Orleans, LA
Young Broadcasting of Rapid City, Inc.	200632080084	KCLO-TV Rapid City, SD
Young Broadcasting of Sioux Falls, Inc.	200632080085	KELO-TV Sioux Falls, SD KPLO-TV Reliance, SD

4. The table attached to this Declaration as Exhibit A-1 accurately reflects, to the best of my knowledge and belief, the Affiliates' responses to the survey that I conducted.

I declare under penalty of perjury that the foregoing is true and correct. Executed on May 5, 2006.

Joy Barksdale

EXHIBIT A-1

WRITTEN COMMENTS AND SUGGESTIONS RECEIVED FROM THE PUBLIC CONCERNING THE "OUR SONS AND DAUGHTERS" EPISODE OF *WITHOUT A TRACE*

Licensee	Station Call Signs and Communities of License	Number of Communications (November 6, 2003)	Number of Communications (December 31, 2004)
Alabama Broadcasting Partners	WAKA (TV) Selma, AL	0	0
Alaska Broadcasting Company, Inc.	KTVA (TV) Anchorage, AK	0	0
Arkansas Television Company	KTHV (TV) Little Rock, AR	0	1
Barrington Broadcasting Quincy Corporation	KHQA-TV Hannibal, MO	0	0
Barrington Broadcasting Missouri Corp.	KRCG (TV) Jefferson City, MO	0	0
Catamount Bestg of Fargo LLC	KXJB-TV Valley City, ND	0	0
Chelsey Broadcasting Company of Casper, LLC	KGWC-TV Casper, WY	0	0
ComCorp of Indiana License Corp.	WEVV (TV) Evansville, IN	0	0
Coronet Comm Co.	WHBF-TV Rock Island, IL	1	0
Des Moines Hearst-Argyle Television, Inc.	KCCI (TV) Des Moines, IA	0	0
Eagle Creek Broadcasting of Laredo, LLC	KVTV (TV) Laredo, TX	0	0
Eagle Creek Broadcasting of Corpus Christi, LLC	KZTV (TV) Corpus Christi, TX	0	0

Licensee	Station Call Signs and Communities of License	Number of Communications (November 6, 2003)	Number of Communications (December 31, 2004)
Emmis Television License LLC	KBIM-TV Roswell, NM	0	0
	KGMB (TV) Honolulu, HI	0	0
	KMTV (TV) Omaha, NE	0	0
	KREZ-TV Durango, CO	0	0
	KRQE (TV) Albuquerque, NM	0	0
Fisher Broadcasting Idaho TV, LLC	KBCI-TV, Boise, ID	0	1
Fisher Broadcasting-SE Idaho TV LLC	KIDK (TV) Idaho Falls, ID	0	0
Freedom Bcstg of TX Licensee LLC	KFDM-TV Beaumont, TX	0	0
Glendive Bcstg Corp.	KXGN-TV Glendive, MT	0	0
Gray Television Licensee, Inc.	KBTX-TV Bryan, TX	0	0
	KGIN (TV) Grand Island, NE	0	0
	KKTV (TV) Colorado Springs, CO	0	0
	KOLN (TV) Lincoln, NE	0	0
	KWTX-TV Waco, TX	0	0
	KXII (TV) Sherman, TX	0	0
	WIBW-TV Topeka, KS	0	0
	WIFR (TV) Freeport, IL	0	0
	WSAW-TV Wausau, WI	0	0
Griffin Entities, LLC	KWTV (TV) Oklahoma City, OK	0	3

Licensee	Station Call Signs and Communities of License	Number of Communications (November 6, 2003)	Number of Communications (December 31, 2004)
Griffin Licensing, L.L.C.	KOTV (TV) Tulsa, OK	2	1
Hoak Media of Colorado LLC	KREX-TV Grand Junction, CO	0	0
Hoak Media of Wichita Falls, L.P.	KAUZ-TV Wichita Falls, TX	0	0
ICA Broadcasting I, LTD	KOSA-TV Odessa, TX	0	1
KCTZ Communications, Inc.	KBZK (TV) Bozeman, MT	0	0
KENS-TV, Inc.	KENS-TV San Antonio, TX	0	0
Ketchikan TV, LLC	KTNL (TV) Sitka, AK	0	0
KGAN Licensee, LLC	KGAN (TV) Cedar Rapids, IA	1	0
KHOU-TV LP	KHOU-TV Houston, TX	0	5
KLFY, LP	KLFY-TV Lafayette, LA	0	0
KMOV-TV, Inc.	KMOV (TV) St. Louis, MO	0	0
KPAX Communications, Inc.	KPAX-TV Missoula, MT	0	0
KRTV Communications, Inc.	KRTV (TV) Great Falls, MT	0	0
KSLA License Subsidiary, LLC	KSLA-TV Shreveport, LA	0	0
KTVQ Communications, Inc.	KTVQ (TV) Billings, MT	1	0
KXLF Communications, Inc.	KXLF-TV Butte, MT	0	0

Licensee	Station Call Signs and Communities of License	Number of Communications (November 6, 2003)	Number of Communications (December 31, 2004)
Libco, Inc.	KGBT-TV Harlingen, TX	0	0
Malara Broadcast Group of Duluth Licensee, LLC[146]	KDLH (TV) Duluth, MN	0	0
MMT License, LLC[147]	KYTX (TV) Nacogdoches, TX	0	0
Media General Broadcasting of South Carolina Holdings, Inc.	KBSH-TV Hays, KS	0	0
	KIMT (TV) Mason City, IA	0	0
	WKRG-TV Mobile, AL	0	0
Media General Communications, Inc.	WHLT (TV) Hattiesburg, MS	0	0
	WIAT (TV) Birmingham, AL	0	0
	WJTV (TV) Jackson, MS	0	0
Meredith Corp.	KCTV (TV) Kansas City, MO	1	0
	KPHO-TV Phoenix, AZ	0	0
Mission Broadcasting, Inc.	KOLR (TV) Springfield, MO	0	0
Neuhoff Family Partnership	KMVT (TV) Twin Falls, ID	0	0
News Channel 5 Network, LP	WTVF (TV) Nashville, TN	1	2
New York Times Management Services	KFSM-TV Fort Smith, AK	0	0
	WHNT-TV Huntsville, AL	0	0
	WREG-TV Memphis, TN	0	0

146 Malara Broadcast Group was not licensee of KDLH(TV) on either November 6, 2003 or December 31, 2004.

147 MMT License was not licensee of KYTX(TV) on November 6, 2003.

Licensee	Station Call Signs and Communities of License	Number of Communications (November 6, 2003)	Number of Communications (December 31, 2004)
Nexstar Broadcasting, Inc.	KLBK-TV Lubbock, TX	0	0
	KLST (TV) San Angelo, TX	0	0
	KTAB-TV Abilene, TX	0	0
	WCIA (TV) Champaign, IL	0	1
	WMBD-TV Peoria, IL	0	0
Noe Corp. LLC	KNOE (TV) Monroe, LA	0	1
Panhandle Telecasting Company	KFDA-TV Amarillo, TX	0	0
Queen B Television, LLC	WKBT (TV) La Crosse, WI	0	0
Raycom America License Subsidiary, LLC	KFVS-TV Cape Giradeau, MO	1	0
	KOLD-TV Tucson, AZ	0	0
Reiten Television, Inc.	KXMA-TV Dickinson, ND	0	0
	KXMB-TV Bismarck, ND	0	0
	KXMC-TV Minot, ND	0	0
	KXMD-TV Williston, ND	0	0
Saga Broadcasting, LLC	WXVT (TV) Greenville, MS	0	0
Saga Quad States Communications, LLC	KOAM-TV Pittsburg, KS	0	0
Sagamore Hill Broadcasting of Wyoming/Northern Colorado, LLC	KGWN-TV Cheyenne, WY	0	0
	KSTF (TV) Gering, NE	0	0
Television Wisconsin, Inc.	WISC-TV Madison, WI	0	0

Licensee	Station Call Signs and Communities of License	Number of Communications (November 6, 2003)	Number of Communications (December 31, 2004)
United Communications Corp.	KEYC-TV Mankato, MN	0	0
WAFB License Subsidiary LLC	WAFB (TV) Baton Rouge, LA	0	0
Waitt Broadcasting, Inc.	KMEG (TV) Sioux City, IA	0	0
WCBI-TV, LLC	WCBI-TV Columbus, MS	0	0
WDJT-TV Limited Partnership	WDJT-TV Milwaukee, WI	0	0
WMDN, Inc.	WMDN (TV), Meridian, MS	0	0
WWL-TV, Inc.	WWL-TV New Orleans, LA	0	1
Young Broadcasting of Rapid City, Inc.	KCLO-TV Rapid City, SD	0	0
Young Broadcasting of Sioux Falls, Inc.	KELO-TV Sioux Falls, SD	0	0
	KPLO-TV Reliance, SD	0	0

ATTACHMENT B

NAL Account Numbers for Each Licensee Responding to the NAL in this Opposition

Licensee	NAL Account Number	Call Sign and Community of License
Alabama Broadcasting Partners	200632080014	WAKA (TV) Selma, AL
Alaska Broadcasting Company, Inc.	200632080015	KTVA (TV) Anchorage, AK
Arkansas Television Company	200632080016	KTHV (TV) Little Rock, AR
Barrington Broadcasting Quincy Corporation	200632080017	KHQA-TV Hannibal, MO
Barrington Broadcasting Missouri Corp.	200632080018	KRCG (TV) Jefferson City, MO
Catamount Bcstg of Fargo LLC	200632080019	KXJB-TV Valley City, ND
Chelsey Broadcasting Company of Casper, LLC	200632080023	KGWC-TV Casper, WY
ComCorp of Indiana License Corp.	200632080024	WEVV (TV) Evansville, IN
Coronet Communications Company	200632080025	WHBF-TV Rock Island, IL
Des Moines Hearst-Argyle Television, Inc.	200632080026	KCCI (TV) Des Moines, IA
Eagle Creek Broadcasting of Laredo, LLC	200632080027	KVTV (TV) Laredo, TX
Eagle Creek Broadcasting of Corpus Christi, LLC	200632080028	KZTV (TV) Corpus Christi, TX
Emmis Television License LLC	200632080029	KBIM-TV Roswell, NM KGMB (TV) Honolulu, HI KMTV (TV) Omaha, NE KREZ-TV Durango, CO KRQE (TV) Albuquerque, NM
Fisher Broadcasting Idaho TV, LLC	200632080030	KBCI-TV, Boise, ID
Fisher Broadcasting-SE Idaho TV LLC	200632080090	KIDK (TV) Idaho Falls, ID
Freedom Bcstg of TX Licensee LLC	200632080031	KFDM-TV Beaumont, TX
Glendive Bcstg Corp.	200632080032	KXGN-TV Glendive, MT

Licensee	NAL Account Number	Call Sign and Community of License
Gray Television Licensee, Inc.	200632080033	KBTX-TV Bryan, TX KGIN (TV) Grand Island, NE KKTV (TV) Colorado Springs, CO KOLN (TV) Lincoln, NE KWTX-TV Waco, TX KXII (TV) Sherman, TX WIBW-TV Topeka, KS WIFR (TV) Freeport, IL WSAW-TV Wausau, WI
Griffin Entities, LLC,	200632080034	KWTV (TV) Oklahoma City, OK
Griffin Licensing, L.L.C.	200632080035	KOTV (TV) Tulsa, OK
Hoak Media of Colorado LLC	200632080036	KREX-TV Grand Junction, CO
Hoak Media of Wichita Falls, L.P.	200632080037	KAUZ-TV Wichita Falls, TX
ICA Broadcasting I, LTD	200632080038	KOSA-TV Odessa, TX
KCTZ Communications, Inc.	200632080040	KBZK (TV) Bozeman, MT
KENS-TV, Inc.	200632080042	KENS-TV San Antonio, TX
Ketchikan TV, LLC	200632080043	KTNL (TV) Sitka, AK
KGAN Licensee, LLC	200632080044	KGAN (TV) Cedar Rapids, IA
KHOU-TV LP	200632080045	KHOU-TV Houston, TX
KLFY, LP	200632080046	KLFY-TV Lafayette, LA
KMOV-TV, Inc.	200632080047	KMOV (TV) St. Louis, MO
KPAX Communications, Inc.	200632080048	KPAX-TV Missoula, MT
KRTV Communications, Inc.	200632080049	KRTV (TV) Great Falls, MT
KSLA License Subsidiary, LLC	200632080050	KSLA-TV Shreveport, LA
KTVQ Communications, Inc.	200632080051	KTVQ (TV) Billings, MT
KXLF Communications, Inc.	200632080053	KXLF-TV Butte, MT
Libco, Inc.	200632080054	KGBT-TV Harlingen, TX

Licensee	NAL Account Number	Call Sign and Community of License
Malara Broadcast Group of Duluth Licensee, LLC	200632080055	KDLH (TV) Duluth, MN
MMT License, LLC	200632080056	KYTX (TV) Nacogdoches, TX
Media General Broadcasting of South Carolina Holdings, Inc.	200632080057	KBSH-TV Hays, KS KIMT (TV) Mason City, IA WKRG-TV Mobile, AL
Media General Communications, Inc.	200632080058	WHLT (TV) Hattiesburg, MS WIAT (TV) Birmingham, AL WJTV (TV) Jackson, MS
Meredith Corp.	200632080059	KCTV (TV) Kansas City, MO KPHO-TV Phoenix, AZ
Mission Broadcasting, Inc.	200632080060	KOLR (TV) Springfield, MO
Neuhoff Family Partnership	200632080061	KMVT (TV) Twin Falls, ID
News Channel 5 Network, LP	200632080062	WTVF (TV) Nashville, TN
New York Times Management Services	200632080063	KFSM-TV Fort Smith, AK WHNT-TV Huntsville, AL WREG-TV Memphis, TN
Nexstar Broadcasting, Inc.	200632080064	KLBK-TV Lubbock, TX KLST (TV) San Angelo, TX KTAB-TV Abilene, TX WCIA (TV) Champaign, IL WMBD-TV Peoria, IL
Noe Corp. LLC	200632080065	KNOE (TV) Monroe, LA
Panhandle Telecasting Company	200632080066	KFDA-TV Amarillo, TX
Queen B Television, LLC	200632080069	WKBT (TV) La Crosse, WI
Raycom America License Subsidiary, LLC	200632080070	KFVS-TV Cape Girardeau, MO KOLD-TV Tucson, AZ

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

In the Matter of	)	
	)	
Complaints Against Various Television Licensees	)	File No. EB-05-IH-0035
Concerning Their December 31, 2004 Broadcast	)	
of the Program "Without A Trace"	)	

ORDER

Adopted: March 28, 2006 Released: March 28, 2006

By the Deputy Chief, Enforcement Bureau:

The *Notice of Apparent Liability for Forfeiture,* FCC 06-18, issued in the above-captioned proceeding to Stations WTHI-TV, Terre Haute, IN; WANE-TV, Fort Wayne, IN; WISH -TV, Indianapolis, IN; WLFI-TV, Lafayette, IN; WSBT-TV, South Bend, IN; WVLT-TV, Knoxville, TN; WDEF-TV, Chattanooga, TN; and WJHL-TV, Johnson City, TN, IS HEREBY CANCELED.

FEDERAL COMMUNICATIONS COMMISSION

Robert H. Ratcliffe
Deputy Chief
Enforcement Bureau

WKBT La Crosse, WI
Problem ID: PROBLEM00955448

Date: Thursday, January 13, 2005 11:55:36 AM
From: [redacted]
Subject: Indecency Complaint

[redacted] Necedah,WI 54646 My Affiliate: WKBT This is a formal COMPLAINT of indecency on broadcast television. NETWORK: CBS PROGRAM TITLE: Without a Trace BROADCAST DATE: December 31, 2004 BROADCAST TIME: 9:00 PM Eastern and Pacific Time, 9:00 PM Central and Mountain Time Documentation ---------- A teenaged girl wearing just a bra and panties is sitting astride the lap of a teenaged boy kissing him while another girl in just a bra and panties fondles them both. The first girl is also shown making sexual bump and grind motions. Two other teenaged girls are sitting on either side of a teenaged boy, fondling him while another group of teens smoking pot and drinking beer watch them from the sofa on the other side of the room. A shirtless teenaged boy starts to remove his pants A teenaged girl with her back to the camera appears to be wearing nothing but panties. She appears to be sitting astride a teenaged boy kissing him while another girl in just a bra and panties fondles them both. There is a quick shot of a pile of naked flesh, mostly arms and legs, though obviously belonging to multiple teens. A young man without a shirt on has his head in the area of a girl's (apparently) bare breasts, next to them on the couch another girl who appears to be wearing just her panties (her breasts are visible in profile) is fondling a boy who is kissing another girl. A teenaged boy takes turns kissing two girls in their underwear. A girl is sitting astride the lap of a teenaged boy. Both are just in their underwear. They are rocking back and forth in a sexual motion. In another room, a girl is sitting on the floor surrounded by several boys. One of her friends yells, 'She's a porn star!' The girl on the floor is wearing a bra and panties. One boy kisses her chest and fondles her, while another rubs his leg on the inside of her thigh, and a third pours liquor down her throat straight from the bottle then starts kissing her on the face. Documentation ---------- PLEASE KEEP ME INFORMED OF THE PROGRESS AND RESULTS OF YOUR INVESTIGATION INTO THIS MATTER. Sincerely, [redacted]

WKBT La Crosse, WI
Problem ID: PROBLEM00955600

Date: Thursday, January 13, 2005 11:55:52 AM
From: [redacted]
Subject: Indecency Complaint

[redacted] Eau Claire,WI 54701 My Affiliate: WKBT This is a formal COMPLAINT of indecency on broadcast television. NETWORK: CBS PROGRAM TITLE: Without a Trace BROADCAST DATE: December 31, 2004 BROADCAST TIME: 9:00 PM Eastern and Pacific Time, 9:00 PM Central and Mountain Time Documentation ---------- A teenaged girl wearing just a bra and panties is sitting astride the lap of a teenaged boy kissing him while another girl in just a bra and panties fondles them both. The first girl is also shown making sexual bump and grind motions. Two other teenaged girls are sitting on either side of a teenaged boy, fondling him while another group of teens smoking pot and drinking beer watch them from the sofa on the other side of the room. A shirtless teenaged boy starts to remove his pants A teenaged girl with her back to the camera appears to be wearing nothing but panties. She appears to be sitting astride a teenaged boy kissing him while another girl in just a bra and panties fondles them both. There is a quick shot of a pile of naked flesh, mostly arms and legs, though obviously belonging to multiple teens. A young man without a shirt on has his head in the area of a girl's (apparently) bare breasts, next to them on the couch another girl who appears to be wearing just her panties (her breasts are visible in profile) is fondling a boy who is kissing another girl. A teenaged boy takes turns kissing two girls in their underwear. A girl is sitting astride the lap of a teenaged boy. Both are just in their underwear. They are rocking back and forth in a sexual motion. In another room, a girl is sitting on the floor surrounded by several boys. One of her friends yells, 'She's a porn star!' The girl on the floor is wearing a bra and panties. One boy kisses her chest and fondles her, while another rubs his leg on the inside of her thigh, and a third pours liquor down her throat straight from the bottle then starts kissing her on the face. Documentation ---------- PLEASE KEEP ME INFORMED OF THE PROGRESS AND RESULTS OF YOUR INVESTIGATION INTO THIS MATTER. Sincerely, [redacted]

WKBT La Crosse, WI
Problem ID: PROBLEM00955882

Date: Thursday, January 13, 2005 11:56:15 AM
From: [redacted]
Subject: Indecency Complaint

[redacted] MN City,MN 55959 My Affiliate: WKBT This is a formal COMPLAINT of indecency on broadcast television. NETWORK: CBS PROGRAM TITLE: Without a Trace BROADCAST DATE: December 31, 2004 BROADCAST TIME: 9:00 PM Eastern and Pacific Time, 9:00 PM Central and Mountain Time Documentation ---------- A teenaged girl wearing just a bra and panties is sitting astride the lap of a teenaged boy kissing him while another girl in just a bra and panties fondles them both. The first girl is also shown making sexual bump and grind motions. Two other teenaged girls are sitting on either side of a teenaged boy, fondling him while another group of teens smoking pot and drinking beer watch them from the sofa on the other side of the room. A shirtless teenaged boy starts to remove his pants A teenaged girl with her back to the camera appears to be wearing nothing but panties. She appears to be sitting astride a teenaged boy kissing him while another girl in just a bra and panties fondles them both. There is a quick shot of a pile of naked flesh, mostly arms and legs, though obviously belonging to multiple teens. A young man without a shirt on has his head in the area of a girl's (apparently) bare breasts, next to them on the couch another girl who appears to be wearing just her panties (her breasts are visible in profile) is fondling a boy who is kissing another girl. A teenaged boy takes turns kissing two girls in their underwear. A girl is sitting astride the lap of a teenaged boy. Both are just in their underwear. They are rocking back and forth in a sexual motion. In another room, a girl is sitting on the floor surrounded by several boys. One of her friends yells, 'She's a porn star!' The girl on the floor is wearing a bra and panties. One boy kisses her chest and fondles her, while another rubs his leg on the inside of her thigh, and a third pours liquor down her throat straight from the bottle then starts kissing her on the face. Documentation ---------- PLEASE KEEP ME INFORMED OF THE PROGRESS AND RESULTS OF YOUR INVESTIGATION INTO THIS MATTER. Sincerely, [redacted]
Fredericksn

WKBT La Crosse, WI
Problem ID: PROBLEM00956302

Date: Thursday, January 13, 2005 11:56:42 AM
From: [redacted]
Subject: Indecency Complaint

[redacted] ONALASKA,WI 54650 My Affiliate: wkbt This is a formal COMPLAINT of indecency on broadcast television. NETWORK: CBS PROGRAM TITLE: Without a Trace BROADCAST DATE: December 31, 2004 BROADCAST TIME: 9:00 PM Eastern and Pacific Time, 9:00 PM Central and Mountain Time Documentation ---------- A teenaged girl wearing just a bra and panties is sitting astride the lap of a teenaged boy kissing him while another girl in just a bra and panties fondles them both. The first girl is also shown making sexual bump and grind motions. Two other teenaged girls are sitting on either side of a teenaged boy, fondling him while another group of teens smoking pot and drinking beer watch them from the sofa on the other side of the room. A shirtless teenaged boy starts to remove his pants A teenaged girl with her back to the camera appears to be wearing nothing but panties. She appears to be sitting astride a teenaged boy kissing him while another girl in just a bra and panties fondles them both. There is a quick shot of a pile of naked flesh, mostly arms and legs, though obviously belonging to multiple teens. A young man without a shirt on has his head in the area of a girl's (apparently) bare breasts, next to them on the couch another girl who appears to be wearing just her panties (her breasts are visible in profile) is fondling a boy who is kissing another girl. A teenaged boy takes turns kissing two girls in their underwear. A girl is sitting astride the lap of a teenaged boy. Both are just in their underwear. They are rocking back and forth in a sexual motion. In another room, a girl is sitting on the floor surrounded by several boys. One of her friends yells, 'She's a porn star!' The girl on the floor is wearing a bra and panties. One boy kisses her chest and fondles her, while another rubs his leg on the inside of her thigh, and a third pours liquor down her throat straight from the bottle then starts kissing her on the face. Documentation ---------- PLEASE KEEP ME INFORMED OF THE PROGRESS AND RESULTS OF YOUR INVESTIGATION INTO THIS MATTER. Sincerely, [redacted] RITTER

WKBT La Crosse, WI
Problem ID: PROBLEM00964566

Date: Thursday, January 13, 2005 11:58:03 AM
From: [redacted]
Subject: Indecency Complaint

[redacted] Chatfield,MN 55923 My Affiliate: WKBT This is a formal COMPLAINT of indecency on broadcast television. NETWORK: CBS PROGRAM TITLE: Without a Trace BROADCAST DATE: December 31, 2004 BROADCAST TIME: 9:00 PM Eastern and Pacific Time, 9:00 PM Central and Mountain Time Documentation ---------- A teenaged girl wearing just a bra and panties is sitting astride the lap of a teenaged boy kissing him while another girl in just a bra and panties fondles them both. The first girl is also shown making sexual bump and grind motions. Two other teenaged girls are sitting on either side of a teenaged boy, fondling him while another group of teens smoking pot and drinking beer watch them from the sofa on the other side of the room. A shirtless teenaged boy starts to remove his pants A teenaged girl with her back to the camera appears to be wearing nothing but panties. She appears to be sitting astride a teenaged boy kissing him while another girl in just a bra and panties fondles them both. There is a quick shot of a pile of naked flesh, mostly arms and legs, though obviously belonging to multiple teens. A young man without a shirt on has his head in the area of a girl's (apparently) bare breasts, next to them on the couch another girl who appears to be wearing just her panties (her breasts are visible in profile) is fondling a boy who is kissing another girl. A teenaged boy takes turns kissing two girls in their underwear. A girl is sitting astride the lap of a teenaged boy. Both are just in their underwear. They are rocking back and forth in a sexual motion. In another room, a girl is sitting on the floor surrounded by several boys. One of her friends yells, 'She's a porn star!' The girl on the floor is wearing a bra and panties. One boy kisses her chest and fondles her, while another rubs his leg on the inside of her thigh, and a third pours liquor down her throat straight from the bottle then starts kissing her on the face. Documentation ---------- PLEASE KEEP ME INFORMED OF THE PROGRESS AND RESULTS OF YOUR INVESTIGATION INTO THIS MATTER. Sincerely, [redacted]

WKBT La Crosse, WI
Problem ID: PROBLEM00965272

Date: Thursday, January 13, 2005 11:58:47 AM
From: [redacted]
Subject: Indecency Complaint

[redacted] LaCrosse,WI 54601 My Affiliate: WKBT This is a formal COMPLAINT of indecency on broadcast television. NETWORK: CBS PROGRAM TITLE: Without a Trace BROADCAST DATE: December 31, 2004 BROADCAST TIME: 9:00 PM Eastern and Pacific Time, 9:00 PM Central and Mountain Time Documentation ---------- A teenaged girl wearing just a bra and panties is sitting astride the lap of a teenaged boy kissing him while another girl in just a bra and panties fondles them both. The first girl is also shown making sexual bump and grind motions. Two other teenaged girls are sitting on either side of a teenaged boy, fondling him while another group of teens smoking pot and drinking beer watch them from the sofa on the other side of the room. A shirtless teenaged boy starts to remove his pants A teenaged girl with her back to the camera appears to be wearing nothing but panties. She appears to be sitting astride a teenaged boy kissing him while another girl in just a bra and panties fondles them both. There is a quick shot of a pile of naked flesh, mostly arms and legs, though obviously belonging to multiple teens. A young man without a shirt on has his head in the area of a girl's (apparently) bare breasts, next to them on the couch another girl who appears to be wearing just her panties (her breasts are visible in profile) is fondling a boy who is kissing another girl. A teenaged boy takes turns kissing two girls in their underwear. A girl is sitting astride the lap of a teenaged boy. Both are just in their underwear. They are rocking back and forth in a sexual motion. In another room, a girl is sitting on the floor surrounded by several boys. One of her friends yells, 'She's a porn star!' The girl on the floor is wearing a bra and panties. One boy kisses her chest and fondles her, while another rubs his leg on the inside of her thigh, and a third pours liquor down her throat straight from the bottle then starts kissing her on the face. Documentation ---------- PLEASE KEEP ME INFORMED OF THE PROGRESS AND RESULTS OF YOUR INVESTIGATION INTO THIS MATTER. Sincerely, [redacted]

WKBT La Crosse, WI
Problem ID: PROBLEM00966332

Date: Thursday, January 13, 2005 12:42:46 PM
From: [redacted]
Subject: Indecency Complaint

[redacted] La Crosse,WI 54601 My Affiliate: wkbt This is a formal COMPLAINT of indecency on broadcast television. NETWORK: CBS PROGRAM TITLE: Without a Trace BROADCAST DATE: December 31, 2004 BROADCAST TIME: 9:00 PM Eastern and Pacific Time, 9:00 PM Central and Mountain Time Documentation ---------- A teenaged girl wearing just a bra and panties is sitting astride the lap of a teenaged boy kissing him while another girl in just a bra and panties fondles them both. The first girl is also shown making sexual bump and grind motions. Two other teenaged girls are sitting on either side of a teenaged boy, fondling him while another group of teens smoking pot and drinking beer watch them from the sofa on the other side of the room. A shirtless teenaged boy starts to remove his pants A teenaged girl with her back to the camera appears to be wearing nothing but panties. She appears to be sitting astride a teenaged boy kissing him while another girl in just a bra and panties fondles them both. There is a quick shot of a pile of naked flesh, mostly arms and legs, though obviously belonging to multiple teens. A young man without a shirt on has his head in the area of a girl's (apparently) bare breasts, next to them on the couch another girl who appears to be wearing just her panties (her breasts are visible in profile) is fondling a boy who is kissing another girl. A teenaged boy takes turns kissing two girls in their underwear. A girl is sitting astride the lap of a teenaged boy. Both are just in their underwear. They are rocking back and forth in a sexual motion. In another room, a girl is sitting on the floor surrounded by several boys. One of her friends yells, 'She's a porn star!' The girl on the floor is wearing a bra and panties. One boy kisses her chest and fondles her, while another rubs his leg on the inside of her thigh, and a third pours liquor down her throat straight from the bottle then starts kissing her on the face. Documentation ---------- PLEASE KEEP ME INFORMED OF THE PROGRESS AND RESULTS OF YOUR INVESTIGATION INTO THIS MATTER. Sincerely, [redacted]

WKBT La Crosse, WI
Problem ID: PROBLEM00977505

Date: Thursday, January 13, 2005 8:31:34 PM
From: [redacted]
Subject: Indecency Complaint

[redacted] Eau Claire,WI 54703 My Affiliate: WKBT This is a formal COMPLAINT of indecency on broadcast television. NETWORK: CBS PROGRAM TITLE: Without a Trace BROADCAST DATE: December 31, 2004 BROADCAST TIME: 9:00 PM Eastern and Pacific Time, 9:00 PM Central and Mountain Time Documentation ---------- A teenaged girl wearing just a bra and panties is sitting astride the lap of a teenaged boy kissing him while another girl in just a bra and panties fondles them both. The first girl is also shown making sexual bump and grind motions. Two other teenaged girls are sitting on either side of a teenaged boy, fondling him while another group of teens smoking pot and drinking beer watch them from the sofa on the other side of the room. A shirtless teenaged boy starts to remove his pants A teenaged girl with her back to the camera appears to be wearing nothing but panties. She appears to be sitting astride a teenaged boy kissing him while another girl in just a bra and panties fondles them both. There is a quick shot of a pile of naked flesh, mostly arms and legs, though obviously belonging to multiple teens. A young man without a shirt on has his head in the area of a girl's (apparently) bare breasts, next to them on the couch another girl who appears to be wearing just her panties (her breasts are visible in profile) is fondling a boy who is kissing another girl. A teenaged boy takes turns kissing two girls in their underwear. A girl is sitting astride the lap of a teenaged boy. Both are just in their underwear. They are rocking back and forth in a sexual motion. In another room, a girl is sitting on the floor surrounded by several boys. One of her friends yells, 'She's a porn star!' The girl on the floor is wearing a bra and panties. One boy kisses her chest and fondles her, while another rubs his leg on the inside of her thigh, and a third pours liquor down her throat straight from the bottle then starts kissing her on the face. Documentation ---------- PLEASE KEEP ME INFORMED OF THE PROGRESS AND RESULTS OF YOUR INVESTIGATION INTO THIS MATTER. Sincerely, [redacted]

WKBT La Crosse, WI
Problem ID: PROBLEM00979299

Date: Friday, January 14, 2005 7:23:30 PM
From: [redacted]
Subject: Indecency Complaint

[redacted]Eau Claire,WI 54701 My Affiliate: WKBT-TV This is a formal COMPLAINT of indecency on broadcast television. NETWORK: CBS PROGRAM TITLE: Without a Trace BROADCAST DATE: December 31, 2004 BROADCAST TIME: 9:00 PM Eastern and Pacific Time, 9:00 PM Central and Mountain Time Documentation ---------- A teenaged girl wearing just a bra and panties is sitting astride the lap of a teenaged boy kissing him while another girl in just a bra and panties fondles them both. The first girl is also shown making sexual bump and grind motions. Two other teenaged girls are sitting on either side of a teenaged boy, fondling him while another group of teens smoking pot and drinking beer watch them from the sofa on the other side of the room. A shirtless teenaged boy starts to remove his pants A teenaged girl with her back to the camera appears to be wearing nothing but panties. She appears to be sitting astride a teenaged boy kissing him while another girl in just a bra and panties fondles them both. There is a quick shot of a pile of naked flesh, mostly arms and legs, though obviously belonging to multiple teens. A young man without a shirt on has his head in the area of a girl's (apparently) bare breasts, next to them on the couch another girl who appears to be wearing just her panties (her breasts are visible in profile) is fondling a boy who is kissing another girl. A teenaged boy takes turns kissing two girls in their underwear. A girl is sitting astride the lap of a teenaged boy. Both are just in their underwear. They are rocking back and forth in a sexual motion. In another room, a girl is sitting on the floor surrounded by several boys. One of her friends yells, 'She's a porn star!' The girl on the floor is wearing a bra and panties. One boy kisses her chest and fondles her, while another rubs his leg on the inside of her thigh, and a third pours liquor down her throat straight from the bottle then starts kissing her on the face. Documentation ---------- PLEASE KEEP ME INFORMED OF THE PROGRESS AND RESULTS OF YOUR INVESTIGATION INTO THIS MATTER. Sincerely, [redacted]

WKBT La Crosse, WI
Problem ID: PROBLEM00979384

Date: Friday, January 14, 2005 8:52:26 PM
From: [redacted]
Subject: Indecency Complaint

[redacted] caledonia,MN 55921 My Affiliate: wkbt This is a formal COMPLAINT of indecency on broadcast television. NETWORK: CBS PROGRAM TITLE: Without a Trace BROADCAST DATE: December 31, 2004 BROADCAST TIME: 9:00 PM Eastern and Pacific Time, 9:00 PM Central and Mountain Time Documentation ---------- A teenaged girl wearing just a bra and panties is sitting astride the lap of a teenaged boy kissing him while another girl in just a bra and panties fondles them both. The first girl is also shown making sexual bump and grind motions. Two other teenaged girls are sitting on either side of a teenaged boy, fondling him while another group of teens smoking pot and drinking beer watch them from the sofa on the other side of the room. A shirtless teenaged boy starts to remove his pants A teenaged girl with her back to the camera appears to be wearing nothing but panties. She appears to be sitting astride a teenaged boy kissing him while another girl in just a bra and panties fondles them both. There is a quick shot of a pile of naked flesh, mostly arms and legs, though obviously belonging to multiple teens. A young man without a shirt on has his head in the area of a girl's (apparently) bare breasts, next to them on the couch another girl who appears to be wearing just her panties (her breasts are visible in profile) is fondling a boy who is kissing another girl. A teenaged boy takes turns kissing two girls in their underwear. A girl is sitting astride the lap of a teenaged boy. Both are just in their underwear. They are rocking back and forth in a sexual motion. In another room, a girl is sitting on the floor surrounded by several boys. One of her friends yells, 'She's a porn star!' The girl on the floor is wearing a bra and panties. One boy kisses her chest and fondles her, while another rubs his leg on the inside of her thigh, and a third pours liquor down her throat straight from the bottle then starts kissing her on the face. Documentation ---------- PLEASE KEEP ME INFORMED OF THE PROGRESS AND RESULTS OF YOUR INVESTIGATION INTO THIS MATTER. Sincerely, [redacted]

WKBT La Crosse, WI
Problem ID: PROBLEM00984937

Date: Saturday, January 15, 2005 2:28:38 PM
From: [redacted]
Subject: Indecency Complaint

[redacted] Tomah,WI 54660 My Affiliate: WKBT-TV This is a formal COMPLAINT of indecency on broadcast television. NETWORK: CBS PROGRAM TITLE: Without a Trace BROADCAST DATE: December 31, 2004 BROADCAST TIME: 9:00 PM Eastern and Pacific Time, 9:00 PM Central and Mountain Time Documentation ---------- A teenaged girl wearing just a bra and panties is sitting astride the lap of a teenaged boy kissing him while another girl in just a bra and panties fondles them both. The first girl is also shown making sexual bump and grind motions. Two other teenaged girls are sitting on either side of a teenaged boy, fondling him while another group of teens smoking pot and drinking beer watch them from the sofa on the other side of the room. A shirtless teenaged boy starts to remove his pants A teenaged girl with her back to the camera appears to be wearing nothing but panties. She appears to be sitting astride a teenaged boy kissing him while another girl in just a bra and panties fondles them both. There is a quick shot of a pile of naked flesh, mostly arms and legs, though obviously belonging to multiple teens. A young man without a shirt on has his head in the area of a girl's (apparently) bare breasts, next to them on the couch another girl who appears to be wearing just her panties (her breasts are visible in profile) is fondling a boy who is kissing another girl. A teenaged boy takes turns kissing two girls in their underwear. A girl is sitting astride the lap of a teenaged boy. Both are just in their underwear. They are rocking back and forth in a sexual motion. In another room, a girl is sitting on the floor surrounded by several boys. One of her friends yells, 'She's a porn star!' The girl on the floor is wearing a bra and panties. One boy kisses her chest and fondles her, while another rubs his leg on the inside of her thigh, and a third pours liquor down her throat straight from the bottle then starts kissing her on the face. Documentation ---------- PLEASE KEEP ME INFORMED OF THE PROGRESS AND RESULTS OF YOUR INVESTIGATION INTO THIS MATTER. Sincerely, [redacted]

WKBT La Crosse, WI
Problem ID: PROBLEM00985021

Date: Saturday, January 15, 2005 5:14:41 PM
From: [redacted]
Subject: Indecency Complaint

[redacted] Chippewa Falls,WI 54729 My Affiliate: WKBT-TV This is a formal COMPLAINT of indecency on broadcast television. NETWORK: CBS PROGRAM TITLE: Without a Trace BROADCAST DATE: December 31, 2004 BROADCAST TIME: 9:00 PM Eastern and Pacific Time, 9:00 PM Central and Mountain Time Documentation ---------- A teenaged girl wearing just a bra and panties is sitting astride the lap of a teenaged boy kissing him while another girl in just a bra and panties fondles them both. The first girl is also shown making sexual bump and grind motions. Two other teenaged girls are sitting on either side of a teenaged boy, fondling him while another group of teens smoking pot and drinking beer watch them from the sofa on the other side of the room. A shirtless teenaged boy starts to remove his pants A teenaged girl with her back to the camera appears to be wearing nothing but panties. She appears to be sitting astride a teenaged boy kissing him while another girl in just a bra and panties fondles them both. There is a quick shot of a pile of naked flesh, mostly arms and legs, though obviously belonging to multiple teens. A young man without a shirt on has his head in the area of a girl's (apparently) bare breasts, next to them on the couch another girl who appears to be wearing just her panties (her breasts are visible in profile) is fondling a boy who is kissing another girl. A teenaged boy takes turns kissing two girls in their underwear. A girl is sitting astride the lap of a teenaged boy. Both are just in their underwear. They are rocking back and forth in a sexual motion. In another room, a girl is sitting on the floor surrounded by several boys. One of her friends yells, 'She's a porn star!' The girl on the floor is wearing a bra and panties. One boy kisses her chest and fondles her, while another rubs his leg on the inside of her thigh, and a third pours liquor down her throat straight from the bottle then starts kissing her on the face. Documentation ---------- PLEASE KEEP ME INFORMED OF THE PROGRESS AND RESULTS OF YOUR INVESTIGATION INTO THIS MATTER. Sincerely, [redacted]

WKBT La Crosse, WI
Problem ID: PROBLEM00985118

Date: Saturday, January 15, 2005 8:34:38 PM
From: [redacted]
Subject: Indecency Complaint

[redacted] Eau Claire,WI 54701 My Affiliate: WKBT-LaCrosse This is a formal COMPLAINT of indecency on broadcast television. NETWORK: CBS PROGRAM TITLE: Without a Trace BROADCAST DATE: December 31, 2004 BROADCAST TIME: 9:00 PM Eastern and Pacific Time, 9:00 PM Central and Mountain Time Documentation ---------- A teenaged girl wearing just a bra and panties is sitting astride the lap of a teenaged boy kissing him while another girl in just a bra and panties fondles them both. The first girl is also shown making sexual bump and grind motions. Two other teenaged girls are sitting on either side of a teenaged boy, fondling him while another group of teens smoking pot and drinking beer watch them from the sofa on the other side of the room. A shirtless teenaged boy starts to remove his pants A teenaged girl with her back to the camera appears to be wearing nothing but panties. She appears to be sitting astride a teenaged boy kissing him while another girl in just a bra and panties fondles them both. There is a quick shot of a pile of naked flesh, mostly arms and legs, though obviously belonging to multiple teens. A young man without a shirt on has his head in the area of a girl's (apparently) bare breasts, next to them on the couch another girl who appears to be wearing just her panties (her breasts are visible in profile) is fondling a boy who is kissing another girl. A teenaged boy takes turns kissing two girls in their underwear. A girl is sitting astride the lap of a teenaged boy. Both are just in their underwear. They are rocking back and forth in a sexual motion. In another room, a girl is sitting on the floor surrounded by several boys. One of her friends yells, 'She's a porn star!' The girl on the floor is wearing a bra and panties. One boy kisses her chest and fondles her, while another rubs his leg on the inside of her thigh, and a third pours liquor down her throat straight from the bottle then starts kissing her on the face. Documentation ---------- PLEASE KEEP ME INFORMED OF THE PROGRESS AND RESULTS OF YOUR INVESTIGATION INTO THIS MATTER. Sincerely, [redacted]

WKBT La Crosse, WI
Problem ID: PROBLEM01062332

Date: Wednesday, January 19, 2005 5:57:29 PM
From: [redacted]
Subject: Indecency Complaint

[redacted] Arcadia,WI 54612 My Affiliate: WKBT-TV This is a formal COMPLAINT of indecency on broadcast television. NETWORK: CBS PROGRAM TITLE: Without a Trace BROADCAST DATE: December 31, 2004 BROADCAST TIME: 9:00 PM Eastern and Pacific Time, 9:00 PM Central and Mountain Time Documentation ---------- A teenaged girl wearing just a bra and panties is sitting astride the lap of a teenaged boy kissing him while another girl in just a bra and panties fondles them both. The first girl is also shown making sexual bump and grind motions. Two other teenaged girls are sitting on either side of a teenaged boy, fondling him while another group of teens smoking pot and drinking beer watch them from the sofa on the other side of the room. A shirtless teenaged boy starts to remove his pants A teenaged girl with her back to the camera appears to be wearing nothing but panties. She appears to be sitting astride a teenaged boy kissing him while another girl in just a bra and panties fondles them both. There is a quick shot of a pile of naked flesh, mostly arms and legs, though obviously belonging to multiple teens. A young man without a shirt on has his head in the area of a girl's (apparently) bare breasts, next to them on the couch another girl who appears to be wearing just her panties (her breasts are visible in profile) is fondling a boy who is kissing another girl. A teenaged boy takes turns kissing two girls in their underwear. A girl is sitting astride the lap of a teenaged boy. Both are just in their underwear. They are rocking back and forth in a sexual motion. In another room, a girl is sitting on the floor surrounded by several boys. One of her friends yells, 'She's a porn star!' The girl on the floor is wearing a bra and panties. One boy kisses her chest and fondles her, while another rubs his leg on the inside of her thigh, and a third pours liquor down her throat straight from the bottle then starts kissing her on the face. Documentation ---------- PLEASE KEEP ME INFORMED OF THE PROGRESS AND RESULTS OF YOUR INVESTIGATION INTO THIS MATTER. Sincerely, [redacted]

WKBT La Crosse, WI
Problem ID: PROBLEM01198087

Date: Thursday, March 10, 2005 3:30:40 PM
From: [redacted]
Subject: Indecency Complaint

[redacted] Menomonie,WI 54751 My Affiliate: WKBT This is a formal COMPLAINT of indecency on broadcast television. NETWORK: CBS PROGRAM TITLE: Without a Trace BROADCAST DATE: December 31, 2004 BROADCAST TIME: 9:00 PM Eastern and Pacific Time, 9:00 PM Central and Mountain Time Documentation ---------- A teenaged girl wearing just a bra and panties is sitting astride the lap of a teenaged boy kissing him while another girl in just a bra and panties fondles them both. The first girl is also shown making sexual bump and grind motions. Two other teenaged girls are sitting on either side of a teenaged boy, fondling him while another group of teens smoking pot and drinking beer watch them from the sofa on the other side of the room. A shirtless teenaged boy starts to remove his pants A teenaged girl with her back to the camera appears to be wearing nothing but panties. She appears to be sitting astride a teenaged boy kissing him while another girl in just a bra and panties fondles them both. There is a quick shot of a pile of naked flesh, mostly arms and legs, though obviously belonging to multiple teens. A young man without a shirt on has his head in the area of a girl's (apparently) bare breasts, next to them on the couch another girl who appears to be wearing just her panties (her breasts are visible in profile) is fondling a boy who is kissing another girl. A teenaged boy takes turns kissing two girls in their underwear. A girl is sitting astride the lap of a teenaged boy. Both are just in their underwear. They are rocking back and forth in a sexual motion. In another room, a girl is sitting on the floor surrounded by several boys. One of her friends yells, 'She's a porn star!' The girl on the floor is wearing a bra and panties. One boy kisses her chest and fondles her, while another rubs his leg on the inside of her thigh, and a third pours liquor down her throat straight from the bottle then starts kissing her on the face. Documentation ---------- PLEASE KEEP ME INFORMED OF THE PROGRESS AND RESULTS OF YOUR INVESTIGATION INTO THIS MATTER. Sincerely, [redacted]

WKBT La Crosse, WI
Problem ID: PROBLEM01221043

Date: Monday, March 21, 2005 10:24:21 PM
From: [redacted]
Subject: Indecency Complaint

[redacted] Onalaska,WI 54650 My Affiliate: WKBT This is a formal COMPLAINT of indecency on broadcast television. NETWORK: CBS PROGRAM TITLE: Without a Trace BROADCAST DATE: December 31, 2004 BROADCAST TIME: 9:00 PM Eastern and Pacific Time, 9:00 PM Central and Mountain Time Documentation ---------- A teenaged girl wearing just a bra and panties is sitting astride the lap of a teenaged boy kissing him while another girl in just a bra and panties fondles them both. The first girl is also shown making sexual bump and grind motions. Two other teenaged girls are sitting on either side of a teenaged boy, fondling him while another group of teens smoking pot and drinking beer watch them from the sofa on the other side of the room. A shirtless teenaged boy starts to remove his pants A teenaged girl with her back to the camera appears to be wearing nothing but panties. She appears to be sitting astride a teenaged boy kissing him while another girl in just a bra and panties fondles them both. There is a quick shot of a pile of naked flesh, mostly arms and legs, though obviously belonging to multiple teens. A young man without a shirt on has his head in the area of a girl's (apparently) bare breasts, next to them on the couch another girl who appears to be wearing just her panties (her breasts are visible in profile) is fondling a boy who is kissing another girl. A teenaged boy takes turns kissing two girls in their underwear. A girl is sitting astride the lap of a teenaged boy. Both are just in their underwear. They are rocking back and forth in a sexual motion. In another room, a girl is sitting on the floor surrounded by several boys. One of her friends yells, 'She's a porn star!' The girl on the floor is wearing a bra and panties. One boy kisses her chest and fondles her, while another rubs his leg on the inside of her thigh, and a third pours liquor down her throat straight from the bottle then starts kissing her on the face. Documentation ---------- PLEASE KEEP ME INFORMED OF THE PROGRESS AND RESULTS OF YOUR INVESTIGATION INTO THIS MATTER. Sincerely, [redacted]