

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

FOX TELEVISION STATIONS, INC.

and

CBS BROADCASTING INC.,

Petitioners,

vs.

FEDERAL COMMUNICATIONS COMMISSION

and

UNITED STATES OF AMERICA,

Respondents.

No. _____

PETITION FOR REVIEW

Pursuant to 47 U.S.C. § 402(a), 28 U.S.C. §§ 2342(1), 2344, and Rule 15(a) of the Federal Rules of Appellate Procedure, Fox Television Stations, Inc. and CBS Broadcasting Inc. (collectively "Petitioners") hereby petition for review of the Federal Communications Commission's ("FCC" or "Commission") Notices of Apparent Liability and Memorandum Opinion & Order, *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, FCC 06-17 (March 15, 2006) ("*Omnibus Order*"). A copy of the *Omnibus Order* is attached hereto as Attachment A.

Venue is proper in this Court pursuant to 28 U.S.C. § 2343.

Petitioners were parties to the agency proceedings that led to the *Omnibus Order* and are aggrieved by the FCC's actions in that order. The *Omnibus Order* disposed of complaints alleging that various broadcast television programs aired between February 2002 and

March 2005 were indecent, profane, or obscene, and it purported to give "substantial guidance to broadcasters and the public about the types of programming that are impermissible under our indecency standard." *Omnibus Order* ¶ 2.

Petitioners seek review of the *Omnibus Order* on the grounds that it is unconstitutional, contrary to the relevant statutes, arbitrary and capricious, and contrary to law.

Petitioners respectfully request that this Court hold unlawful and set aside the *Omnibus Order* and grant such other relief as may be deemed just and proper.

The corporate disclosure statement required by Rule 26.1 of the Federal Rules of Appellate Procedure is set forth in Attachment B hereto.

Dated: April ¹³/~~14~~, 2006

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ATTACHMENT A

Notices of Apparent Liability and Memorandum Opinion & Order, *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, FCC 06-17 (March 15, 2006) ("*Omnibus Order*")

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

In the Matter of)
)
Complaints Regarding Various Television)
Broadcasts Between February 2, 2002 and)
March 8, 2005)

**NOTICES OF APPARENT LIABILITY AND
MEMORANDUM OPINION AND ORDER**

Adopted: February 21, 2006

Released: March 15, 2006

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

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I. INTRODUCTION

1. The Commission has regulated the broadcast of indecent programming for decades, and our authority in this area has long been upheld as constitutional by the U.S. Supreme Court. During the last few years, however, we have witnessed increasing public unease with the nature of broadcast material. In particular, Americans have become more concerned about the content of television programming, with the number of complaints annually received by the Commission rising from fewer than 50 in 2000 to approximately 1.4 million in 2004. At the same time, broadcasters have sought guidance from the Commission about our rules, arguing that they lack certainty regarding the meaning of our indecency and profanity standards. The decisions we issue today respond to both of these concerns.

2. In these decisions, we address hundreds of thousands of complaints alleging that various broadcast television programs aired between February 2002 and March 2005 are indecent, profane, and/or obscene. The cases we resolve today represent a broad range of factual patterns. Taken both individually and as a whole, we believe that they will provide substantial guidance to broadcasters and the public about the types of programming that are impermissible under our indecency standard. The cases also further refine our standard regarding the use of profane language in the broadcast medium and illustrate the types of language proscribed by that standard. Overall, the decisions demonstrate repeatedly that we must always look to the context in which words or images occur to determine whether they are indecent. In addition, while we find certain highly offensive language to be presumptively profane, we also take care to emphasize that such words may not be profane in specified contexts.

3. Section II below is devoted to providing a full description of the Commission's standards for analyzing whether programming is indecent and/or profane and referencing the legal sources upon which these standards are based. In Section II, we also fully describe our methodology for calculating proposed forfeitures against broadcast licensees when there has been an apparent violation of our prohibitions against indecency and/or profanity.

4. In Section III, we apply these indecency and/or profanity standards to the complaints before us on a case-by-case basis. We begin with cases in which we have determined that the broadcast licensee apparently aired indecent and/or profane material and propose forfeitures against the licensee. The monetary forfeitures proposed demonstrate that the

Commission will exercise its statutory authority to ensure that the broadcast of indecent and/or profane material will be appropriately sanctioned.

5. Section III next addresses cases in which we find the complained-of material indecent and/or profane but do not propose taking action against the licensee. In these cases, the licensee was not on notice at the time of the broadcast that we would deem the relevant material indecent or profane. For example, we hold that a single use of the word "shit" and its variants (the "S-Word") in the contexts presented is both indecent and profane. However, we do not propose adverse action in these cases because we have not previously announced this conclusion.

6. Section III concludes with a discussion of a number of cases in which we determine that various words, phrases, or scenes that occur in a variety of programs, while undoubtedly upsetting to some viewers, do not warrant action against the broadcast station licensee. We reach these determinations either because the complained-of material is not within the scope of our indecency or profanity definitions or because, even if it is within the scope of our indecency definition, it is not, in the contexts before us, patently offensive as measured by contemporary community standards for the broadcast medium.

7. Together, these decisions demonstrate the Commission's strong commitment to fulfilling the responsibility vested in us by Congress within the parameters of the United States Constitution. We believe that issuing these decisions as a single order will enable broadcasters to better understand the boundaries of our indecency and profanity standards, while at the same time responding to the concerns expressed by hundreds of thousands of citizens in complaints filed with the Commission. In the end, our primary objective is to fulfill our statutory obligation to enforce the law in this area and to do so in a clear and consistent manner.

II. BACKGROUND

8. Section 1464 of title 18, United States Code, prohibits the broadcast of obscene, indecent, or profane programming.¹ The FCC rules implementing that statute, a subsequent statute establishing a "safe harbor" during certain hours, and the Communications Act of 1934, as amended (the "Act"), prohibit radio and television stations from broadcasting obscene material at any time and indecent material between 6 a.m. and 10 p.m.² Broadcasters also may not air profane material during this time period.³

9. The federal prohibition against the broadcast of indecent and profane material is longstanding. In the Radio Act of 1927, Congress first provided that "[n]o person within the jurisdiction of the United States shall utter any obscene, indecent, or profane language by means

¹ 18 U.S.C. § 1464.

² See 47 C.F.R. § 73.3999; see also Public Telecommunications Act of 1992, Pub. L. No. 102-356, 106 Stat. 949 (1992) (setting the safe harbor of 10 p.m. to 6 a.m. for the broadcast of indecent material); see also *Action for Children's Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995) (*en banc*) ("*ACT III*"), *cert. denied*, 516 U.S. 1072 (1996) (affirming restrictions prohibiting the broadcast of indecent material between the hours of 6 a.m. and 10 p.m.)

³ See *Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, Memorandum Opinion and Order 18 FCC Rcd 19859 (Enf. Bur. 2004), *review granted*, 19 FCC Rcd 4975, 4981 ¶¶ 13 and 14 (2004) ("*Golden Globe Awards Order*"), *petitions for stay and recon. pending*. The Commission established a "safe harbor" period from 10 p.m. to 6 a.m. during which profane speech may be legally broadcast as a narrowly tailored means of vindicating its compelling interests in assisting parents and protecting minors, consistent with the D.C. Circuit's decision that the same "safe harbor" period for indecent material is consistent with the Constitution. See *ACT III*, 58 F.3d at 667.

of radio communication."⁴ This prohibition was then reenacted as part of the Act and was moved subsequently to title 18 of the United States Code in 1948.

10. *Indecency Analysis.* The federal courts have consistently upheld Congress's authority to regulate the broadcast of indecent material, as well as the Commission's interpretation and implementation of the governing statute. In 1978, the U.S. Supreme Court, in upholding the constitutionality of the prohibition against the broadcast of indecent material, concluded that "special treatment of indecent broadcasting" was appropriate. The Court noted that the Commission's authority to regulate indecent broadcast material is justified by two primary considerations, both of which are equally, if not more, applicable today. First, the broadcast media occupy "a uniquely pervasive presence in the lives of all Americans."⁵ Indecent material "presented over the airwaves confronts the citizen, not only in public, but also in the privacy of their own home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder."⁶ "Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content."⁷ Indeed, while the Supreme Court's observation regarding the pervasiveness of the broadcast media dates back to 1978, the ubiquity of television in the lives of Americans has only increased in the intervening 28 years. Second, the Supreme Court observed that "broadcasting is uniquely accessible to children, even those too young to read."⁸ This finding is even more relevant today given the increased accessibility of the broadcast media to children.⁹

11. Enforcement of the provisions restricting the broadcast of indecent, obscene, or profane material is an important component of the Commission's overall responsibility over broadcast radio and television operations. At the same time, however, the Commission must be mindful of the First Amendment to the United States Constitution and section 326 of the Act, which prohibit the Commission from censoring program material or interfering with broadcasters' free speech rights.¹⁰ As such, in making indecency determinations, the Commission proceeds cautiously and with appropriate restraint.¹¹

⁴ 44 Stat. 1172.

⁵ *FCC v. Pacifica Foundation*, 438 U.S. 726, 748 (1978) ("*Pacifica*").

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 749.

⁹ See Donald F. Roberts, Ulla G. Foehr, and Victoria Rideout, *Generation M: Media in the Lives of 8-18 Year Olds* (March 2005) at 12-13 (finding that 99% of children 8-18 have a television set in their home and that 68% of children 8-18 have a television set in their bedroom).

¹⁰ U.S. CONST., amend. I; 47 U.S.C. § 326. See also *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813-15 (2000).

¹¹ See *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 generic definition of indecency will be tempered by the Commission's restrained enforcement policy.").

12. The Commission defines indecent speech as material that, in context, depicts or describes sexual or excretory activities or organs in terms patently offensive as measured by contemporary community standards for the broadcast medium.¹²

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.¹³

13. In our assessment of whether broadcast material is patently offensive, “the *full context* in which the material appeared is critically important.”¹⁴ Three principal factors are significant to this contextual analysis: (1) the explicitness or graphic nature of the description; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; and (3) whether the material panders to, titillates, or shocks the audience.¹⁵ In examining these three factors, we must weigh and balance them on a case-by-case basis to determine whether the broadcast material is patently offensive because “[e]ach indecency case presents its own particular mix of these, and possibly, other factors.”¹⁶ In particular cases, one or two of the factors may outweigh the others, either rendering the broadcast material patently

¹² See *Infinity Broadcasting Corporation of Pennsylvania*, Memorandum Opinion and Order, 2 FCC Rcd 2705 (1987) (subsequent history omitted) (citing *Pacifica Foundation*, Memorandum Opinion and Order, 56 FCC 2d 94, 98 (1975), *aff'd sub nom. Pacifica*, 438 U.S. 726).

¹³ *Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. §1464 and Enforcement Policies Regarding Broadcast Indecency*, Policy Statement, 16 FCC Rcd 7999, 8002 ¶¶ 7-8 (2001) (“*Indecency Policy Statement*”) (emphasis in original). In applying the “community standards for the broadcast medium” criterion, the Commission has stated:

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.

WPBN/WTOM License Subsidiary, Inc., Memorandum Opinion and Order, 15 FCC Rcd 1838, 1841 ¶ 10 (2000) (“*WPBN/WTOM MO&O*”). The Commission's interpretation of the term “contemporary community standards” flows from its analysis of the definition of that term set forth in the Supreme Court's decision in *Hamling v. United States*, 418 U.S. 87 (1974), *reh'g denied*, 419 U.S. 885 (1974). In *Infinity Broadcasting Corporation of Pennsylvania (WYSP(FM))*, Memorandum Opinion and Order, 3 FCC Rcd 930 (1987) (subsequent history omitted), the Commission observed that in *Hamling*, which involved obscenity, “the Court explained that the purpose of ‘contemporary community standards’ was to ensure 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.” *Id.* at 933 (citing 418 U.S. at 107). The Commission also relied on the fact that the Court in *Hamling* indicated that decisionmakers need not use any precise geographic area in evaluating material. *Id.* at 933 (citing 418 U.S. at 104-05). Consistent with *Hamling*, the Commission concluded that its evaluation of allegedly indecent material is “not one based on a local standard, but one based on a broader standard for broadcasting generally.” *Id.* at 933.

¹⁴ *Indecency Policy Statement*, 16 FCC Rcd at 8002 ¶ 9 (emphasis in original).

¹⁵ *Id.* at 8002-15 ¶¶ 8-23.

¹⁶ *Id.* at 8003 ¶ 10.

offensive and consequently indecent,¹⁷ or, alternatively, removing the broadcast material from the realm of indecency.

14. In each of the cases below in which the complaint alleges indecency, we apply the two-pronged indecency analysis described above. Specifically, we first determine whether the complained-of material is within the scope of our indecency definition; *i.e.*, whether it describes or depicts sexual or excretory activities or organs. If so, we then turn to the three principal factors of the second prong to determine whether, taken in context, the material is patently offensive as measured by contemporary community standards for the broadcast medium.

15. As evidenced below, our contextual analysis takes into account the manner and purpose of broadcast material.¹⁸ For example, material that panders to, titillates, or shocks the audience is treated quite differently than material that is primarily used to educate or inform the audience. In particular, we recognize the need for caution with respect to complaints implicating the editorial judgment of broadcast licensees in presenting news and public affairs programming, as these matters are at the core of the First Amendment's free press guarantee.¹⁹

16. **Profanity Analysis.** In the *Golden Globe Awards Order*, we concluded that the "F-Word" constituted "profane language" within the meaning of 18 U.S.C. § 1464 because, in context, it involved vulgar and coarse language "so grossly offensive to members of the public who actually hear it as to amount to a nuisance."²⁰ We indicated in that decision that we would analyze other potentially profane words on a case-by-case basis.

17. Just as with indecent broadcasting, we are mindful that, in exercising our statutory authority over profane broadcast material, we must proceed with "due respect for the high value our Constitution places on freedom and choice in what the people say and hear."²¹ In the *Golden Globe Awards Order*, we interpreted profanity, citing a decision by the U.S. Court of Appeals for the Seventh Circuit, as "denoting certain of those personally reviling epithets naturally tending to provoke violent resentment or denoting language so grossly offensive to members of the public who actually hear it as to amount to a nuisance."²² In the context of broadcasting, however, it is not clear whether the "fighting words" portion of this definition applies. Given the nature of television and radio, it appears unlikely that broadcast material would provoke immediate violence between those uttering such words and the audience. Therefore, in the cases below, and

¹⁷ *Id.* at 8009 ¶ 19 (citing *Tempe Radio, Inc. (KUPD-FM)*, Notice of Apparent Liability for Forfeiture, 12 FCC Rcd 21828 (Mass Media Bur. 1997) (forfeiture paid), and *EZ New Orleans, Inc. (WEZB(FM))*, Notice of Apparent Liability for Forfeiture, 12 FCC Rcd 4147 (Mass Media Bur. 1997) (forfeiture paid) (finding that the extremely graphic or explicit nature of references to sex with children outweighed the fleeting nature of the references).

¹⁸ *Indecency Policy Statement*, 16 FCC Rcd at 8010 ¶ 20 (noting that "the manner and purpose of a presentation may well preclude an indecency determination even though other factors, such as explicitness, might weigh in favor of an indecency finding").

¹⁹ See *Syracuse Peace Council*, Memorandum Opinion and Order, 2 FCC Rcd 5043, 5050-51 ¶ 52 (1987) (subsequent history omitted) (eliminating the fairness doctrine, which placed an affirmative obligation on broadcasters to cover, and present contrasting viewpoints on, controversial issues of public importance).

²⁰ 19 FCC Rcd at 4981 ¶ 13.

²¹ *ACT I*, 852 F.2d at 1344 (noting that "the potentially chilling effect of the FCC's generic definition will be tempered by the Commission's restrained enforcement policy.").

²² 19 FCC Rcd at 1980 ¶ 12.

as a general matter, we will analyze potentially profane language with respect to whether it is "so grossly offensive as to constitute a nuisance."

18. Additionally, given the sensitive First Amendment implications in this area, we establish a presumption that our regulation of profane language will be limited to the universe of words that are sexual or excretory in nature or are derived from such terms. As our regulation of profane language is based on a nuisance rationale similar to that which forms the basis for indecency regulation, we believe that the same limitation on the scope of our regulation is appropriate and rests upon sound constitutional footing.²³ Although we recognize that additional words, such as language conveying racial or religious epithets, are considered offensive by most Americans, we intend to avoid extending the bounds of profanity to reach such language given constitutional considerations.²⁴

19. We conclude below that certain vulgar sexual or excretory terms are so grossly offensive to members of the public that they amount to a nuisance and are presumptively profane. We reserve that distinction for the most offensive words in the English language, the broadcast of which are likely to shock the viewer and disturb the peace and quiet of the home. We also note, however, that in rare cases, language that is presumptively profane will not be found to be profane where it is demonstrably essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance.²⁵ As detailed below, we caution that we will find this exception to be applicable only in unusual circumstances.

20. **Forfeiture Calculations.** The *Notices of Apparent Liability for Forfeiture* ("NALs") contained in this decision are issued pursuant to section 503(b)(1) of the Act. Under that provision, any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission or to have violated section 1464 of title 18, United States Code, shall be liable to the United States for a forfeiture penalty.²⁶ Section 312(f)(1) of the Act defines willful as "the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law.²⁷ The legislative history to section 312(f)(1) of the Act clarifies that this definition of willful applies to both sections 312 and 503(b) of the Act,²⁸ and the Commission has so interpreted the term in the section 503(b) context.²⁹ The term "repeated" means that the action was committed or omitted more than once, or lasts more than one day.³⁰ We emphasize that every licensee is responsible for the decision to air particular programming and will be held

²³ See *Pacifica*, 438 U.S. at 748-751; *Golden Globe Awards Order*, 19 FCC Rcd at 4981-82 ¶¶ 13-16.

²⁴ See, e.g., *Raycom America, Inc.*, Memorandum Opinion and Order, 18 FCC Rcd 4186, 4187. ¶¶ 3-4 (2003); *Complaint of Julian Bond, Atlanta NAACP*, Letter, 69 FCC 2d 943 (Broadcast Bur. 1978).

²⁵ See *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"*, Memorandum Opinion and Order, 20 FCC Rcd 4507, 4512-14 ¶¶ 13-18 (2005) ("*Saving Private Ryan*").

²⁶ 47 U.S.C. § 503(b)(1)(B) & D. See also 47 C.F.R. 1.80(a)(1).

²⁷ 47 U.S.C. § 312(f)(1).

²⁸ See H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982).

²⁹ See *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991).

³⁰ *Callais Cablevision, Inc., Grand Isle, Louisiana*, Notice of Apparent Liability for Forfeiture, 16 FCC Rcd 1359, 1362 ¶ 9 (2001).

broadcast the program prior to 10 p.m.”¹⁶¹ Accordingly, we find that no forfeiture is warranted in this case.

2. “The 2003 Billboard Music Awards” (December 10, 2003)¹⁶²

112. *The Programming.* The Commission received a number of complaints alleging that the Fox Television Network (“Fox” or “Fox Network”) aired indecent material during the “Billboard Music Awards” program on December 10, 2003 between 8 and 10 p.m., Eastern Standard Time.¹⁶³ The complainants allege that, during the broadcast, Nicole Richie, an award presenter, uttered vulgar expletives in violation of the Commission’s rules restricting the broadcast of indecent material.¹⁶⁴ The complainants request that the Commission levy sanctions against each station licensee that aired the remarks.

113. The Bureau sent Fox a letter of inquiry and attached a transcript of the material in question.¹⁶⁵ Fox responded on January 30, 2004.¹⁶⁶ Fox contends that the aired material is not actionably indecent and does not contain any description or depiction of sexual or excretory organs or activities in a patently offensive manner.¹⁶⁷

114. *Indecency Analysis.* During her appearance on the “Billboard Music Awards,” Ms. Richie uttered the “F-Word” and the “S-Word.” Fox does not dispute that the “S-Word” refers to excrement.¹⁶⁸ Fox contends, however, that Ms. Richie used the “F-Word” as a mere vulgar expletive to express emphasis, not to depict or describe sexual activities.¹⁶⁹ We disagree.

¹⁶¹ *Golden Globe Awards Order*, 19 FCC Rcd at 4982 ¶ 15.

¹⁶² FCC File Nos. EB-03-IH-0617, EB-04-IH-0295, EB-04-IH-0091.

¹⁶³ See Letter from Lara Mahaney, Parents Television Council to David Solomon, Chief, Enforcement Bureau, Federal Communications Commission (December 11, 2003). We also deny an additional complaint from PTC regarding another segment of that same broadcast. See Letter from Lara Mahaney, Parents Television Council, to David Solomon, Chief, Enforcement Bureau, Federal Communications Commission (January 22, 2004) (“*Second PTC Complaint*”). See note 195 *infra*.

¹⁶⁴ According to Fox, the Fox affiliate stations located within the Eastern and Central Time Zones broadcast the following exchange between Paris Hilton and Nicole Richie after they walked onstage to present an award:

Paris Hilton: Now Nicole, remember, this is a live show, watch the bad language.
 Nicole Richie: Okay, God.
 Paris Hilton: It feels so good to be standing here tonight.
 Nicole Richie: Yeah, instead of standing in mud and cow[blocked]. Why do they even call it “The Simple Life”? Have you ever tried to get cow shit out of a Prada purse? It’s not so fucking simple.

Fox advises that it edited the tape to remove the expletives before the program aired on tape delay over Fox Stations in the Mountain and Pacific time zones. See Letter from John C. Quale, Counsel to Fox Television Stations, Inc., to Investigations and Hearings Division, Enforcement Bureau (Jan. 30, 2004) (“Response”) at 3-4, 8.

¹⁶⁵ See Letter from William D. Freedman, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, to Fox Television Stations, Inc. (January 7, 2004).

¹⁶⁶ See *supra* note 179.

¹⁶⁷ See Response at 12-13.

¹⁶⁸ *Id.* at 13. We note, however, that even if Ms. Richie was not literally referring to cow excrement, her use of the “S-Word” would still fall within the subject matter prong of our indecency definition. The “S-Word” has an excretory connotation, however it may be used. Its use invariably invokes a coarse excretory image in any context.

¹⁶⁹ Response at 13.

Given the core meaning of the "F-Word," any use of that word inherently has a sexual connotation and falls within the first prong of our indecency definition.¹⁷⁰ We conclude that the material at issue clearly describes sexual and excretory activity. The material, therefore, warrants further scrutiny to determine whether or not it is patently offensive as measured by contemporary community standards for the broadcast medium. We conclude, looking at the three principal factors in our contextual analysis, that it is.

115. First, the complained-of material is quite graphic and explicit. The "F-Word" is one of the most vulgar, graphic, and explicit depictions of sexual activity in the English language. Its use invariably invokes a coarse sexual image.¹⁷¹ Similarly, the "S-Word" is a vulgar, graphic, and explicit depiction of excretory activity. Its use invariably invokes a coarse excretory image. Consequently, we conclude that the broadcast of the "F-Word" and the "S-Word," under the circumstances presented here, is vulgar, graphic and explicit.

116. Second, the fact that use of the words was not sustained or repeated, while relevant, is not dispositive. As the Commission indicated in the *Golden Globe Awards Order*: "[T]he mere fact that specific words or phrases are not sustained or repeated does not mandate a finding that material that is otherwise patently offensive to the broadcast medium is not indecent."¹⁷²

117. Third, and most important to our analysis in this context, Ms. Richie's use of the "F-Word" and the "S-Word" here, during a live broadcast of a music awards ceremony when children were expected to be in the audience, was shocking and gratuitous.¹⁷³ Indeed, Fox admits that the tone of the material was vulgar.¹⁷⁴

118. Like the broadcaster discussed the *Golden Globe Awards Order*, Fox was "on notice that an award presenter or recipient might use offensive language during the live broadcast, and it could have taken appropriate steps to ensure that it did not broadcast such language."¹⁷⁵ As the previous case involving Cher demonstrates, Fox had clear notice that celebrities at this program might utter offensive expletives, including the "F-Word" during the broadcast. Moreover, the record of this broadcast shows that Fox, as the producer of the program and the network that carried it to affiliates throughout the country, deliberately sought to push the limits of decency. According to Fox, the original script called for Ms. Richie to make excretory references to "pig crap" and "cow manure," and to substitute the euphemism "freaking" for the "F-Word."¹⁷⁶ Under the circumstances, there was a palpable risk that Ms. Richie would use the "F-Word" and the "S-Word" instead of the euphemisms in the script.

119. Technological advances have made it possible to block the broadcast of offensive words without disproportionately disrupting a speaker's message.¹⁷⁷ Indeed, Fox utilized a five-

¹⁷⁰ See *Golden Globe Awards Order*, 19 FCC Rcd at 4978 ¶ 8; see also *Pacifica Foundation*, 56 FCC 2d at 99.

¹⁷¹ See *Golden Globe Awards Order*, 19 FCC Rcd at 4979 ¶ 9.

¹⁷² *Id.*, 19 FCC Rcd 4980 ¶ 12.

¹⁷³ *Id.* at 4979 ¶ 9.

¹⁷⁴ See Response at 13.

¹⁷⁵ 19 FCC Rcd at 4979 ¶ 10.

¹⁷⁶ Response at 6.

¹⁷⁷ See *Golden Globe Awards Order*, 19 FCC Rcd at 4980 ¶ 11.

second delay during the broadcast in question and successfully blocked Ms. Richie's first use of the "S-Word."¹⁷⁸ Fox could have avoided the indecency violation here by delaying the broadcast for a period of time sufficient to ensure that all offending words were blocked.¹⁷⁹ It did not do so. As a result, it broadcast highly offensive material within the 6 a.m. to 10 p.m. time frame relevant to an indecency determination under section 73.3999 of the Commission's rules.

120. In sum, because the material is explicit and shocking and gratuitous, we conclude that the broadcast of the material at issue here is patently offensive under contemporary community standards for the broadcast medium and thus apparently indecent. By broadcasting this material, the Fox affiliated stations whose broadcasts were the subject of viewer complaints to the Commission apparently violated the prohibitions in 18 U.S.C. § 1464 and the Commission's rules against broadcast indecency.¹⁸⁰

121. *Profanity Analysis.* In the *Golden Globe Awards Order*, the Commission concluded that the "F-Word" constituted "profane language" within the meaning of 18 U.S.C. § 1464 because, in context, it constituted vulgar and coarse language "so grossly offensive to members of the public who actually hear it as to amount to a nuisance." In this case, we similarly find that the "F-Word" is a vulgar sexual term and the "S-Word" is a vulgar excretory term, each of which is so grossly offensive to members of the public as to amount to a nuisance and that each word accordingly is presumptively profane. For the reasons stated above, use of the "F-Word" invariably invokes a coarse sexual image and use of the "S-Word" invariably invokes a coarse excretory image. Each of these words is among the most offensive words in the English language, the broadcast of which is likely to shock the viewer and disturb the peace and quiet of the home.

122. In rare contexts, language that is presumptively profane will not be found to be profane where it is demonstrably essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance.¹⁸¹ We caution, however, that we will find this to be the case only in unusual circumstances, and such circumstances are not

¹⁷⁸ See Response at 8.

¹⁷⁹ See *Golden Globe Awards Order*, 19 FCC Rcd at 4980 ¶ 11. We note that Fox has pledged, whenever possible, to air future live entertainment programming with a five-minute delay. See Response at 9. While we applaud that change in Fox's practices, it does not excuse the indecency violation in this case.

¹⁸⁰ PTC also filed a complaint concerning an exchange between musician David Grohl and "Triumph the Insult Comic Dog," a hand puppet, during the same program. See *Second PTC Complaint*. According to a partial transcript attached to the complaint, the exchange focused on whether the puppet would "poop" on various celebrities. The exchange also included the phrases "kick-ass lip-singer," "sex with a dog," "singers that suck," "a lot of crap," "my ass," and "you suck." The transcript supplied by PTC stated that the references to pooping on someone were "slang for insults." *Id.* Moreover, the word "poop" is more puerile than offensive. The other words and phrases in question are not generally considered to be as graphic, vulgar, and offensive as the "S-Word" or the "F-Word," and most are fairly commonly used in a non-sexual, non-excretory manner. Accordingly, although they may offend some people, we find that, viewed in the context in which they were used, "poop" and the other words and phrases in question were not patently offensive for the broadcast medium. See, e.g., *Complaints by Parents Television Council Against Various Broadcast Licensees Regarding Their Airing of Allegedly Indecent Material*, Memorandum Opinion and Order, 20 FCC Rcd 1931, 1938, ¶ 8 (2005) ("*PTC 2*") (in context, fleeting uses of words such as "penis," "dick," "testicle," "vaginal," "ass," "bastard," and "bitch" not indecent). We note, however, that in another context, such as a more graphic and explicit description of sexual or excretory organs or activities, the use of these words might contribute to a finding of indecency. We also conclude that these words were not profane in this context.

¹⁸¹ See *Saving Private Ryan*, 20 FCC Rcd at 4512-14 ¶¶ 13-18.

present here. Although in this case, profane language may have had some communicative purpose, we do not believe that Fox has demonstrated that it was essential to informing viewers on a matter of public importance or that editing the language in question would have had a material impact on the network's function as a source of news and information.

123. It is undisputed that the complained-of material was broadcast within the 6 a.m. to 10 p.m. time frame relevant to a profanity determination under section 73.3999 of the Commission's rules. Because there was a reasonable risk that children may have been in the audience at the time the material at issue was broadcast, the material broadcast is legally actionable.¹⁸²

124. *No Sanction Proposed.* Based upon our review of the record in this case, we conclude that the Fox Network affiliated stations in the Eastern and Central Time Zones whose broadcasts were the subject of viewer complaints to the Commission aired material in violation of 18 U.S.C. § 1464 and our rules. They each broadcast indecent and profane words in an awards show that aired between 6 a.m. and 10 p.m. and was watched by people of all ages. The licensees of these stations each consciously and deliberately broadcast the program in question. Accordingly, the apparent violation of 18 U.S.C. § 1464 and section 73.3999 of our rules was willful. The willful broadcast of indecent and profane material on a national network broadcast ordinarily would warrant a forfeiture under the standards announced in the *Golden Globe Awards Order*. Nonetheless, we recognize that our precedent at the time of the broadcast indicated that the Commission would not take indecency enforcement action against isolated use of expletives.¹⁸³ "But for the fact that existing precedent would have permitted this broadcast, it would be appropriate to initiate a forfeiture proceeding against [Fox] and other licensees that broadcast the program prior to 10 p.m."¹⁸⁴ Accordingly, we find that no forfeiture is warranted in this case.

3. "NYPD Blue" (various dates between January 14 and May 6, 2003)¹⁸⁵

125. The Commission has received complaints alleging that KMBC Hearst-Argyle Television, Inc., licensee of Station KMBC-TV, Kansas City, Missouri, and other network stations affiliated with The ABC Television Network ("ABC") aired indecent material during several episodes of "NYPD Blue" broadcast between 9:00 and 10:00 p.m. Central Standard Time on various dates between January and May 2003.¹⁸⁶ The complaints allege that, in each of the identified episodes, one or more characters utter expletives in violation of the Commission's

¹⁸² See *ACT III*, 58 F.3d at 660-63

¹⁸³ See *Golden Globe Awards Order*, 19 FCC Rcd at 4980 ¶ 12 (citing *Pacifica Foundation, Inc.*, Memorandum Opinion and Order, 2 FCC Rcd 2698, 2699 (1987)). The fact that the statement in question included two expletives is unlikely to have removed it from the former isolated use exception under Commission precedent. The only pre-*Golden Globe Awards Order* decision of which we are aware in which a forfeiture was proposed for a single phrase or statement involved the use of multiple expletives combined with a description of sexual activity. See *LBJS Broadcasting Company*, Notice of Apparent Liability for Forfeiture, 13 FCC Rcd 20956 (1998) (forfeiture paid) (finding broadcast apparently indecent for use of phrase "suck my dick you fucking cunt").

¹⁸⁴ *Golden Globe Awards Order*, 19 FCC Rcd at 4982 ¶ 15.

¹⁸⁵ FCC File No. EB-03-IH-0355.

¹⁸⁶ Collectively referred to as the "NYPD Blue Expletive Complaints."

249. Requests for payment of the full amount of these *NALs* under an installment plan should be sent to: Associate Managing Director -- Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.²⁹⁹

250. Accordingly, IT IS ORDERED that the complaints in the above-referenced *NAL* proceedings ARE GRANTED to the extent indicated herein, AND ARE OTHERWISE DENIED, and the complaint proceedings ARE HEREBY TERMINATED.

251. IT IS FURTHER ORDERED that the complaints referenced in these *NALs* and *MO&O* are GRANTED to extent set forth herein and otherwise DENIED.³⁰⁰

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

²⁹⁹ See 47 C.F.R. § 1.1914.

³⁰⁰ Consistent with section 503(b) of the Act and consistent Commission practice, for the purposes of the forfeiture proceeding initiated by each *NAL* in this *Order*, the only party or parties to such proceeding will be the licensee or licensees specified above.