

December 9, 2004

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Assistant Division Chief
Investigations and Hearings Division
Enforcement Bureau
Federal Communications Commission
445 Twelfth Street, S.W., Room 4-A462
Washington, D.C. 20554

Re: Station KABC-TV
Los Angeles, California
File No. EB-04-IH-0497

Dear Mr. Brown:

On behalf of ABC Holding Company Inc. ("ABC"), licensee of KABC-TV, Los Angeles, California, we write in reply to your November 9, 2004 letter regarding a complaint that the station may have broadcast indecent and/or profane material in violation of 18 U.S.C. § 1464 and section 73.3999 of the Commission's rules, 47 C.F.R. § 73.3999.

Specifically, you write, "it is alleged that the word 'fuck' or a variation thereof (the 'Expletive') was aired during the station's September 10, 2004, broadcast of the Miami-Florida State football game at approximately 6:30 PM PST."

The complaint itself, dated September 22, 2004 and attached to your letter, alleges that "[d]uring the halftime report [of the Miami-Florida State football game] USC football player Matt Leinart was interviewed wearing a shirt that said clearly showed [sic] the obscenity message "F--- [sic] the NCAA."

In fact, the halftime report at issue did not contain or depict the word "FUCK" or any other explicit, graphic epithet; was not presented in a pandering, titillating, or patently offensive manner; and was neither indecent nor profane within the meaning of the statute, Commission rules, or Commission precedent.

I will now answer your specific inquiries in turn.

Inquiry 1

On Friday, September 10, 2004, the ABC Television Network broadcast live the ABC Sports telecast of the football game between Miami and Florida State. The live broadcast began at 8 PM Eastern time and 5 PM Pacific time. (KABC's broadcast began at 5 PM.) The game, hosted by

Florida State, was originally scheduled to take place and to be broadcast by ABC on Monday, September 6, but was rescheduled due to Hurricane Charlie.

During the halftime break of most of its college football game broadcasts, ABC Sports presents a 15 minute long halftime report hosted by three on-air commentators. The halftime report typically contains: (a) news, highlights and updates about other college football games and sporting events occurring that day or recently around the country, (b) commentary about and highlights of the first half of the game shown by ABC; and (c) one or more live or pretaped interviews or other segments concerning current college football news.

The halftime report for the Miami-Florida State game began at 9:32 PM ET (6:32 PM PT). A taped segment presenting excerpts from an interview with Matt Leinart, star quarterback of the University of Southern California (USC) football team, began at about 9:38 PM ET (6:38 PM PT). A VHS tape and a transcript of the interview segment as broadcast are enclosed with this letter.

By way of background, last year's college football season ended in controversy, with USC and Louisiana State University (LSU) each claiming to be the national champion. LSU's claim was based on its defeating Oklahoma in the national championship bowl game set up under the auspices of the Bowl Championship Series (BCS). The BCS bases its bowl game selections, including the selection for the national championship match-up, largely on computer rankings. USC supporters and other critics asserted that USC – which was ranked first in the media and coaches' polls – should have been selected to take part in the national championship bowl game.

This was not the first time that the BCS choices for the championship and other bowl games have come under criticism. See, e.g., “Final Answers from the BCS Once Again Raise Questions,” New York Times, December 6, 2004 at C1 (“For the fourth time in the last five seasons, there is a debate over whether the BCS formula will accurately decide the national champion.”).

Since their inception in 1999, the BCS bowl games have been broadcast on television exclusively by ABC Sports and the ABC Television Network. Nonetheless, ABC Sports broadcasts have included many discussions of the controversy surrounding the BCS and its ratings, including criticism of the BCS bowl game selections.

Matt Leinart is a star quarterback for USC this season, as he was last year, and is a leading candidate for the Heisman Trophy. He was interviewed for the taped segment on the USC campus on September 7, 2004. He arrived for the interview after football practice in casual attire, including sandals, shorts, and a t-shirt. He was accompanied by a representative of USC's Sports Information Department, who was present throughout the interview. The interview was shot in a standard definition format of 480 lines of resolution (not high definition).

No makeup person or stylist was used. ABC Sports does not typically apply makeup to athletes for their interviews, nor are they usually asked to change their attire. In general, ABC Sports attempts to capture the interviewees in a natural, realistic manner, providing a more relaxed atmosphere in which to conduct the interview and presenting the interview subject in his or her natural element.

The t-shirt that Mr. Leinart wore to and during the interview included, across the front, the letter F, followed the image of a football helmet (the USC Trojans logo), followed by the letters C and K, followed, after a space, by the words “THE BCS.” The lettering and the helmet logo on the shirt appeared in plain block yellow letters approximately 2 inches high across Mr. Leinart’s chest on a burgundy background. The shirt contained no other graphics. USC’s school colors are burgundy and gold, the same as the t-shirt.

The shirt, which apparently was quite popular on the USC campus, reflected the indignation felt by many at USC – and elsewhere -- that the USC football team was not chosen last year to participate in the BCS national championship game, despite being rated number one in both the media poll and the coaches’ poll.

As edited and aired on September 10, the taped interview segment with Matt Leinart was approximately 1:38 (one minute thirty-eight seconds) long. In the segment, Leinart discussed how he tries to cope with his growing celebrity and the pressures that come with fame. Footage of him speaking was interspersed with game footage and still photographs.

The t-shirt message in question was visible in some of the interview footage included in the segment itself and in a brief “bumper” providing an advance look at the interview in the commercial break preceding the segment. The “bumper” footage showed the t-shirt’s lettering for approximately 10 seconds; each shot in which the lettering was visible during the segment itself lasted approximately one to three seconds in duration. In all of this footage the camera did not focus on the t-shirt lettering itself, but rather showed the lettering incidentally as it captured Leinart speaking. All but one of the shots – including the “bumper” -- were “wide” shots, showing Leinart’s entire body as he sat on the floor and spoke. One brief shot, lasting about three seconds, showed Leinart in a tighter shot from the waist up; again, the focus of the shot was on Leinart’s speaking, not the t-shirt.

Because of folds in the shirt, lighting, and camera angle, the t-shirt’s lettering – particularly the letter F – was partially obscured in all of the shots, including the bumper. Someone who did not already know what the t-shirt actually said would likely have had difficulty in making out all the letters. At various times, the first letter may have appeared to be a “B,” a “D,” or some other letter, rather than the “F” that it actually was. Moreover, as noted above, the space immediately following the first letter on the t-shirt was in fact not occupied by a letter at all, but by a logo – the helmet logo of the USC Trojans.

At no time during the broadcast bumper or interview segment did Leinart or anyone else quote, talk about, comment on, or direct attention to the t-shirt or its message.

At no point was the word “fuck” or any other epithet actually shown or uttered.

Inquiry 2 and Inquiry 3

As discussed above, the programming described in Inquiry 1 of your letter does not accurately reflect the material broadcast over Station KABC-TV. Specifically, the broadcast did not contain the word "FUCK" or any other explicit or graphic expletive.

A VHS copy of the complete halftime report as broadcast by KABC-TV on September 10, 2004, is enclosed with this response, as is a transcript of the Matt Leinart interview segment in question.

Inquiry 4 and Inquiry 5

The halftime show as aired on KABC-TV was also aired, simultaneously and with the same form and network content, on each of the other television stations licensed to ABC, Inc. or its subsidiaries. Those stations, and the approximate local time of broadcast, were as follows:

WABC-TV, New York, N.Y.	9:32 PM
WPVI-TV, Philadelphia, Pa.	9:32 PM
WTVD-TV, Durham, N.C.	9:32 PM
WJRT-TV, Flint, Mich.	9:32 PM
WTVG-TV, Toledo, Ohio	9:32 PM
WLS-TV, Chicago, Ill.	8:32 PM
KTRK-TV, Houston, Tex.	8:32 PM
KFSN-TV, Fresno, Cal.	6:32 PM
KGO-TV, San Francisco, Cal.	6:32 PM

Inquiry 6

As noted above, a VHS tape and a transcript of the interview segment in question are enclosed with this reply, as is an affidavit from Robert Toms, Vice President of Production for ABC Sports, verifying the truth and accuracy of the factual information contained herein.

We will now discuss why, in our view, the broadcast in question did not contain any indecent or profane material within the meaning of 18 U.S.C. § 1464 and Section 73.3999 of the Commission's rules, 47 C.F.R. § 73.3999.

1. The broadcast did not depict or describe sexual or excretory organs and activities and did not present, in a graphic or explicit fashion, any highly offensive epithet or profanity.

As interpreted by the Commission and the courts, an indecent broadcast consists of “language or material that, in context, depicts or describes sexual or excretory organs or activities in terms patently offensive as measured by contemporary community standards for the medium.” See, e.g., Young Broadcasting of San Francisco, 19 FCC Rcd 1751 (2004) at ¶ 8 (citing Infinity Broadcasting Corp. of Pennsylvania, 2 FCC Rcd 2705 (1987)(subsequent history omitted)).

A key consideration in the Commission's indecency analysis is “the *explicitness or graphic nature* of the description or depiction of sexual or excretory organs or activities.” Golden Globe Award Program, 199 FCC Rcd 4975 (2004) at ¶ 7, quoting from Indecency Policy Statement, 16 FCC Rcd 7999, 8003 (2001) (emphasis in original).

The broadcast at issue here plainly did not include any explicit or graphic depiction or description of sexual or excretory organs or activities.

In Golden Globes, the Commission held indecent the clear and explicit broadcast of the word “fucking” as used by the rock performer Bono during a live entertainment awards show. The Commission held that, although not used in a clearly sexual context, the word fuck or fucking “inherently has a sexual connotation, and therefore falls within the first prong of our indecency definition.” Id. at ¶ 8.

For similar reasons, the Commission found that inclusion of the word “fucking” in the awards broadcast violated the proscription on broadcast profanity, id. at ¶ 13, and stated that in the future, depending on the context, it would consider as “potentially profane” words “that are as highly offensive as” fuck. Id.

Unlike the Golden Globes broadcast, however, the word “fuck” or “fucking” was neither uttered nor displayed in the broadcast at issue here. Matt Leinart's t-shirt did not include the word “fuck.” Nor did it contain, or was any mention made of, any other graphic or highly offensive expletive or profanity. Instead, the message on the t-shirt included a milder euphemism – the letter F, followed by a football helmet logo, followed by the letters C and K.

Routinely, in households across America as well as on television, radio and other media, words or exclamations such as “shoot,” “darn,” “drat,” “frigging,” “freaking,” “fricking,” and “oh fudge” are widely used as acceptable alternatives to cruder language. The changing of a letter or two in an epithet has long been viewed as altering it sufficiently into something

satisfactory for use in family and other situations in which the graphic epithet itself would be inappropriate or offensive.¹

The t-shirt in question here used an emblem, rather than a different letter or sound, to accomplish the same purpose – to create something that might allude to an epithet but that was itself something different and milder, more suitable for public use.

Moreover, as noted above, the message on the t-shirt – especially the letter “F” – was partially obscured by folds in the shirt and rendered difficult to make out by the camera angle, lighting, and editing.

In these circumstances, the material in question was not sufficiently graphic or explicit to constitute either indecency or profanity. Cf. Citadel Broadcasting Co., 17 FCC Rcd 483 (2002)(obscuring and editing of song’s most overtly sexual language rendered the song “not...sufficiently explicit or graphic enough” to be found indecent); NBC Telemundo License Co., FCC 04-235 (November 23, 2004) at ¶ 8 (“[N]one of the episodes [of the show *Coupling*] contains graphic descriptions of sexual activities and organs or uses language that is so graphic as to qualify as indecent or profane”); Fox Television Stations, Inc., FCC 04-233 (November 23, 2004) at ¶ 7 (“[T]he material [in the show *Keen Eddie*] contains no graphic or explicit dialogue, discussion, depiction or description of any particular sexual or excretory organ or activity”); WBDC Broadcasting, Inc., FCC 04-234 (November 23, 2004) at ¶ 7 (“[T]he specific words used [in the show *Off Centre*] are not sufficiently explicit or graphic to be indecent in context”); UPN, 19 FCC Rcd 15995 (2004)(scene of kissing and straddling in *Buffy the Vampire Slayer* not “sufficiently graphic or explicit to be deemed indecent”); KSAZ License, Inc., 19 FCC Rcd 15999 at ¶ 6 (2004)(the “material broadcast on the ‘Will and Grace’ program at issue is not sufficiently explicit or graphic to be indecent”).

2. The context and manner in which the material was broadcast were not pandering, titillating, or patently offensive.

The Commission has long and repeatedly emphasized that in determining whether material is patently offensive, “the context of the broadcast is particularly critical.” Indecency Policy Statement at ¶ 21. Recent Commission decisions finding material to be indecent or profane have continued to recognize the importance of context in that analysis. See, e.g., Golden Globe Award Program, 19 FCC Rcd 4975 (2004) at ¶ 7 (2004); Young Broadcasting of San Francisco, Inc., 19 FCC Rcd 1751 (2004) at ¶ 10. Even in the case of a graphic depiction of sexual material or use of an explicit graphic profanity, context is key in determining whether the use is pandering, titillating, and patently offensive. Id.

¹ See, e.g., J. Green, *Dictionary of Contemporary Slang* (1984) at 101-103 and J.E. Lighter (ed.), *Random House Dictionary of American Slang*, Vol. 1 (1994) at 811, 819, 821, listing “freaking,” “fricking,” “frigging,” “fudge,” and other words as euphemisms for “fucking” or “fuck.” The *Random House Dictionary of American Slang* chronicles many examples of uses of these and other euphemistic terms in mainstream popular media such as television and newspapers.

Applying this principle, the Commission has deemed not indecent the repeated broadcast of the words “fuck” and “fucking” during a taped report on National Public Radio’s “All Things Considered” news program. Peter Branton, 6 FCC Rcd 610 (1991), aff’d sub nom. Branton v. FCC, 993 F.2d 906 (1993), cert. denied, 114 S. Ct. 1610 (1994). The report included excerpts of FBI wiretaps that captured organized crime figure John Gotti using coarse and threatening language, including ten utterances of the word “fuck” or “fucking.” Although the expletive appeared repeatedly, clearly, and totally unobscured in the broadcast, the Commission held that, in context, the language was not legally indecent. In a letter to the complainant, the Commission stated:

We recognize that the repetitious use of coarse words is objectionable to many persons, and understand that you personally may have been offended by the use of expletives during the Gotti segment. Nonetheless, we do not find the use of such words in a legitimate news report to have been gratuitous, pandering, titillating or otherwise "patently offensive," as that term is used in our indecency definition. Id.²

In the recent Golden Globes decision, the Commission found indecent the broadcast of the word “fucking” uttered by the rock performer Bono during the Golden Globe Award ceremonies. 19 FCC Rcd 4975 (2004). The Commission expressly distinguished the Branton case, emphasizing that in Branton the word had appeared within “a bona fide news story.” Id. at ¶ 9 n.25. By contrast, the Commission said, NBC had not even suggested any such mitigating value or factors in its broadcast of the word “fucking” during the awards presentation. Id. at ¶ 9.³

² Other Commission indecency decisions have found otherwise objectionable material to be not indecent when considered in context. Thus, even an explicit and extended discussion of sexual organs, functions, and techniques, while potentially offensive to some, was deemed permissible when part of a serious clinical or instructional discussion. King Broadcasting Co., 5 FCC Rcd 2971 (1990) (broadcast of portions of high school sex education class, including graphic depictions of sex organs and discussions of birth control and other sexual topics). Accord Letter to Chris Giglio (July 20, 1994) (Oprah show on improving sexual relations with one’s partner); Letter to Gerald P. McAtee (October 26, 1989) (Geraldo Rivera Show, “Unlocking the Great Mysteries of Sex”). Similarly, full frontal nudity was deemed not to be indecent in the context of a film depicting the atrocities undergone by concentration camp inmates during the Holocaust. WPBN/WTOM License Subsidiary, Inc., 15 FCC Rcd 1838 (2000) (“Schindler’s List”).

In each of these circumstances, as in the Branton case, the context of the material demonstrated that its appearance was not intended to pander or to titillate and, thus, was not patently offensive. That is the case here – the t-shirt was part of the clothing worn by the interview subject during a sports interview, and was not itself depicted in a pandering or titillating fashion.

³ The Commission also held that the broadcast of the word “fucking” during the Golden Globes awards violated the proscription against profanity. In this analysis, too, the Commission made clear that context was critical. Rather than declare that broadcast of the word “fuck” would always be considered per se unlawful profanity, the Commission said that it would consider as profane “the ‘F-word’ and those words (or variants thereof) that are as highly offensive as the ‘F-word’” -- “*depending on the context.*” [Emphasis added.] 19 FCC Rcd at ¶ 14.

Here, as in Branton, the complained of material appeared in the context of an informational report – in this case, on the t-shirt worn by an interview subject during a legitimate sports interview contained within a halftime sports program. The t-shirt was chosen by the interview subject to express a viewpoint about a highly controversial public issue – the legitimacy of the BCS as the means for choosing the college football national champion. The Supreme Court has recognized that a protest slogan on a t-shirt – even one as coarse as the explicit anti-war message “Fuck the Draft” – is entitled to First Amendment protection. See Cohen v. California, 403 U.S. 15 (1971).⁴

Of course, the t-shirt at issue in Cohen – like the broadcasts involved in the Branton and Golden Globe decisions – involved the explicit and graphic use of the word “fuck” or “fucking.” As discussed above, neither the t-shirt worn by Matt Leinart, nor the ABC broadcast, actually depicted the word “fuck.” Rather, the t-shirt showed the letter F, followed by a football helmet logo, followed by the letters C and K and the words THE BCS. As actually presented in the broadcast, even that message, particularly the initial F, was partially obscured by folds in the clothing, lighting, and camera angles.

Moreover, as discussed above, neither Leinart, nor the camera, nor any of the sportscasters drew attention to the t-shirt’s message in any manner, much less in a manner that could be considered pandering or titillating. A useful contrast is provided by the decision in Young Broadcasting of San Francisco, 19 FCC Rcd 1751 (2004). In Young Broadcasting, the Commission issued an indecency fine to a television station for a morning news report about the stage production “Puppetry of the Penis” which included the full (albeit brief) on-air exposure of a performer’s penis. The Commission emphasized that the broadcast matter displayed a “sexual organ,” the male penis, *id.* at ¶ 9, and that the penis was “fully exposed,” *id.* at ¶ 3, in an “extremely graphic and titillating” manner. *Id.* at ¶ 16. In reaching its decision, the Commission considered the “overall context” and tone of the material -- including the nature of the production “Puppetry of the Penis,” which involves nude performers manipulating their penises into the forms of persons, animals, and objects; the urgings of off-set station personnel to the performers

⁴ Petitioner in Cohen v. California had worn an anti-war t-shirt that bore the words “Fuck the Draft” into a state courthouse and was arrested and convicted of “disturb[ing] the peace [by] offensive conduct.” The Supreme Court held that the First Amendment required reversal of the conviction because the t-shirt, while “distasteful” to some, served a “communicative function” and constituted the protected expression of opinion and emotion. 403 U.S. at 26.

The FCC has recognized repeatedly that “[a]ny consideration of government action against allegedly indecent or profane programming must take into account the fact that such speech is protected under the First Amendment. . . . [T]he First Amendment is a critical constitutional limitation that demands that, in such determinations, we proceed cautiously and with appropriate restraint.” Golden Globe at ¶ 5. “[T]he FCC may regulate such material only with due regard for the high value our Constitution places on freedom and choice in what people may say and hear.” *Id.* at n. 25, quoting from Action for Children’s Television v. FCC, 852 F.2d 1332, 1344 (D.C. Cir. 1988)(“ACT I”). Accordingly, “‘the potentially chilling effect of the FCC’s generic definition of indecency’ must be ‘tempered by the Commission’s restrained enforcement policy.’” *Id.*, quoting from ACT I, 852 F.2d at 1340 n.14. This is nowhere more true than in the area of news and other public affairs and informational programming. As the Commission said in the Branton case, “we traditionally have been reluctant to intervene in the editorial judgments of broadcast licensees on how best to present serious public affairs programming to their [audiences].” 6 FCC Rcd at 610. Sports reporting, such as the Matt Leinart interview segment in the September 10 halftime report, is news, informational, and public affairs programming subject to full First Amendment protection.

to “let’s see it”; the performer’s request to the show hosts “should we show you a couple of quick ones?” and the host’s assent to a quick demonstration. Id. at ¶ 14. In these circumstances, even though the material appeared during a morning news program, the Commission found that “the manner in which the station presented this material establishes...that, in its overall context, the material was apparently intended to pander to, titillate and shock viewers,” id. at ¶ 12, which, “coupled with the graphic and explicit nature of the adult male frontal nudity, renders this broadcast indecent under the statute.” Id. at ¶ 14.

The September 10 halftime report did not include any graphic or explicit sexual matter or epithet. Nor was the t-shirt presented in a sensationalistic, pandering, or titillating way. Indeed, the camera never focused on the t-shirt’s message; the lettering – especially the letter F – was partially obscured by clothing folds, lighting, and camera angle; and neither Matt Leinart nor the program’s hosts pointed attention to or commented on the shirt’s message in any way.

In sum, the sports interview that is the subject of this inquiry was neither indecent nor profane as those terms have been construed by this Commission and the courts.

Please contact the undersigned if you have any further questions or if you would like ABC to provide any additional information or materials.

Respectfully submitted,

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