

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

In the Matter of)	
)	
FOX TELEVISION STATIONS, INC.)	File No. EB-03-IH-0672
)	
Licensee of Station WTTG(TV))	Facility ID No. 22207
Washington, D.C.)	

MEMORANDUM OPINION AND ORDER

Adopted: February 14, 2005

Released: February 28, 2005

By the Commission:

I. INTRODUCTION

1. In this *Memorandum Opinion and Order*, we deny a complaint¹ filed by the Parents Television Council (“PTC”), alleging that Fox Television Stations, Inc., licensee of Station WTTG(TV), Washington, D.C., aired an episode of the program *Arrested Development* in violation of the federal restrictions regarding the broadcast of indecent material.²

2. PTC alleges that Station WTTG(TV) and other television stations affiliated with the Fox Television Network (“Fox Affiliates”) broadcast indecent material on November 16, 2003, at 9:30 p.m. Eastern Standard Time contained in an episode of the *Arrested Development* program. PTC complains about several scenes in the episode. Specifically, according to the Complaint, “There are multiple scripted bleeps, and some sexual innuendo dealing with homosexuality.” In particular, the episode contains a reference to “making corn-holes” and then “corn-holing” (which the Complaint describes as “slang for anal sex”), within the context of discussions of a corn baller, an implement for making popcorn balls. After review of the Complaint and the videotape of the subject episode provided by PTC, we find that the material is not patently offensive, as defined by Commission precedent, and therefore does not violate our indecency prohibition.

¹ Letter from Lara Mahaney, Parents Television Council, to David H. Solomon, Chief, Enforcement Bureau, Federal Communications Commission, dated November 24, 2003, at 2 (“Complaint”). A copy of the Complaint is provided in the Attachment.

² See 18 U.S.C. § 1464; 47 C.F.R. § 73.3999.

II. DISCUSSION

3. The Federal Communications Commission is authorized to license radio and television broadcast stations and is responsible for enforcing the Commission's rules and applicable statutory provisions concerning the operation of those stations. The Commission's role in overseeing program content is very limited. The First Amendment to the United States Constitution and section 326 of the Communications Act of 1934, as amended (the "Act"), prohibit the Commission from censoring program material and from interfering with broadcasters' freedom of expression.³ The Commission does, however, have the authority to enforce statutory and regulatory provisions restricting obscenity, indecency and profanity. Specifically, it is a violation of federal law to broadcast obscene, indecent or profane programming. Title 18 of the United States Code, section 1464 prohibits the utterance of "any obscene, indecent or profane language by means of radio communication."⁴ Consistent with a subsequent statute and court case,⁵ section 73.3999 of the Commission's rules provides that radio and television stations shall not broadcast obscene material at any time, and shall not broadcast indecent material during the period 6 a.m. through 10 p.m.⁶ The Commission may impose a monetary forfeiture, pursuant to section 503(b)(1) of the Act,⁷ upon a finding that a licensee has broadcast obscene, indecent or profane material in violation of 18 U.S.C. § 1464 and section 73.3999 of the rules.

4. Any consideration of government action against allegedly indecent programming must take into account the fact that such speech is protected under the First Amendment.⁸ The federal courts consistently have upheld Congress's authority to regulate the broadcast of indecent speech, as well the Commission's interpretation and implementation of the governing statute.⁹ Nevertheless, the First Amendment is a critical constitutional limitation that demands that, in such determinations, we proceed cautiously and with appropriate restraint.¹⁰

³ U.S. CONST., amend. I; 47 U.S.C. § 326 (2002).

⁴ 18 U.S.C. § 1464.

⁵ Public Telecommunications Act of 1992, Pub. L. No. 102-356, 106 Stat. 949 (1992), *as modified by Action for Children's Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995) (*en banc*), *cert. denied*, 516 U.S. 1043 (1996) ("*ACT III*").

⁶ *See* 47 C.F.R. § 73.3999.

⁷ *See* 47 U.S.C. § 503(b)(1). *See also* 47 U.S.C. § 312(a)(6) (authorizing license revocation for indecency violations).

⁸ U.S. CONST., amend. I; *See Action for Children's Television v. FCC*, 852 F.2d 1332, 1344 (D.C. Cir. 1988) ("*ACT I*").

⁹ *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). *See also ACT I*, 852 F.2d at 1339; *Action for Children's Television v. FCC*, 932 F.2d 1504, 1508 (D.C. Cir. 1991), *cert. denied*, 503 U.S. 914 (1992) ("*ACT II*"); *ACT III*.

¹⁰ *ACT I*, 852 F.2d at 1344 ("Broadcast 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"); *id.* at 1340 n.14 ("the potentially chilling effect of the FCC's generic definition of indecency will be tempered by the Commission's restrained enforcement policy").

5. The Commission defines indecent speech as language 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.¹¹

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

6. The material aired during the *Arrested Development* program arguably describes sexual activities and, therefore, warrants further scrutiny to determine whether it is patently offensive as measured by contemporary community standards. For the reasons set forth below, however, we conclude that the material is not patently offensive, and therefore, not indecent.

7. In making indecency determinations, the Commission has indicated that the “*full context* in which the material appeared is critically important,”¹³ and has articulated three “principal factors” for its analysis: “(1) the *explicitness or graphic nature* of the description or depiction of sexual or excretory organs or activities; (2) whether the material *dwells on or repeats at length* descriptions of sexual or excretory organs or activities; (3) *whether the material appears to pander or is used to titillate, or whether the material appears to have been presented for its shock value.*”¹⁴ In examining these three factors, we must weigh and balance them 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.”¹⁵ In particular cases, one or two of the factors may outweigh the others, either rendering the broadcast material patently offensive and consequently indecent,¹⁶ or, alternatively, removing the broadcast material from the realm of indecency.¹⁷

¹¹ *Infinity Broadcasting Corporation of Pennsylvania*, 2 FCC Rcd 2705 (1987) (subsequent history omitted) (citing *Pacifica Foundation*, 56 FCC 2d 94, 98 (1975), *aff’d sub nom. FCC v. Pacifica Foundation*, 438 U.S. 726 (1978)).

¹² *Industry Guidance on the Commission’s Case Law Interpreting 18 U.S.C. §1464 and Enforcement Policies Regarding Broadcast Indecency (“Indecency Policy Statement”)*, 16 FCC Rcd 7999, 8002 (2001) (emphasis in original).

¹³ *Id.* (emphasis in original). In *Pacifica*, the Court “emphasize[d] the narrowness of [its] holding and noted that under the Commission rationale that it upheld, “context is all-important.” 438 U.S. at 750.

¹⁴ *Indecency Policy Statement*, 16 FCC Rcd at 8003 (emphasis in original).

¹⁵ *Id.*

¹⁶ *Id.* at 8009 (citing *Tempe Radio, Inc. (KUPD-FM)*, 12 FCC Rcd 21828 (MMB 1997) (forfeiture paid) (extremely graphic or explicit nature of references to sex with children outweighed the fleeting nature of the references), and *EZ New Orleans, Inc. (WEZB(FM))*, 12 FCC Rcd 4147 (MMB 1997) (forfeiture paid)).

¹⁷ *Indecency Policy Statement*, 16 FCC Rcd at 8010, ¶ 20 (“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”).

8. PTC complains about four scenes contained in the November 16, 2003, episode of *Arrested Development*. After review of the Complaint and the videotape of the episode, we conclude that the material is not patently offensive, as defined by Commission precedent, because the cited dialogue is neither sufficiently graphic nor explicit.¹⁸ As PTC acknowledges in its Complaint, virtually all of the language to which it objects was edited from the program prior to broadcast, so that it is not decipherable by viewers.¹⁹ The remaining non-edited language cited in the Complaint as sexual innuendo is ambiguous. Consequently, we conclude that the material in question is not indecent.²⁰

III. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED, that the Complaint alleging that Fox Television Stations, Inc., licensee of Station WTTG(TV), Washington, D.C., and other Fox Affiliates broadcast indecent material contained in the *Arrested Development* program on November 16, 2003, in violation of 18 U.S.C. § 1464 and 47 C.F.R. § 73.3999, is hereby DENIED.

10. IT IS FURTHER ORDERED, that copies of this *Memorandum Opinion and Order* shall be sent by Certified Mail, Return Receipt Requested, to Fox Television Stations, Inc., 5151 Wisconsin Avenue, N.W., Washington, D.C. 20015, and to the Parents Television Council, 707 Wilshire Boulevard, #2075, Los Angeles, California 90017.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

¹⁸ See *KSAZ License, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 15999, 16001, ¶ 6 (2004); *Complaints Against Various Licensees Regarding Their Airing of the UPN Network Program "Buffy the Vampire Slayer" on November 20, 2001*, Memorandum Opinion and Order, 19 FCC Rcd 15995, 15998, ¶ 6 (2004).

¹⁹ *Complaint* at 2, 3 ("These are extended bleeps, where more than one offensive item is said, but you can't make out what is being said; These are extended bleeps where you cannot decipher what the character is saying, but it offends other characters."). Thus, the parentheses in the transcript submitted by PTC are, in virtually all cases, PTC's guess regarding what the deleted word was.

²⁰ We note that, in the Complaint, PTC cites as indecent a line in which expletives (stated by a character who was burned by the corn baller implement) are edited out, leaving the word "Christ" at the end of the exclamation. The 9th Circuit held that such statements are not a violation under 18 U.S.C. § 1464. See *Gagliardo v. United States*, 366 F.2d 720, 725 (9th Cir. 1966) ("God damn it" not a violation under 18 U.S.C. § 1464), and *Warren B. Appleton*, 28 FCC 2d 36 (B'cast Bur. 1971) ("damn" not a violation under 18 U.S.C. § 1464); see also *Burstyn v. Wilson*, 343 U.S. 495, 505 (1952) (government shall not "suppress real or imagined attacks upon a particular religious doctrine"); *Raycom America (WMC-TV)*, Memorandum Opinion and Order, 18 FCC Rcd 4186 (2003).