

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

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

ORDER ON RECONSIDERATION

Adopted: May 4, 2006

Released: May 31, 2006

By the Commission: Commissioner Adelstein concurring in part, dissenting in part, and issuing a statement.

I. INTRODUCTION

1. In this *Order on Reconsideration*, issued pursuant to section 405(a) of the Communications Act of 1934, as amended (the “Act”), and section 1.106(j) of the Commission’s rules,¹ we deny the Petition for Reconsideration of Forfeiture Order (“*Petition*”) filed by CBS Broadcasting Inc. (“CBS”) in this forfeiture proceeding.² The CBS *Petition* seeks reconsideration of our decision to impose a forfeiture of \$550,000 against CBS Corporation, as the ultimate parent company of the licensees of the television stations involved in this proceeding, for the violation of 18 U.S.C. § 1464 and the Commission’s rule regulating the broadcast of indecent material.³ We find that CBS has failed to present any argument warranting reconsideration of our *Forfeiture Order*.

II. BACKGROUND

2. This proceeding involves the broadcast of the halftime show of the National Football League’s Super Bowl XXXVIII over the CBS owned-and-operated television stations in the CBS Network (the “CBS Stations”) on February 1, 2004, at approximately 8:30 p.m. Eastern Standard Time.⁴ Super Bowl XXXVII was the most-watched program of the 2003-2004 television season and had an

¹ 47 U.S.C. § 405(a); 47 C.F.R. § 1.106(j).

² Petition for Reconsideration of Forfeiture Order by CBS, dated April 14, 2006 (“*Petition*”).

³ See *Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show*, Forfeiture Order, FCC 06-19 at 1 ¶ 1 & n. 2, 2006 FCC LEXIS 1267 (rel. March 15, 2006) (“*Forfeiture Order*”) (citing 18 U.S.C. § 1464 and 47 C.F.R. § 73.3999).

⁴ The CBS Stations were identified in the Appendix to the *Forfeiture Order*. The *Forfeiture Order* noted that viewers in markets served by each of the CBS Stations filed complaints with the Commission concerning the February 1, 2004 broadcast of the Super Bowl XXXVIII halftime show. See *Forfeiture Order* at 1 ¶ 1, n. 4 and Appendix.

average of audience of 89.8 million viewers.⁵ At the end of the musical finale of the halftime show, Justin Timberlake pulled off part of Janet Jackson's bustier, exposing one of her breasts to the television audience. After conducting an investigation, the Commission issued a Notice of Apparent Liability (the "NAL") finding the ultimate parent company of the licensees of the CBS Stations⁶ apparently liable for violating 18 U.S.C. § 1464 and section 73.3999, the Commission's rule regulating the broadcast of indecent material.⁷ The NAL proposed a forfeiture in the amount of \$27,500, the statutory maximum forfeiture amount, against each of the CBS Stations, for a total forfeiture amount of \$550,000.⁸

3. CBS submitted its *Opposition* to the NAL on November 5, 2004.⁹ CBS argued that the material broadcast was not actionably indecent under the Commission's existing case law.¹⁰ CBS further argued that the broadcast of Jackson's breast was accidental, and therefore not "willful" under section 503(b)(1)(B) of the Act.¹¹ CBS further argued that the Commission's indecency framework is unconstitutionally vague and overbroad, both on its face and as applied to the halftime show.¹²

4. In the *Forfeiture Order*, released on March 15, 2006, the Commission rejected CBS's arguments and imposed the \$550,000 forfeiture proposed in the NAL. The *Forfeiture Order* held that, under the Commission's contextual analysis, the broadcast of the halftime show was patently offensive as measured by contemporary community standards for the broadcast medium. With respect to the first principal factor in the Commission's contextual analysis, the Commission rejected CBS's arguments relating to whether the broadcast of partial nudity was premeditated or planned by the broadcaster. Rather, the Commission held that the focus of the first factor of the analysis is whether the broadcast was graphic and explicit from the viewer's or listener's point of view. The Commission found that the video broadcast of an image of a woman's breast is graphic and explicit if it is clear and recognizable to the average viewer, as was the case here.¹³ With respect to the second principal factor in the Commission's contextual analysis, the Commission agreed with CBS that the image in the halftime show was fleeting, but the Commission held that the brevity of the partial nudity was not dispositive.¹⁴ The third principal

⁵ VNU Media and Marketing Guide for Super Bowl, (<http://www.nielsenmedia.com/newsreleases/2005/2005SuperBowl.pdf>).

⁶ The NAL was directed to Viacom, Inc., which was the ultimate corporate parent company of the licensees in question at that time. As of December 31, 2005, Viacom, Inc. effected a corporate reorganization in which the name of the ultimate parent company of the licensees of the CBS Stations was changed to CBS Corporation. For the sake of clarity, we generally refer to the petitioner herein as CBS and to its corporate parent company as CBS Corporation, even for periods preceding the reorganization. As part of the reorganization, certain non-broadcast businesses, including MTV Networks, were transferred to a new company named Viacom Inc. At the time of the violations, however, the CBS Stations and MTV Networks were corporate affiliates under common control.

⁷ See *Complaints Against Various Television Licensees Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show*, Notice of Apparent Liability, 19 FCC Rcd 19230, n. 4 (2004) ("NAL") (citing 18 U.S.C. § 1464 and 47 C.F.R. § 73.3999). The NAL found that there was no evidence that any licensee of any non-CBS-owned television station was involved in the selection, planning or approval of the apparently indecent material and that such licensees could not have reasonably anticipated that the CBS Network's production of a prestigious national event such as the Super Bowl would contain material that included the on-camera exposure of Ms. Jackson's breast. *Id.*, 19 FCC Rcd at 19240 ¶ 25. Accordingly, the NAL did not propose a forfeiture by any such licensee.

⁸ *Id.*, 19 FCC Rcd at 19240 ¶ 24.

⁹ *Opposition to Notice of Apparent Liability for Forfeiture by CBS*, dated November 5, 2004 ("*Opposition*").

¹⁰ *Opposition* at 13-34.

¹¹ *Id.* at 35-38.

¹² *Id.* at 44-77.

¹³ *Forfeiture Order* at 6-7 ¶ 11.

¹⁴ *Id.* at 7 ¶ 12.

factor is whether the material is pandering, titillating or shocking. The Commission clarified that the broadcaster's or performer's state of mind is not relevant here. Rather, this factor focuses on the material that was broadcast and its manner of presentation.¹⁵ The Commission rejected CBS's claim that the segment in question merely involved an accidental, fleeting glimpse of a woman's breast. Rather, the segment was part of a halftime show that featured "performances, song lyrics, and choreography [that] discussed or simulated sexual activities."¹⁶ These sexually suggestive performances culminated in the spectacle of Timberlake tearing off a portion of Jackson's clothing to reveal her naked breast during a highly sexualized performance while he sang "gonna have you naked by the end of this song."¹⁷ The Commission stated: "Clearly, the nudity in this context was pandering, titillating and shocking to the viewing audience."¹⁸ The Commission therefore held that, on balance, the graphic, explicit, pandering, titillating and shocking nature of the material outweighed its brevity in the contextual analysis.¹⁹

5. The *Forfeiture Order* also rejected CBS's claim that the violation was accidental rather than willful under section 503(b)(1) of the Act. The Commission dismissed CBS's attempts to define "willful" in accordance with criminal law and copyright law cases, holding that the definition of the word appearing in section 312 of the Act applies to this case.²⁰ Specifically, the Commission held that CBS Corporation acted willfully because it consciously and deliberately broadcast the halftime show, whether or not it intended to broadcast nudity, and because it consciously and deliberately failed to take reasonable precautions to ensure that no actionably indecent material was broadcast.²¹ The Commission further held that CBS Corporation was vicariously liable under the doctrine of *respondeat superior* for the willful actions of the performers and choreographer that it selected and over whose performance it exercised extensive control.²²

6. The *Forfeiture Order* also rejected CBS's constitutional arguments, concluding that the Commission's indecency standard has been upheld in a series of decisions and has not been invalidated by subsequent developments in the legal or technological landscape.²³ The *Forfeiture Order* further held that the upward adjustment of the forfeiture amount to the statutory maximum was supported by the factors enumerated in section 503(b)(2)(D) of the Act, particularly the circumstances involving the preparation, execution and promotion of the halftime show by CBS Corporation, the gravity of the violation in light of the nationwide audience for the indecent broadcast, CBS Corporation's ability to pay the forfeiture, and the need for strong financial disincentives to violate the Act and the indecency rule.²⁴ The *Forfeiture Order* also rejected CBS's claim that it lacked prior notice that a brief scene of partial nudity might result in a forfeiture. The Commission noted that in *Young Broadcasting*,²⁵ the Commission released a Notice of Apparent Liability proposing the statutory maximum forfeiture amount in a case involving a brief display of male frontal nudity shortly before the subject Super Bowl broadcast.²⁶

¹⁵ *Id.* at 7 n. 44.

¹⁶ *NAL*, 19 FCC Rcd at 19236 ¶ 14.

¹⁷ *Forfeiture Order* at 8 ¶ 13.

¹⁸ *Id.*

¹⁹ *Id.* at 8 ¶ 14.

²⁰ *Id.* at 8-9 ¶ 15.

²¹ *Id.* at 8-13 ¶¶ 15-22.

²² *Id.* at 13-15 ¶¶ 23-25.

²³ *Id.* at 17-19 ¶¶ 30-35.

²⁴ *Id.* at 15-16 ¶¶ 26-28.

²⁵ *Young Broadcasting of San Francisco, Inc.*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 1751 (2004) ("*Young Broadcasting*") (response pending).

²⁶ *Id.* at 16-17 ¶ 29.

III. DISCUSSION

7. *Indecency Analysis.* We reject CBS's contention that the Commission misapplied the test for broadcast indecency in the *Forfeiture Order*. In doing so, we note that CBS does not contest the Commission's determination that the material at issue here falls within the subject matter scope of our indecency definition because it "describe[d] or depict[ed] sexual or excretory organs or activities."²⁷ Rather, CBS takes issue with our conclusion that the Super Bowl halftime show was patently offensive as measured by contemporary community standards for the broadcast medium. While many of the arguments raised by CBS are repetitive of those set forth in its Opposition to the *NAL* and rejected by the Commission in the *Forfeiture Order*, we do address two new objections raised in the *Petition*.

8. First, CBS disputes the Commission's conclusion that "a video broadcast image of [Justin] Timberlake pulling off part of [Janet] Jackson's bustier and exposing her bare breast, where the image of the nude breast is clear and recognizable to the average viewer, is graphic and explicit,"²⁸ arguing that this conclusion is inconsistent with determinations reached by the Commission in the *Omnibus Order*.²⁹ No such inconsistency exists; rather, a comparison of the Super Bowl halftime show to the material addressed in the *Omnibus Order* highlights the critical importance that the Commission places on the particular content and context in evaluating indecency complaints.

9. CBS's attempt to compare Ms. Jackson's "wardrobe malfunction" to the material addressed in the *Omnibus Order* from *The Today Show* and *The Amazing Race 6* is unavailing. In both of those cases, the complained-of material did not constitute the focus of the scene in question. During *The Today Show*, a man's penis was briefly exposed at a considerable distance while he was shown being pulled from raging floodwaters in news footage. As the Commission indicated, "the overall focus of the scene [was] on the rescue attempt, not on the man's sexual organ."³⁰ As a result, many viewers may not have even noticed the briefly exposed penis. Similarly, during *The Amazing Race 6*, while two contestants were leaving a train in Budapest, the camera shot briefly showed the phrase "Fuck Cops!" spray-painted in small white letters on the side of a train. Again, the graffiti was in the background, did not constitute the focus of the scene, and would not likely have been noticed by the average viewer.³¹ Under these circumstances, we found that the material at issue was not graphic or explicit.

10. In the Super Bowl halftime show, by contrast, the exposure of Ms. Jackson's breast was the central focus of the scene in question.³² As we stated in the *Forfeiture Order*, "Jackson and Timberlake, as the headline performers, are in the center of the screen, and Timberlake's hand motion ripping off Jackson's bustier draws the viewer's attention to her exposed breast."³³ Furthermore, even though CBS claims that "this action occurred only after the shot moved away from a close-up to a long shot," Jackson's breast is nonetheless "readily discernable" and the natural focus of viewers' attention.³⁴ As Jackson and Timberlake were the headline performers on stage at that time, it would have been hard for someone looking at the television screen not to notice that he ripped off her clothing to expose her breast. We therefore reject CBS's theory that most viewers did not notice the exposure of Jackson's

²⁷ *Forfeiture Order* at 5 ¶ 9.

²⁸ *Id.* at 6 ¶ 11.

²⁹ Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, FCC 06-17, 2006 FCC LEXIS 1265, released March 15, 2006 ("*Omnibus Order*").

³⁰ *Omnibus Order* at ¶ 215.

³¹ *See Omnibus Order* at ¶¶ 189-92.

³² As such, we note that the Commission's treatment of the Super Bowl halftime show is consistent with our evaluation of the brief exposure of a penis in *Young Broadcasting*.

³³ *Forfeiture Order* at 6 ¶ 11.

³⁴ *See id.*

breast.³⁵ We also reject CBS's repeated attempt to conflate the first and second factors of the Commission's contextual analysis. While we acknowledge that the exposure of Jackson's breast was relatively brief, this does not alter the fact that it was explicit.³⁶ For all of these reasons, we reaffirm our conclusion that the televised image of Timberlake tearing off Jackson's clothing to reveal her bare breast was explicit.³⁷

11. Second, CBS maintains that the Commission misconstrued the third prong of our contextual analysis. Tellingly, CBS does not directly dispute the Commission's conclusion that the material was presented in a pandering, titillating and shocking manner. At the conclusion of a halftime show filled with sexual references, Timberlake and Jackson performed a duet of the song "Rock Your Body" in which Timberlake repeatedly grabbed Jackson, slapped her buttocks, and rubbed up against her in a manner simulating sexual activity, all the while proclaiming, among other things: "I wanna rock your body." Then, as the Commission stated in the *Forfeiture Order*, the performance "culminated in the spectacle of Timberlake ripping off a portion of Jackson's bustier and exposing her breast while he sang 'gonna have you naked by the end of this song.'"³⁸

12. Understandably, given these facts, CBS does not make any effort to argue that the material was not presented in a pandering, titillating, and shocking manner. Instead, CBS argues that the Commission should have examined whether CBS *intended* to pander, titillate, or shock the audience, rather than the manner in which the material was actually presented. CBS fundamentally misunderstands the contextual analysis employed by the Commission. In evaluating whether material is indecent, we examine the material itself and the manner in which it is presented, not the subjective state of mind of the

³⁵ In support of its claim that "the event became recognizable as nudity to most people only because they actively searched for images after the fact," CBS cites the facts that Janet Jackson was the most searched term on Google in February 2004 and that the end of the Super Bowl halftime show became the most TiVoed moment in the history of digital video recorders, *Petition* at 5, n.7. This evidence, however, does not provide support for CBS's theory. Given the widespread media coverage of the Super Bowl halftime show, it should come as no surprise that public interest in Jackson skyrocketed in the aftermath of the incident, thus causing many people to search for information about her using Google. While some of these searches may have been conducted by individuals wishing to see images from the halftime show, it is entirely speculative to suggest that many of these individuals: (1) had watched the halftime show; but (2) did not realize at the time that Jackson had exposed her breast. Similarly, the fact that the end of the Super Bowl halftime show was the most TiVoed moment in the history of digital video recorders lends no support to CBS's theory. There are many reasons why viewers might have replayed the exposure of Jackson's breast – not the least of which is that viewers clearly saw the image and were truly shocked. For CBS to suggest that the fact that the Super Bowl halftime show was the most TiVoed moment in history demonstrates that people watching the broadcast at the time were confused about what had happened has no basis in the evidence. For example, before Super Bowl XXXVIII, the most replayed moment in TiVo history had been the kiss shared by Britney Spears and Madonna during the 2003 MTV Video Music Awards, and it was not unclear at the time whether those two singers had actually kissed. See Ben Charny, "Janet Jackson Still Holds TiVo Title," September 29, 2004 (http://news.com.com/Janet+Jackson+still+holds+TiVo+title/2100-1041_3-5388626.html).

³⁶ See *Young Broadcasting*.

³⁷ To the extent that CBS attempts to compare, for purposes of explicitness, the exposure of Jackson's breast during the Super Bowl halftime show to the brief exposure of an infant's naked buttocks on *America's Funniest Home Videos*, see *Petition* at 5, we seriously question CBS's grasp of contemporary community standards. We also note that the Commission found the footage from *America's Funniest Home Videos* "somewhat explicit" but that factor was outweighed in that case by the scene's brevity and the absence of any shocking, pandering, or titillating effect on the audience. *Omnibus Order* at ¶ 226. Moreover, CBS's comparison of the Super Bowl halftime show to the display of a "portion of the side of [a] maid's breast" in material previously considered by the Commission is obviously inapposite as far more than a portion of the side of Jackson's breast was displayed during her duet with Timberlake. See *Petition* at 3, n.3.

³⁸ *Forfeiture Order* at 8 ¶ 13.

broadcaster.³⁹ Indeed, under the test proposed by CBS, the same material presented in the same manner and context could be indecent on one occasion but not indecent on another if the broadcasters in question had differing intents in airing the material. CBS suggests no legal or public policy reason why the Commission should be compelled to undertake such a fruitless analysis.

13. In this instance, it is clear that the material was presented in a pandering, titillating, and shocking manner. In this regard, we strongly dispute CBS's assertion that the exposure of Jackson's breast was "exactly" the same as a broadcast where a woman's dress strap breaks and accidentally reveals her breast.⁴⁰ In this case, at the conclusion of a highly sexualized performance in which Timberlake, among other things, rubbed up against Jackson in a manner simulating sexual intercourse and implored her to "do that ass-shakin' thing you do," Timberlake ripped off a portion of Jackson's clothing, thus exposing her breast, while singing "gonna have you naked by the end of this song." To claim that this material is no more pandering or titillating than an incident where a woman's dress strap accidentally breaks, thus revealing her breast for a second, utterly ignores the far different contexts of each situation.

14. We also once again reject CBS's general argument that the imposition of a forfeiture here "would be contrary to contemporary community standards for the broadcast medium" because "available information shows that the community at large was not upset about the Super Bowl broadcast."⁴¹ In light of the public uproar following the Super Bowl halftime show, we believe that it is CBS, and not the Commission, that is out of touch with the standards of the American people. Moreover, while we continue to reject the use of third-party polls as determinative in our assessment of contemporary community standards for the broadcast medium and our analysis in this order does not rely upon any third-party polls, we do not accept CBS's argument that "available information shows that the community at large was not upset about the Super Bowl broadcast."⁴² The polls cited by CBS do not indicate whether the Super Bowl broadcast was patently offensive under contemporary community standards for the broadcast medium.⁴³ Moreover, we note that other survey information suggests that most Americans

³⁹ Contrary to CBS's assertion, *see Petition* at 7, n. 10, the Commission in *Young Broadcasting* used the same approach that we have employed in this case. In *Young Broadcasting*, the Commission concluded that "the *manner of presentation* of the complained-of material . . . was pandering, titillating, and shocking." *Young Broadcasting*, 19 FCC Rcd at 1757 (2004) (emphasis added). Among other things, the Commission pointed to the fact that the broadcast included comments made by off-camera station employees urging performers from "Puppetry of the Penis" to conduct a nude demonstration.

⁴⁰ *See Petition* at 7.

⁴¹ *Petition* at 9.

⁴² *Petition* at 9.

⁴³ The surveys cited by CBS in its *Petition* highlight the difficulties associated with relying on third-party public opinion polls in assessing whether material is patently offensive as measured by contemporary community standards for the broadcast medium. Most significantly, the questions asked by pollsters are often not aligned with the issues we must resolve in determining whether broadcast material is indecent under the statute and our rule. For example, the Kaiser Family Foundation survey cited by CBS did not ask respondents whether or not they found the broadcast of the Super Bowl halftime show finale to be offensive. Rather, they were asked about a quite different matter: how concerned they were about the effect of the "Janet Jackson incident" on their own children. Indeed, the fact that 17% of respondents answered that they were "very concerned" about the impact that the Janet Jackson Super Bowl incident had on their own children and that another 14% of respondents were "somewhat concerned" shows an astoundingly high level of concern about the impact of a single program on their own families, especially given that not all of the respondents even had children who watched the Super Bowl halftime show. Contrary to the suggestion of CBS, it certainly does not show that the community at large was "not upset about the Super Bowl broadcast." *Petition* at 9. Similarly, the Associated Press/Ipsos poll cited by CBS does not appear to have asked respondents whether or not they found the broadcast of the finale of the Super Bowl halftime show to have been offensive. Rather, the survey appears to have asked the conclusory question of whether the Timberlake/Jackson stunt was an illegal act, even though there is no evidence that poll respondents were informed before answering the question of the legal standard for broadcast indecency. *See Poll: Janet's Revelation No Crime*, February 21, 2004,

(continued....)

were indeed offended by the Super Bowl halftime incident and did not believe that it was appropriate broadcast material.⁴⁴ Further, we note that while CBS now claims that the exposure of Jackson's breast was not patently offensive, it conceded otherwise shortly after the incident. For example, testifying before the House Energy and Commerce Committee, Viacom's President and Chief Operating Officer stated that "everyone at CBS and everyone at MTV was shocked and appalled . . . by what transpired" and maintained that the material "went far beyond what is acceptable standards for our broadcast network."⁴⁵ Similarly, at the same hearing, the Commissioner of the NFL said that he was "deeply disappointed and offended by the inappropriate content of the show."⁴⁶ Finally, we reject CBS's argument that the Commission generally does not evaluate material using contemporary community standards for the broadcast medium. As we have stated before, "We rely on our collective experience and knowledge, developed through constant interaction with lawmakers, courts, broadcasters, public interest groups and ordinary citizens, to keep abreast of contemporary community standards for the broadcast medium."⁴⁷

15. In sum, we reaffirm our conclusion in the *Forfeiture Order* that "the Super Bowl XXXVIII halftime show contained material that was graphic, explicit, pandering, titillating, and shocking and, in context and on balance, was patently offensive under contemporary community standards for the broadcast medium and thus indecent."⁴⁸ As we found in the *Forfeiture Order*, "[a]lthough the patently offensive material was brief, its brevity is outweighed in this case by the first and third factors in our contextual analysis."⁴⁹

16. *Whether Violation Was "Willful."* Seeking to absolve itself of responsibility for the Super Bowl halftime show broadcast, CBS challenges the Commission's finding that the indecency violation was willful because of both CBS's own conduct and its vicarious liability for the willful actions of the performers under the doctrine of respondeat superior. We conclude that there is no basis to reconsider our decision on either ground.

(...continued from previous page)

www.cbsnews.com/stories/2004/02/02/entertainment/printable597184.shtml. (We note that the poll is proprietary, and CBS does not provide any information concerning precisely what was asked to elicit the poll responses.) In sum, we view the results of polls and surveys in the indecency context with care and a measure of skepticism because survey results in this area can easily be skewed by the phraseology of the questions, and those questions are often not on point with the issues we must resolve in determining whether broadcast material is indecent under the statute and our rule.

⁴⁴ For example, when specifically asked by survey researchers whether the \$550,000 forfeiture proposed by the FCC against CBS was appropriate in this case, a majority of Americans responded either that the FCC had handled the case appropriately or that the Commission's proposed sanction was not harsh enough. See "Americans Gearing Up for 'Ad Bowl' 2005", February 4, 2005, (<http://www.comscore.com/press/release.asp?press=554>) (44 percent of Americans agree that the FCC handled the Super Bowl halftime incident appropriately while another 12 percent felt that the Commission should have done more to punish CBS and the NFL). Moreover, a survey conducted by Opinion Dynamics Corporation also reveals that the majority of the American people think that CBS and MTV showed a lack of respect for the American people in airing the Super Bowl halftime show. See "Could Election 2004 Be as Close as 2000?" (February 5, 2004) (<http://www.foxnews.com/story/0,2933,110675,00.html>) (56 percent of Americans agree that CBS and MTV demonstrated a lack of respect for the American people with the Janet Jackson-Justin Timberlake halftime show during the Super Bowl).

⁴⁵ *Hearings Before the Subcommittee on Telecommunications and the Internet of the Committee on Energy and Commerce of the House of Representatives on H.R. 3717*, Serial No. 108-68 (February 11, 2004) at 37 (statement of Mel Karmazin).

⁴⁶ *Id.* at 30 (statement of Paul Tagliabue).

⁴⁷ *Infinity Radio License, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 5022, 5026 (2004).

⁴⁸ *Forfeiture Order* at 8 ¶ 14.

⁴⁹ *Id.*

17. CBS contends that the “only question” in determining whether it is legally responsible for “willfully” violating the Act and the Commission’s rules is whether it “intended for Ms. Jackson to bare her breast as part of a broadcast that CBS aired.”⁵⁰ The Commission disagrees. Not only is that not the “only question,” it is not the question at all. CBS acted willfully because it consciously and deliberately broadcast the halftime show and consciously and deliberately failed to take reasonable precautions to ensure that no actionably indecent material was broadcast.⁵¹ The record shows that CBS was acutely aware of the risk of unscripted indecent material in this production, but failed to take adequate precautions that were available to it to prevent that risk from materializing.⁵² Under these circumstances, the Commission was justified in finding CBS responsible for the indecent broadcast based on its conscious and deliberate omissions even if it did not intend for Ms. Jackson to bare her breast.⁵³

18. While defending its “meticulous efforts to ensure the performance adhered to broadcast standards and that no unforeseen incidents or departures from script occurred,”⁵⁴ and dismissing the record evidence on which the Commission relied, CBS fails to address several important facts cited by the Commission. For example, CBS does not explain in its *Petition* why it was not alarmed by, and did not investigate, the news item posted on MTV’s website before the show in which Jackson’s choreographer predicted that Jackson’s performance would include some “shocking moments.”⁵⁵ By CBS’s own account, the management of both MTV and Viacom were aware of the claims but apparently did nothing to investigate them, preferring instead to remain in the dark based on implausible assumptions regarding their meaning.⁵⁶ We found unconvincing CBS’s previous assertions that MTV management believed that the “shocking moments” quote referred to Timberlake’s “surprise” appearance, and that Viacom personnel who reviewed the story dismissed it as hyperbole common in the music industry. As we explained in the *Forfeiture Order*, it seems dubious that Timberlake’s appearance would be described as “shocking” when MTV included his name in the on-screen credits before the show.⁵⁷ Similarly, CBS says nothing about the fact that a question posed by another halftime performer to MTV staff about the length of the broadcast delay was recognized as having “scary” implications – presumably because it signaled that a performer might be contemplating a script departure and was wondering what he might be able to get away with.⁵⁸ And CBS does not dispute that the show’s sponsor, the NFL, raised specific concerns about Timberlake’s scripted line “gonna have you naked by the end of this song,” which anticipated the stunt resulting in the broadcast nudity.⁵⁹

19. CBS dismisses as irrelevant the fact that it learned the morning of the show of plans to use tearaway cheerleading outfits for dancers in another halftime performance in connection with a scripted line (“I wanna take my clothes off”) that is markedly similar to Timberlake’s line that immediately preceded the tearaway of Jackson’s bustier (and had, incidentally, worried the NFL). CBS claims that this “reveals that, in carefully examining the costumes before the show, CBS reinforced its prohibition on reveals or other stunts that could go wrong and implicate indecency concerns.”⁶⁰ But CBS

⁵⁰ *Petition* at 12.

⁵¹ *Forfeiture Order* at 8-13 ¶¶ 15-22.

⁵² *Id.*

⁵³ See 47 U.S.C. § 312(f)(1).

⁵⁴ *Petition* at 14.

⁵⁵ *Forfeiture Order* at 10 ¶ 19.

⁵⁶ See *Opposition* at 7-8.

⁵⁷ See *Forfeiture Order* at 12 n.74.

⁵⁸ *Forfeiture Order* at 10 ¶ 19; Con. App. 6.

⁵⁹ *Forfeiture Order* at 10 ¶ 19; Con. App. at 5.

⁶⁰ *Petition* at 15-16.

does not say whether in “carefully examining the costumes before the show” it noticed that Jackson’s bustier was constructed so that the cups could easily be torn away.⁶¹ Nor does it address whether the parallel lyrics noted by the Commission (“I wanna take my clothes off”/“gonna have you naked by the end of this song”) caused it any concern. In fact, CBS does not explain at all how it “reinforced its prohibition on reveals or other stunts that could go wrong and implicate indecency concerns.”⁶²

20. These should have served as warnings signs of the risk of visual as well as audio departures from script, yet CBS does not explain why its “meticulous efforts” did not include further investigation or an adequate delay mechanism.⁶³ It also fails to explain why it did not take the simple measure at the outset of requiring that MTV’s agreements with the performers obligate them to conform to the script and to CBS’s broadcast standards and practices.⁶⁴

21. Regarding the evidence that it does address, CBS complains that the Commission has taken evidence out of context or inflated its significance, but the record suggests otherwise. For example, it takes issue with the Commission’s characterization that MTV was seeking to “push the envelope” in its halftime production, but counters only with the argument that MTV did not use that term to mean pushing the bounds of propriety in terms of sexually provocative content.⁶⁵ But the Commission’s characterization is its own, and is well-founded based on the entirety of the record. MTV clearly intended for the show to be sexually provocative and repeatedly made decisions in an effort to push the show in that direction. Moreover, the fact that the NFL had to rein in MTV when it felt the show was heading in too risqué a direction suggests that MTV was in fact trying to push the envelope of propriety, without regard to whether MTV chose to use that term.⁶⁶

22. CBS also disputes our conclusion that it made a calculated decision to rely on a five-second audio delay even though it was aware of the risk of visual deviations from the script that could not be blocked with a five-second delay. It asserts that this did not reflect a “calculated risk” but rather simply conformance with standard industry practice, and that a video delay was “entirely unprecedented, and the technique had to be specially engineered after the Super Bowl incident.”⁶⁷ It also claims that the NFL was concerned only about audio, not visual, departures from the script.⁶⁸ Contrary to CBS’s contention, however, the record indicates that the NFL’s expressed concerns were not limited to audio deviation,⁶⁹ and, perhaps even more importantly, that CBS/MTV understood that the risks were not limited to audio deviations as well.⁷⁰ Furthermore, if the standard industry delay practice was inadequate

⁶¹ *Id.* See also *id.* at 14 (“CBS double-checked with Ms. Jackson’s staff there would be no alterations in her performance as scripted, including any involving wardrobe”). See also “Jackson’s halftime stunt fuels indecency debate,” USA Today.com, February 2, 2004, http://www.usatoday.com/sports/football/super/2004-02-02-jackson-halftime-incident_x.htm (“Close-ups of the costume, posted on the Internet, appear to reveal snaps around that part of the bustier.”).

⁶² *Petition* at 15-16.

⁶³ See para. 22 *infra* regarding CBS’s decision to implement a 5-second delay.

⁶⁴ *Forfeiture Order* at ¶ 20.

⁶⁵ See *Petition* at 14-15.

⁶⁶ See *Forfeiture Order*. at 10 ¶ 18. See also Con. App. 1, 5.

⁶⁷ *Petition* at 15.

⁶⁸ *Id.* at n.24.

⁶⁹ The NFL’s concern about the lyrics “I am going to get you naked by the end of this song” can most reasonably be understood as a concern that the performers might act out the lyrics. There did not appear to be any particular cause for concern that the performers might insert profanity into that line any more than any other line.

⁷⁰ See Con. App. 5, 8.

to alleviate the concerns under the circumstances, then CBS was obligated to do more.⁷¹ We note that this was not a typical broadcast; it was the most-watched television program of the year and millions of families and children were expected to be in the audience.

23. Holding CBS responsible for the indecent broadcast under these circumstances is not tantamount to imposing strict liability, as CBS contends, because the finding of willfulness is based on CBS's knowledge of the risks and its conscious and deliberate omissions of the acts necessary to address them. As we stated in the *Forfeiture Order*, this approach is consistent with the statutory definition of willfulness,⁷² and it is particularly appropriate here given the nondelegable nature of broadcast licensees' responsibility for their programming.

24. We find CBS's arguments concerning our application of the doctrine of respondeat superior equally unpersuasive. CBS's assertion that the Commission applied "unusually strict rules" of vicarious liability in the *Forfeiture Order* is inaccurate.⁷³ The Commission applied traditional agency principles, which "ordinarily make principals or employers vicariously liable for acts of their agents or employees in the scope of their authority or employment."⁷⁴ Under these principles, the FCC concluded that Jackson, Timberlake and Jackson's choreographer were Viacom/CBS employees for purposes of determining whether CBS is vicariously liable for their conduct here, and that their actions were within the scope of their employment.⁷⁵ CBS's assertion that the Commission "seeks to impose nontraditional vicarious liability" appears to be founded on the three's alleged status "as independent contractors, not employees."⁷⁶ The factors on which CBS relies, however, are not strongly indicative of independent contractor status in the circumstances before us, and CBS does not dispute the Commission's finding on the decisive control factor.

25. The Commission properly treated CBS's right to control the halftime show as the most significant test of its relationship with the performers. Courts look to numerous factors in determining a hired party's status under common law agency principles.⁷⁷ "Though no single factor is dispositive, the greatest emphasis should be placed on the first factor—that is, on the extent to which the hiring party controls the manner and means by which the worker completes his or her assigned tasks."⁷⁸ In addition, the relative weight of common law factors also varies according to the legal context in which the agency

⁷¹ Notwithstanding CBS's protestations to the contrary, delaying a live broadcast long enough to block visual indecency does not appear to pose major technical challenges to a company such as CBS.

⁷² 47 U.S.C. §§ 312(f)(1), 503(b)(1).

⁷³ *Petition* at 16 (internal quotes omitted).

⁷⁴ *Forfeiture Order* at 13 ¶ 23, quoting *Meyer v. Holley*, 537 U.S. 280, 285 (2003) (citation omitted).

⁷⁵ *Id.* at 13-15 ¶¶ 24-25. This decision was consistent with *Holley*. In that case, the Supreme Court held that, absent a statutory basis, vicarious liability could not be imposed based solely on the right to control. Rather, evidence was also needed that the employee acted in the scope of employment. See *Meyer v. Holley*, 537 U.S. at 286. Here, the Commission determined that the performers were both subject to CBS's control and acting in the scope of their authority.

⁷⁶ *Petition* at 17.

⁷⁷ *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989), citing Restatement (Second) of Agency § 220(2) (1957) (Restatement).

⁷⁸ *Eisenberg v. Advance Relocation & Storage, Inc.*, 237 F.3d 111, 114 (2nd Cir. 2000) ("The first factor is entitled to this added weight because, under the common law of agency, an employer-employee relationship exists if the purported employer controls or has the right to control both the result to be accomplished and the manner and means by which the purported employee brings about that result.") (internal quotes and citations omitted). See *id.* at 114-15 (listing authorities). See also Restatement § 220(1) cmt. D ("control or right to control the physical conduct of the person giving service is important and in many situations is determinative" of whether that person is an employer or independent contractor).

issue arises,⁷⁹ and the control factor is particularly important in the vicarious liability context because the root issue is where responsibility lies for preventing the risk of harm to third parties.⁸⁰

26. CBS does not dispute the Commission's finding that the halftime show performance was subject to exacting control by Viacom/CBS. However, its suggestion that it exercised no more control than necessary "to ensure a proper result or end-product of the work"⁸¹ belies the evidence that every aspect of the performance, including the exact time, length, location, material, set, script, staging, and wardrobe, was subject to the control of Viacom/CBS through its corporate affiliate MTV.⁸² Viacom/CBS was not commissioning a sculpture for its lobby or hiring workers to install a floor covering, as were the hired parties in the cases it cites.⁸³ Rather, it was producing the Super Bowl halftime show in order to attract a large nationwide audience to a CBS network program and promote the brand of its corporate affiliate MTV.⁸⁴ Viacom/CBS developed the creative concepts for the show, scripted every word uttered on stage, and reviewed every article of clothing worn by the performers.⁸⁵ CBS's reliance on *Community for Creative Non-Violence v. Reid* and *Chaiken v. VV Publishing Corp.* is misplaced because the extent of control exercised by the hiring parties in those cases was not remotely comparable to this situation.⁸⁶ *Reid* is also a work-for-hire copyright case in which factors related to compensation and benefits are generally accorded more weight than they are entitled to in other legal contexts.⁸⁷

⁷⁹ See, e.g., *id.* at 116.

⁸⁰ See Restatement § 219(1) cmt. a ("Bearing in mind the purpose for fixing the categories, it may be said that a servant is an agent standing in such close relation to the principal that it is just to make the latter respond for some of his physical acts resulting from the performance of the principal's business.").

⁸¹ *Petition* at 17.

⁸² *Forfeiture Order* at 13-14 ¶ 24. See *Lorenz Schneider Co. v. NLRB*, 517 F.2d 445, 451 (2nd Cir. 1975) ("the more detailed the supervision and the stricter the enforcement standards, the greater the likelihood of an employer-employee relationship").

⁸³ See *Petition* at 18, n. 31 and accompanying text (relying on *Community for Creative Nonviolence v. Reid*, 490 U.S. 730, 752-53 (1989) (sculptor was an independent contractor under the work-for-hire doctrine) and *Carpet Exch. Of Denver, Inc. v. Indus. Claim Appeals Office*, 859 P.2d 278, 281 (Colo. App. 1993) (workers who installed floor covering purchased by company's customers were not employees for purposes of state worker's compensation law)). CBS cites the *Carpet Exch. Of Denver, Inc.* case for the proposition that "independent contractors, though 'subject to control sufficient to ensure that the end resulted contracted for is reached, are not subject to control over the[ir] means and methods.'" As discussed herein, however, in this case the performers were subject to extensive control over their means and methods.

⁸⁴ See CBS Response, App. C at Bates stamped pgs. 312, 355-57, 370.

⁸⁵ *Forfeiture Order* at 13-14 ¶ 24. See CBS Response, App. C. at Bates stamped pgs. 318, 452, 459-69, 518-19.

⁸⁶ See *Reid*, 490 U.S. at 753 ("Apart from the deadline for completing the sculpture, Reid had absolute freedom to decide when and how long to work."); *Chaiken v. VV Publishing Corp.*, 907 F.Supp. 689, 699 (S.D.N.Y. 1995) ("As an experienced reporter, Friedman controlled the manner in which the article was written—including the selection of a topic, research plan, and sources—without any guidance from the *Voice*. *Voice* editors reviewed the article only after Friedman completed a draft, and the editors subsequently made few substantive changes.").

⁸⁷ As the Second Circuit has explained, special consideration of such factors "may make sense in the copyright work-for-hire context because, under the copyright statute, workers and employees are free to allocate intellectual property rights by contract." *Eisenberg*, 237 F.3d at 117. If *Reid*'s weighing of factors applied in the vicarious liability context, however, firms could devise compensation packages to opt out of tort liability. Compare *id.* (declining to accord presumptive significance to benefits and tax treatment in determining whether a female warehouse worker was an employee under anti-discrimination laws; "[w]hile the rights to intellectual property can depend on contractual terms, the right to be treated in a non-discriminatory manner does not depend on the terms of any particular contract.").

27. In this context, the contractual terms related to compensation and benefits cited by CBS are not strongly indicative of independent contractor status.⁸⁸ CBS was obligated to ensure that its broadcast programming served the public interest, and was not free to confer this obligation on another by contract.⁸⁹ Likewise, CBS's contention that the performers were "highly skilled" does not meaningfully cut in its favor. Courts applying common law agency principles have not hesitated to hold entertainers and artists to be employees of the parties that hire them.⁹⁰ We recognize that some of the common law factors are not indicative of agency. Again, however, the relative weight of common law factors varies according to the legal context in which the agency issue arises. The central issue here is the parties' relationship for the specific purpose of imposing vicarious liability for the performers' actions in that performance that were harmful to the public (rather than for copyright, workers' compensation, anti-discrimination or other purposes). In this context, the Commission properly concluded that the evidence clearly demonstrating Viacom/CBS's right to control the halftime show performance was decisive.⁹¹

28. CBS's assertion that the performers' actions were outside the scope of authority conferred by its agreements with them also lacks merit.⁹² As the Commission explained, their conduct is fully attributable to CBS if it was "incident to the performance rather than 'an independent course of conduct intended to serve no purpose of the employer.'"⁹³ Here, the actions at issue were part of the performance for which Jackson and Timberlake were hired. Furthermore, examination of the record reflects that the costume reveal was intended to serve Viacom/CBS's overarching entertainment goal of providing a spectacular finale.⁹⁴ Accordingly, the Commission correctly concluded that Jackson and Timberlake were within the scope of their authority under common law agency principles.

29. *Amount of Forfeiture.* In its *Petition*, CBS asks the Commission to reduce the amount of the forfeiture imposed on it for three reasons. We find each of these arguments to be unpersuasive.

⁸⁸ *Petition* at 17.

⁸⁹ See *Forfeiture Order* at ¶ 16. Cf. *Eisenberg*, 237 F.3d at 117 (placing special weight on the extent to which the hiring party controlled the "manner and means" by which the worker completes her assigned tasks, rather than benefits and tax treatment factors, in anti-discrimination context because special consideration of benefits and tax treatment factors "would allow workers and firms to use individual employment contracts to opt out of the anti-discrimination statutes.").

⁹⁰ See *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 87 (2nd Cir. 1995) (sculptors held to be employees despite their "artistic freedom and skill"); *Jack Hammer Assoc., Inc. v. Delmy Productions, Inc.*, 499 N.Y.S.2d 418, 419-20 (1st Dep't 1986) (actor in musical play); *Challis v. National Producing Co.*, 88 N.Y.S.2d 731 (3d Dep't 1949) (circus clown); *Berman v. Barone*, 88 N.Y.S.2d 327, 328 (3d Dep't 1949) (ballet dancer and variety artist). See also *Landman Fabrics, a div. of Blocks Fashion Fabrics, Inc.*, 160 F.3d 106, 113 (2nd Cir. 1998) (evidence would support a holding that artist who developed a fabric design was an employee in copyright context where, *inter alia*, artist was highly skilled but hiring party controlled the artist's work to the smallest detail). As the Commission noted, the contracts contain choice-of-law provisions specifying New York law. *Forfeiture Order* at 14 ¶ 25 n.87.

⁹¹ CBS notes that Jackson's, Timberlake's, and Duldalao's contracts "were with a production company, not CBS or MTV," but fails to point out the significance of this fact. Examination of the record reflects that Jackson's and Timberlake's contracts were with "FRB Productions, Inc.," and Duldalao's contract was with "Remote Productions, Inc." Neither FRB nor Remote is identified in CBS's Response, but they appear to be creatures of MTV. MTV executives generated, reviewed, and signed the contracts on behalf of FRB and Remote. See, e.g., CBS Response, App. C at Bates stamped pgs. 154-71, 257-61, 359-63, 2160-61, 2341. At least one document in the record specifies that Remote is "a wholly owned subsidiary of MTV Networks," *id.* at Bates stamped p.2352, and another document suggests that MTV executives treated FRB as interchangeable with Remote. See *id.* at Bates stamped p.2148.

⁹² *Petition* at 19.

⁹³ *Forfeiture Order* at 14-15 ¶ 25, quoting Restatement (Third) of Agency § 7.07 (T.D. No.5 2004).

⁹⁴ See *Forfeiture Order* at 10 ¶¶ 18-19; CBS Response, App. B at Bates stamped pgs. 130, 135.

30. First, CBS maintains that “[t]o the extent that any O&O station was not the subject [of] a complaint about the halftime show, its fine should be rescinded and the total forfeiture reduced proportionately.”⁹⁵ However, as we stated in the *Forfeiture Order*, “viewers in markets served by each of the CBS Stations filed complaints with the Commission concerning the February 1, 2004 broadcast of the Super Bowl XXXVIII halftime show.”⁹⁶ Accordingly, it was appropriate for the Commission to impose a forfeiture on all stations owned by CBS. To the extent that CBS is suggesting that the Commission will only impose a forfeiture in response to complaints that specifically mention a station’s call letters, it misunderstands the enforcement policy announced by the Commission in the *Omnibus Order*. Under that policy, it is sufficient that viewers in markets served by each of the CBS Stations filed complaints with the Commission identifying the allegedly indecent program broadcast by the CBS Stations.

31. Second, CBS claims that the Commission has not provided a “logically consistent explanation” for why forfeitures were imposed on those stations owned by CBS but not on affiliates owned by others.⁹⁷ However, as we explained in the *Forfeiture Order*, CBS’s culpability for the broadcast of indecent material in this case was far greater than that of other owners of CBS stations.⁹⁸ “CBS admits that it was closely involved in the production of the halftime show, and that its MTV affiliate produced it.”⁹⁹ Under these circumstances, it was within the Commission’s enforcement discretion to impose fines on the stations owned by CBS but not on affiliates owned by others. While CBS attempts to distance its wholly-owned television stations from its wholly-owned affiliate supervising the halftime production, it does not dispute that both entities were part of the same corporate structure, responsible to the same corporate parent.

32. Third, CBS argues that the forfeiture should be reduced because of its “long record of compliance with broadcast standards” and because it did not “intentionally flout[] FCC rules.”¹⁰⁰ We disagree. Looking at all of the relevant factors enumerated in section 503(b)(2)(D) of the Act, we continue to believe that the maximum statutory forfeiture is warranted given the particular circumstances of this case. In particular, given CBS’s size and resources, we stand by our belief that a lesser forfeiture “would not serve as a significant penalty or deterrent.”¹⁰¹ Indeed, we note that the amount of the forfeiture in this case is less than one-quarter of the \$2.3 million that CBS charged for a single 30-second advertisement aired during its broadcast of Super Bowl XXXVIII.¹⁰² While CBS observes that indecency findings may also have a deterrent effect because of the potential negative consequences on a company’s licenses, it remains the case that monetary forfeitures are a central tool used by the Commission to insure compliance with our rules.¹⁰³ Moreover, as we noted in the *Forfeiture Order*, the gravity of this violation is heightened because the indecent material was broadcast to “an enormous nationwide audience,”¹⁰⁴ a fact that CBS does not dispute. Indeed, the material in question was part of the most-watched program of

⁹⁵ *Petition* at 19-20.

⁹⁶ *Forfeiture Order* at 1 ¶ 1, n.4.

⁹⁷ *Petition* at 20.

⁹⁸ *Forfeiture Order* at 15 ¶ 27.

⁹⁹ *Id.*

¹⁰⁰ *Petition* at 21.

¹⁰¹ *Forfeiture Order* at 16 ¶ 28.

¹⁰² “Television Keeps NFL On Top,” *Fort Worth Star Telegram* at 1A (January 30, 2004) (“The cost for a 30-second advertisement is \$2.3 million, or roughly the cost of a \$77,000 luxury car each second.”).

¹⁰³ Contrary to CBS’s suggestion in its *Petition*, this does not mean, of course, that the Commission will always impose a maximum forfeiture anytime that a large company violates our rules. However, consistent with section 503(b)(2)(D) of the Act, a company’s “ability to pay” is a factor that weighs in our analysis.

¹⁰⁴ *Forfeiture Order* at 16 ¶ 28.

the entire 2003-2004 television season by far,¹⁰⁵ and this fact heightens the gravity of the violation in this case. CBS's broadcast of Super Bowl XXXVIII was viewed by an average of 89.8 million people.¹⁰⁶ By contrast, the second most-watched program of the 2003-2004 television season, the series finale of *Friends*, only drew an average of 52.5 million viewers.¹⁰⁷ In addition, according to Nielsen Media Research, Super Bowl XXXVIII was the top-ranked program of the 2003-2004 television season among children of all age groups: 2 to 5; 6 to 11; and 12 to 17.¹⁰⁸ Finally, we continue to believe that the particular nature of this violation weighs in favor of the statutory maximum forfeiture. In this case, unsuspecting viewers were confronted during the Super Bowl halftime show, which was not rated as content inappropriate for children,¹⁰⁹ by a highly sexualized performance in which Timberlake tore off a piece of clothing to reveal Jackson's breast while singing "gonna have you naked by the end of this song." While CBS now argues that this conduct was not patently offensive, we disagree.

33. *Constitutional Issues.* We also adhere to our rejection of CBS's facial and as-applied constitutional challenges to the imposition of a forfeiture in this case.

34. The Commission's authority to enforce the statutory restrictions against the broadcast of indecent programming during times of day in which children are likely to be in the audience was upheld against constitutional challenge by the Supreme Court in *Pacifica* more than a quarter-century ago, and has been reaffirmed since then.¹¹⁰ Under our standards implementing this settled precedent, as we have explained, CBS's broadcast was actionably indecent.

35. We reject CBS's contention that the *Forfeiture Order* abandons the policy of restraint upon which *Pacifica* was based.¹¹¹ The Order does no such thing. On the contrary, the Commission remains "sensitive to the impact of our decisions on speech."¹¹² In this case, however, CBS broadcast "the offensive spectacle of a man tearing off a woman's clothing on stage in the middle of a sexually charged performance" during the halftime show of one of the nation's most heavily-watched sporting events, to a vast nationwide audience that included numerous children.¹¹³ As we have found, the broadcast was "planned by CBS and its affiliates under circumstances where they had the means to exercise control and good reason to take precautionary measures."¹¹⁴ Under the circumstances, we fail to see how the decision in *Pacifica* – or any other consideration – requires us to refrain from exercising our indecency enforcement powers to impose a forfeiture in this case.

36. We also reject CBS's argument that *Pacifica* limits the Commission's authority "to penalize isolated and fleeting transmissions of indecent material."¹¹⁵ On the contrary, in upholding the Commission's power to proceed against material that involved the repeated use of expletives, the Court in

¹⁰⁵ See "Viewer Track: Top-rated programs of 2003-04" (www.tvb.org/rcentral/viewertrack/trends/top2003.asp).

¹⁰⁶ See VNU Media and Marketing Guide for Super Bowl, (<http://www.nielsenmedia.com/newsreleases/2005/2005SuperBowl.pdf>).

¹⁰⁷ See Joal Ryan, "52 Million Friends See Off 'Friends'" (May 7, 2004) (<http://att.eonline.com/News/Items/0,1,14056,00.html>).

¹⁰⁸ See Nielsen Media Research, TV National People Meter Data 9/22/2003 - 5/26/2004.

¹⁰⁹ Indeed, the program was not rated at all.

¹¹⁰ See, e.g., *FCC v. Pacifica Foundation*, 438 U.S. 726, 748-51 (1978); *Action for Children's Television v. FCC*, 58 F.3d 654, 669-70 (D.C. Cir. 1995) (en banc) (*ACT III*), cert. denied, 516 U.S. 1043 (1996).

¹¹¹ *Petition* at 23.

¹¹² *Forfeiture Order* at 19 ¶ 35.

¹¹³ *Id.* at ¶ 28.

¹¹⁴ *Id.* at 19 ¶ 35.

¹¹⁵ *Petition* at 23 n.42.

Pacifica expressly left open the issue of whether an isolated expletive might also be held indecent, and did not even address a brief display of televised nudity.¹¹⁶ In addition, the Commission has never itself held, as CBS suggests,¹¹⁷ that a brief display of televised nudity could not be found actionably indecent. To the contrary, in *Young Broadcasting* (released shortly before the Super Bowl halftime show was broadcast), we made clear that a televised display of male frontal nudity, though comparably brief, constituted an apparent violation of our indecency rules.¹¹⁸

37. Finally, we reiterate our rejection of CBS's contention that changes in law and technology have undermined *Pacifica* and its progeny.¹¹⁹ CBS asserts that "every court decision that applies to every medium that allows targeted blocking of content has struck down broadcast-type indecency regulation."¹²⁰ But those same decisions recognize that there remain "special justifications" that allow for more extensive government regulation of broadcast speech.¹²¹ Among them is that broadcasting continues to have "a uniquely pervasive presence in the lives of all Americans,"¹²² a presence that is particularly evident where highly-anticipated annual national programming events -- epitomized by the Super Bowl -- are concerned. As for technological changes, while the V-chip provides a technological tool not available when *Pacifica* was decided, older televisions do not contain a V-chip,¹²³ and on newer sets the evidence shows that most parents are unaware of the V-chip's existence or the manner of its operation.¹²⁴ The V-chip also depends on accurate program ratings,¹²⁵ but as the

¹¹⁶ *Pacifica*, 438 U.S. at 750; see *Golden Globes*, 19 FCC Rcd 4975, 4982 ¶ 16 (2004).

¹¹⁷ *Petition* at 24.

¹¹⁸ 19 FCC Rcd 1751, 1755 ¶ 12 (2004). In *WGBH Educ. Found.*, 68 FCC 2d 1250 (1978), we granted the renewal of a public television station license renewal in the face of complaints based on the station's broadcast of programs -- including "Monty Python's Flying Circus" -- that allegedly contained "nudity and/or sexually-oriented material." 69 FCC2d at 1250-51 ¶ 2. In holding that the complaints did not make out a case that the station's continued operation would be inconsistent with the public interest, *id.* at 1255, ¶ 13, we nowhere suggested that the televised broadcast of nudity could never be actionably indecent.

¹¹⁹ *Petition* at 25.

¹²⁰ *Id.* (emphasis in original). (citing *United States v. Playboy Entmt. Group, Inc. v. FCC*, 529 U.S. 803 (2000); *Reno v. ACLU*, 521 U.S. 844 (1997); and *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727 (1996)).

¹²¹ *Reno*, 521 U.S. at 868. See *Playboy*, 529 U.S. at 815. See also *ACT III*, 58 F.3d at 660 (recognizing that "radio and television broadcasts may properly be subject to different -- and often more restrictive -- regulation than is permissible for other media under the First Amendment").

¹²² See *ACT III*, 58 F.3d at 659 (quoting *Pacifica*, 438 U.S. at 748).

¹²³ As of January 1, 2000, all television sets manufactured in the United States or shipped in interstate commerce with a picture screen of thirteen inches or larger must be equipped with a "V-chip" system that can be programmed to block violent, sexual, or other programming that parents do not wish their children to view. *Technical Requirements to Enable Blocking of Video Programming Based on Program Ratings*, 13 FCC Rcd 11248 (1998); 47 C.F.R. § 15.120(b). Out of a total universe of 280 million sets in U.S. households, see Nielsen Media Research U.S. TV Household Estimates, 2003-04, about 119 million sets in use are equipped with V-chips. Broadcasting & Cable TVFAX, *TV Watch "Exposes" V-chip Critics*, July 8, 2005, at 2.

¹²⁴ See *Forfeiture Order* at ¶ 34 n.117 (citing broadcaster's statements in 2004 that "less than 10 percent of all parents are using the V-chip and 80 percent of all parents who currently own a television set with a V-chip are not aware that they have it"). See also *Parents, Media and Public Policy: A Kaiser Family Foundation Survey* (Fall 2004), at 7 (telephone survey of 1,001 parents of children ages 2-17 showing that (1) only 15 percent of all parents have used the V-chip; (2) 26 percent of all parents have not bought a new television set since January 2000 (when the V-chip was first required in all sets); (3) 39 percent of parents have bought a new television set since January 2000, but do not think it includes a V-chip; and (4) 20 percent know they have a V-chip, but have not used it).

¹²⁵ In the Kaiser Family Foundation survey, nearly 4 in 10 parents of children aged 2-17 stated that most television programs are not rated accurately. *Id.* at 5. See also Parents Television Council, *The Ratings Sham: TV Executives Hiding Behind A System That Doesn't Work* (April 2005) (study of 528 hours of television programming concluding that numerous shows were inaccurately and inconsistently rated).

Commission explained in the *Forfeiture Order*, sporting events are not included in the V-chip ratings system,¹²⁶ and neither the Super Bowl nor its halftime show were given V-chip ratings in this case. Nor does CBS provide any basis for concluding that had it rated the Super Bowl halftime show, it would have rated the show as inappropriate for children. Thus, CBS's constitutional argument based on the availability of blocking technology is completely irrelevant to this case.

38. *Conclusion.* For all of these reasons, we deny CBS's *Petition*. Based on our careful consideration of the law and the record in this case, we continue to believe that the \$550,000 forfeiture imposed on CBS here is appropriate.

IV. ORDERING CLAUSES

39. Accordingly, IT IS ORDERED, pursuant to section 405(a) of the Act, and section 1.106(j) of the Commission's rules,¹²⁷ that the *Petition for Reconsideration of Forfeiture Order* filed by CBS on April 14, 2006 is DENIED.

40. IT IS FURTHER ORDERED that a copy of this Order on Reconsideration be sent by Certified Mail, Return Receipt Requested, to Anne Lucey, Esq., Senior Vice President for Regulatory Policy, CBS Corporation, 1750 K Street, N.W., 6th Floor, Washington, D.C. 20005 and Robert Corn-Revere, Esq., Davis Wright Tremaine LLP, 1500 K Street, N.W., Suite 450, Washington, D.C. 20005-1272.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

¹²⁶ *Implementation of Section 551 of the Telecommunications Act of 1996*, Report and Order, 13 FCC Rcd 8232, 8242-43, ¶ 21 (1998).

¹²⁷ 47 U.S.C. § 405(a); 47 C.F.R. § 1.106(j).

**STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN
CONCURRING IN PART, DISSENTING IN PART**

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

The Super Bowl XXXVIII halftime show was arguably one of the most shocking incidents in the history of live broadcast television. Indeed, the Super Bowl was the most-watched program of the entire 2003-04 television season and American viewers, collectively, expressed their disappointment and disapproval. The Commission, entrusted with the responsibility to execute faithfully broadcast indecency laws, responded swiftly and appropriately.

While I agree with the ultimate outcome of today's Order on Reconsideration, I concur in part because the Commission again has not provided much-needed clarity and guidance to our decision-making process in indecency enforcement. In addition, I dissent in part because I continue to believe the Commission has erred in fining only CBS owned and operated stations, not all stations that broadcasted the indecent material.

Considering the substantial public confusion that pervades the Commission's indecency enforcement, we should, whenever possible, opt for clear statements of Commission policy. Until today, Commission policy has been to refrain from considering third-party polls or opinion surveys in assessing whether a program is indecent as measured by contemporary community standards. Regardless whether the poll or survey attempts to reflect the views of the national or local audience, the Commission simply does not consider opinion polls in indecency cases and polls are not a factor in determining the contemporary community standards. To suggest otherwise, as the instant Order does, is contrary to long standing Commission policy.¹

I also have grave concerns with the failure of this Order to provide clear guidance on the nature of the Commission's new fine imposition policy announced in the March 15th, 2006, Omnibus TV Order. Rather than stating what the new policy is *not*, as today's Order does,² the Commission should state affirmatively the key features of our new "more limited approach towards the imposition of forfeiture penalties."³ After all, it is still unclear how the Commission determines the sufficiency of a viewer's complaint in light of this new enforcement policy.⁴

¹ While the Commission, in today's Order, maintains that it rejects the use of third-party polls as "determinative" and that it does not "rely" upon any third-party polls, we should provide clear guidance as to whether the Commission, as a matter of policy, even "considers" polls in its indecency analysis. The answer to that inquiry should be an unequivocal "no." Rather than making this point clear, the Commission engages in a gratuitous discussion about the adequacy of the polls cited by CBS. The Commission argues that the opinion polls cited by CBS were unavailing because the polls did not answer the central legal question – namely, "whether the Super Bowl broadcast was patently offensive under contemporary community standards." Order at ¶ 14. This discussion is misleading because the Commission does not consider polling data, notwithstanding the artfulness of the questions asked by pollsters.

² Order at ¶ 30.

³ Complaints Regarding Various Television Programs Broadcast Between February 2, 2002 and March 8, 2005, FCC 06-17 (released March 15, 2006) (Omnibus TV Order) at ¶ 71.

⁴ In a failed attempt to address this significant concern, the instant Order states that "it is sufficient that viewers in markets served by each of the CBS Stations filed complaints with the Commission identifying the allegedly indecent program broadcast by the CBS Stations." This is a mere restatement of fact, not a policy statement of the essential components of a sufficient and adequate complaint.

(continued....)

Finally, I dissented in part in our initial Super Bowl decision (the September 22nd, 2004, *Notice of Apparent Liability*),⁵ and I do so again today. I continue to believe the Commission has decided erroneously to fine only CBS owned and operated stations, not all stations that broadcasted the indecent material. Notwithstanding the fact that this Commission has always purported to apply a national indecency standard on the broadcast medium, the Commission has failed to penalize the vast majority of stations that actually broadcasted the offending halftime performance.

I believe now, as I believed then, that this is not the restrained enforcement policy the Supreme Court advised in *Pacifica*. Consistent with the values of First Amendment, this Commission should exercise restraint and caution in its determination of the type of expression that is indecent. But once the indecency determination is made, the Commission should apply a uniform fine imposition policy across the broadcast medium.

The Commission has an obligation to provide clarity and guidance whenever possible. Equally, the Commission is obligated to enforce a consistent fine imposition policy across the broadcast medium. Sadly, today's Order fails to meet our obligation on both counts. Accordingly, I concur in part and dissent in part to this Order on Reconsideration.

(...continued from previous page)

In the Omnibus TV Order, the sole guidance the Commission provided was that it would propose forfeiture against only the licensee whose broadcast of the material was actually the subject of a viewer complaint. Omnibus TV Order at ¶ 71. Yet in the same order, based on a California viewer's complaint of indecent material against a local Washington, D.C. affiliate *and* the entire network, the Commission proposed forfeiture only against the local D.C. affiliate. The California viewer did not even assert that she viewed the program in Washington, D.C. Further, in the same case, it was completely unclear whether the complainant even watched the program on over-the-air broadcasting or on cable. The Commission is obligated to resolve or clarify these legitimate concerns.

⁵ See Complaints Against Various Television Licensees Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show, Notice of Apparent Liability for Forfeiture, FCC 04-209 (released September 22, 2004) (Commr. Jonathan S. Adelstein, approving in part and dissenting in part).