

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

In the Matter of	)	
	)	
Complaints Against Various Licensees Regarding	)	NAL/Acct. No. 200532080003
Their Broadcast Of The Fox Television Network	)	File No. EB-03-IH-0162
Program "Married By America" On April 7, 2003	)	

**OPPOSITION TO NOTICE OF APPARENT LIABILITY FOR FORFEITURE**

**Submitted by:**

**Fox Broadcasting Company**

**and**

**The Licensees of the Television Broadcast Stations Affiliated with the Fox Television  
Network, Identified in Attachment A Hereto**

Dated: December 3, 2004

## SUMMARY

*Married By America* was a reality television series designed as an experiment to determine whether the viewing public could find a suitable match for five unmarried contestants. With the help of relationship experts, the viewers at the outset of the series were given the chance to vote on the contestants' prospective spouses. Then, over the course of seven weekly episodes of the program, viewers watched as the couples tested their compatibility and developed their relationships. Producers filmed, edited and compiled these episodes on an extremely time-constrained schedule, so that the audience could concurrently evaluate the couples' progress. Finally, following the penultimate episode of the program that aired on April 7, 2003, the audience was given the chance to vote on which couple was most likely to have a successful marriage. The couple that won the audience vote was eligible for a prize worth up to \$500,000.

After the broadcast of the April 7 episode, the Commission sent a letter of inquiry ("LOI") to a single station owned and operated by Fox (an "O&O"). Although the LOI did not specify whether any viewers had complained about the program, the Commission nonetheless indicated that it was "investigating allegations" that *Married By America* contained indecent material. The station that received the LOI promptly responded, defending the program and demonstrating that the April 7 episode did not contain any indecent content under the Commission's rules and precedents. Over the station's First Amendment objection, the Commission also demanded that the station disclose the names of other broadcasters that aired the program.

Ultimately, the Commission issued a Notice of Apparent Liability for Forfeiture ("NAL") against not only the station that received the LOI, but also against 168

other television stations. The Commission's decision represents a fundamental violation of the First Amendment and a stark departure from precedent. Accordingly, the Commission should rescind the NAL in its entirety.

First and foremost, the Commission's indecency regulations no longer can withstand constitutional scrutiny. Given the tremendous technological changes that have transformed the modern media environment, the Commission simply cannot justify an intrusive, content-specific regulation of broadcasters. Indeed, the massive expansion of cable and satellite video programming, together with the advent of the Internet, renders obsolete the second-class treatment of broadcasters under the First Amendment. These technological and marketplace changes make clear that regulation of indecency, which the Commission itself recognizes is constitutionally protected speech, cannot possibly survive strict scrutiny review.

While the Supreme Court has not reviewed the Commission's broadcast indecency rules in the quarter century since it narrowly upheld the regime in *Pacifica*, the Court in *Reno v. ACLU* recently struck down a law attempting to restrict content on the Internet on the ground that the government's definition of indecency was unconstitutionally vague. The definition in that case was virtually identical to the Commission's broadcast indecency definition. The *Reno* Court's conclusions apply with equal weight to the Commission's vague indecency standard, which has never provided broadcasters any ability to discern which content is lawful in the eyes of the Commission. For example, numerous affiliates of the ABC Television Network, serving a substantial portion of the national television audience, felt constrained recently to preempt the award-winning movie *Saving*

*Private Ryan* (which the network had broadcast twice before on Veterans Day) out of concern that they would run afoul of the Commission's vague indecency standard.

Equally significant, technological advancements provide the Commission with a far less restrictive manner of protecting children from the purported harm of indecent material – the V-Chip, for instance, gives parents the ability easily to block unwanted programming from entering the home. In the case of the April 7 episode of *Married By America*, Fox Broadcasting Company ("FBC") rated the program TV-14, indicating that it contained themes and subject matter that many parents would find unsuitable for children under the age of 14. FBC also included at the beginning of the program a content advisory, which warned the audience, using both a voice-over and on-screen text, that "Due to some sexual content, parental discretion is advised."

Even aside from the constitutional infirmities that plague the entire indecency regime, the Commission's aggressive investigatory tactics in this case represent a further constitutional defect. The Commission promised both the Supreme Court and the U.S. Court of Appeals for the D.C. Circuit that it would enforce its indecency rules cautiously and with appropriate restraint. The LOI, however, exhibited no restraint – among other things, it sought to coerce one station to report on the activities of others and it demanded that the station defend itself against vague allegations of wrongdoing. The NAL, moreover, sanctioned 169 television stations even though the Commission only sent a letter of inquiry to a single station. Worse, in order to impose a penalty, the Commission starkly departed from precedent and found content to be indecent despite the fact that the program depicted *no nudity and no sexual activity*. These tactics are unconstitutional as applied to the stations that are the subjects of the NAL.

Perhaps recognizing the tenuous ground on which it tread, the Commission was forced in the NAL to introduce an entirely new concept to evaluate whether content is indecent: it asserted that the "sexual nature" of the scenes was inescapable. Yet the Commission's *Indecency Policy Statement* contains no mention of the phrase "sexual nature," and no previous case has relied on this criterion to find that broadcast material violates the Commission's threshold requirements for an indecency violation. The Commission's use of this new standard only serves to underscore the vagueness of its entire indecency regime. There is simply no way that broadcasters could have been on notice that they would be held liable for scenes that are merely "sexual in nature." Indeed, programs too numerous to mention and fitting into widely divergent genres contain scenes that could be described as "sexual in nature." The Commission's new standard threatens to implicate much of the day-time and prime-time line-ups for nearly all of broadcast television – and it already is chilling protected speech.

Furthermore, the scenes on which the Commission based its findings in the NAL were not patently offensive. The content clearly was not graphic or explicit – on the contrary, the program pixilated or obscured all nudity. Nor did the episode dwell on or repeat at length any allegedly offensive material, as the activities alleged to be indecent comprised just 105 seconds in an hour-long program. Finally, the material was not used to pander, titillate or shock the audience. Rather, it was an integral aspect of the storyline used to illustrate the contestants' character development. Indeed, the contestants who exhibited the most discomfort at their bachelor and bachelorette parties were the same contestants chosen by viewers in the final audience vote. The Commission ignores these facts, choosing instead to insert itself into the creative process by suggesting that the content of the program

"goes well beyond that necessary" for character development. The full context, though, makes clear that the material cited in the NAL was not patently offensive, notwithstanding the Commission's unconstitutional decision to assume the role of producer and second-guess the program's creative determinations.

The Commission made no effort whatsoever to explain its decision that the April 7 episode was offensive as determined by "contemporary community standards for the broadcast medium." In a recent notice of apparent liability, the Commission pointed to more than 500,000 complaints about a program, ostensibly to suggest that the program conflicted with some national norm for decency. Even accepting that measure, the April 7 *Married By America* episode cannot be considered patently offensive. Initially, the NAL reported that the Commission received 159 "complaints" about *Married By America*. In response to a FOIA request, however, the Commission confirmed that in fact only 23 people (from just 13 states) had filed 90 complaints (since several individuals submitted duplicate complaints to multiple Commission staff). All but four of the complaints were identical (apparently generated from the same web site) and *only one complainant professed even to have watched the program*. The Fox Television Network received only 15 viewer comments directly, while the stations that aired the program also received only 19 viewer comments – a miniscule total for a show that had a national audience of 5.1 million households.

In any event, even if the Commission does not rescind the NAL in its entirety, it nonetheless should not sanction any of the non-O&O affiliates of the Fox Television Network (the "Fox affiliates") for airing *Married By America*. For one thing, penalizing the affiliates conflicts with the Commission's pledge to proceed cautiously when enforcing its indecency regulations. The Commission has never provided the Fox affiliates with any

indication as to whether their stations were the subject of any viewer complaints. Similarly, no Fox affiliate received a letter of inquiry, nor did any of them get an opportunity to refute the indecency allegations prior to a finding of apparent liability issued by the full Commission. The Commission's aggressive tactics not only conflict with its obligation to pursue a restrained approach to indecency enforcement, they also constitute a violation of the affiliates' First Amendment rights.

In addition, the Commission was incorrect in assuming that the affiliates had been given any opportunity to review the program in advance. Because *Married By America* was a reality program incorporating audience participation, it was produced on an extremely time-constrained schedule. The presence of a vote at the end of the April 7 episode, which had the potential to influence the allocation of prize money, also generated concern about keeping the content confidential to maintain an even playing field for contestants when it came to the nationwide vote. Advance information about the content, especially given how fast information travels in the Internet age, could have been used by supporters of particular contestants in an effort to unfairly influence the outcome of the vote. Consequently, FBC did not deliver the program to its affiliates in advance of air time, but rather transmitted it much like it would deliver a live sports event. For the same reasons that the Commission refused to sanction CBS affiliates in the recent Super Bowl decision, fundamental fairness compels that the Commission not sanction the Fox affiliates here.

Even if the episode had been filmed, edited and compiled weeks in advance, however, the Commission's vague indecency standard would have made it impossible for any affiliate to know that airing *Married By America* would result in a sanction. In fact, in the collective judgment of scores of broadcasters, the program was not indecent and, contrary to

the Commission's assertion in the NAL, not a single affiliate preempted the program on indecency grounds.

In sum, the foundation for disparate treatment of broadcasters under the First Amendment has crumbled under the weight of dramatic technological and marketplace changes. The Commission should recognize this new reality, disregard its erroneous conclusions regarding the content of the program, and rescind the NAL in its entirety with respect to every station that aired the program.

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ATTACHMENT A – List of the Licensees of the Television Broadcast Stations Affiliated With the Fox Television Network that Join in this Opposition to Notice of Apparent Liability for Forfeiture

**EXHIBITS**

*Exhibit No. 1* – Declaration of Roland McFarland, Vice President, Broadcast Standards & Practices, Fox Broadcasting Company

*Exhibit No. 2* – Recapitulation of Certain Scenes from the April 7, 2003 Episode of *Married By America*

*Exhibit No. 3* – Copy of Fox Broadcasting Company Cybermailer Regarding the April 7, 2003 Episode of *Married By America*

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FEDERAL COMMUNICATIONS COMMISSION  
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In the Matter of )  
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Complaints Against Various Licensees Regarding ) NAL/Acct. No. 200532080003  
Their Broadcast Of The Fox Television Network ) File No. EB-03-IH-0162  
Program "Married By America" On April 7, 2003 )

**OPPOSITION TO NOTICE OF APPARENT LIABILITY FOR FORFEITURE**

Fox Broadcasting Company ("FBC"), which operates the Fox Television Network ("Fox"), and the affiliates of Fox listed in Attachment A hereto hereby oppose the above-captioned Notice of Apparent Liability for Forfeiture, released on October 12, 2004,<sup>1</sup> and urge the Commission promptly to rescind it, both because the indecency rules are unconstitutional and because, in any event, the broadcast in question did not violate those rules.<sup>2</sup>

In the Spring of 2003, FBC created a new reality television series called *Married By America*. The program was designed as an experiment to determine whether the viewing public could find a suitable match for five unmarried contestants. With the

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<sup>1</sup> See *In re Complaints Against Various Licensees Regarding Their Broadcast of the Fox Television Network Program "Married By America" on April 7, 2003*, Notice of Apparent Liability for Forfeiture, FCC 04-242 (rel. October 12, 2004) (the "NAL"). Due to the complexity of the issues involved, parties to this Opposition hereby request, to the extent necessary, a waiver of Section 1.49(c) of the Commission's rules (47 C.F.R. § 1.49(c)) to allow for a complete and accurate summary of the Opposition.

<sup>2</sup> Each of the licensees listed on Attachment A is an affiliate of Fox and was identified on the attachment to the NAL. While joining this opposition to the NAL, each of these licensees expressly reserves all, and does not waive any, of its individual rights and procedural options with respect to the NAL and any subsequent Commission decision with respect to the NAL.

help of relationship experts, the viewing public at the outset of the series was given a chance to vote on which person from a pool of potential spouses should become engaged to each contestant. Over the course of the next seven weeks, the program chronicled the couples' interactions and tested their character and compatibility, enabling the viewing audience to evaluate the couples as their relationships developed each week. After each episode, one couple was eliminated. At the conclusion of the penultimate episode that aired on April 7, 2003, viewers once again were given the chance to vote – this time to decide, based on how they saw the relationships develop, which of the remaining two couples was most likely to have a successful marriage. If the winning couple chose to get married during the series finale, they would win a prize worth up to \$500,000.

FBC recognized that *Married By America* dealt with adult themes and contained content that parents might deem unsuitable for younger viewers. As a result, it rated the April 7 episode of the series as TV-14, and the broadcast included a content advisory at the beginning of the program. The advisory warned the audience, using both a voice-over and on-screen text, that "Due to some sexual content, parental discretion is advised." FBC was cognizant of the need to inform its viewers that, even though the program did not depict any sexual activities, the subject matter did include some scenes that were sexual in nature.

After the broadcast of the April 7 episode of *Married By America*, the Commission sent a letter of inquiry ("LOI") to a single licensee – TVT License, Inc., the licensee of television station WTVT(TV), Tampa, Florida (a Fox O&O).<sup>3</sup> The LOI did

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<sup>3</sup> See Letter from Maureen F. Del Duca, Chief, Investigations and Hearings Division, Enforcement Bureau, to TVT License, Inc., dated July 10, 2003 (the "LOI").

not specify whether any viewer had complained about *Married By America*, but it nonetheless informed the licensee that the Commission "was investigating allegations that TVT License, Inc. may have broadcast indecent material on April 7, 2003" during an episode that included a segment about the contestants' bachelor and bachelorette parties.<sup>4</sup> The LOI demanded that TVT License, Inc. defend itself against this allegation, and that the licensee disclose to the Commission the names of other licensees that broadcast the episode.<sup>5</sup> TVT License, Inc. filed its response to the LOI on August 11, 2003, objecting on First Amendment grounds to the Commission's aggressive investigatory tactics.<sup>6</sup> The response urged the Commission to adhere to its self-described obligation to proceed cautiously and with appropriate restraint when enforcing the indecency rules, and it declined to provide the Commission with information about other licensees because "asking one broadcaster to respond to an inquiry scrutinizing the behavior of others threatens to chill the speech of all broadcasters."<sup>7</sup> The response also demonstrated that the content of the April 7 episode of *Married By America* did not contain any indecent material under the Commission's definition or its rules and precedents.<sup>8</sup>

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<sup>4</sup> *Id.* at 1.

<sup>5</sup> *See id.* at 4.

<sup>6</sup> *See* Letter from John C. Quale, Counsel to TVT License, Inc., to Melanie A. Godschall, dated August 11, 2003.

<sup>7</sup> *Id.*

<sup>8</sup> *See id.*

Following a request from the Enforcement Bureau staff, TVT License, Inc. filed a supplemental response to the LOI on September 9, 2003.<sup>9</sup> In this supplemental response, the licensee, while "preserve[ing] all of the objections set forth in its response to the LOI," provided the Commission with a list of other licensees that it believed broadcast the April 7 episode of *Married By America*.<sup>10</sup> In the supplemental response, TVT License, Inc. again pointed out that the Commission should approach its investigation with caution and restraint, respectful of the First Amendment sensitivities, but the licensee nonetheless provided the requested information in an effort to promptly bring the matter to conclusion.<sup>11</sup>

On October 12, 2004, the Commission issued an NAL to 169 television stations that broadcast the April 7 episode of *Married By America*.<sup>12</sup> The NAL greatly expanded the reach of the Commission's inherently vague indecency definition – finding the content to be indecent despite the fact that the program contained *no nudity and no sexual activity*.<sup>13</sup> In an equally surprising departure from the cautious approach to content regulation compelled by the Constitution, the Commission issued the NAL to 169 stations, even though it only sent a letter of inquiry to a single licensee.<sup>14</sup>

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<sup>9</sup> See Letter from John C. Quale, Counsel to TVT License, Inc., to William D. Freedman, dated September 9, 2003.

<sup>10</sup> *Id.*

<sup>11</sup> *See id.*

<sup>12</sup> *See* NAL.

<sup>13</sup> *See id.*

<sup>14</sup> *See id.*

For the reasons demonstrated herein, however, the Commission should rescind the NAL in its entirety. Given the tremendous technological changes that have transformed the modern media environment, the Commission's indecency regulations no longer can withstand constitutional scrutiny. The massive expansion of cable and satellite video programming, together with the advent of the Internet, renders obsolete the second-class treatment that broadcasters are being subjected to under the First Amendment.

These technological and marketplace changes make clear that the regulation of indecency, which the Commission itself recognizes is constitutionally protected speech, cannot possibly survive strict scrutiny review. First and foremost, the Commission's definition of indecency is unconstitutionally vague, providing broadcasters with no reliable guidelines to discern which content is lawful in the eyes of the Commission. Moreover, the definition incorporates the concept of a national community standard for the broadcast medium, but the Commission has never defined that standard with any degree of precision, let alone the kind of precision necessary to survive a constitutional review. Equally significant, the Commission's indecency enforcement regime is unconstitutionally overbroad. In contrast to a total ban on protected speech, technology, particularly the V-Chip, provides the government with a far less restrictive means of protecting children from the purported harm of indecent material: Parents can simply disable television sets from receiving objectionable content. In fact, though, the government has never demonstrated that indecent material is harmful to children, and for that reason as well, the Commission's rules cannot survive strict constitutional scrutiny.

Even if the Commission decides, despite the tremendous changes that have characterized the 25 years since the Supreme Court narrowly upheld the indecency rules, that they remain constitutional, the content of the April 7 episode of *Married By America* was not indecent. The program did not contain any depiction or description of sexual or excretory organs or activities, and none of the content in the program was patently offensive under any standard. Accordingly, the Commission should rescind the NAL with respect to every station that broadcast *Married By America*.

In any event, should the Commission decide not to rescind the NAL in its entirety, it nonetheless should rescind it with respect to the Fox affiliates that broadcast *Married By America*. Because it was a reality program incorporating audience participation, FBC did not deliver *Married By America* to its affiliates prior to the time that the program was scheduled to be broadcast – much like a live sports event. It would be fundamentally unfair for the Commission to sanction the Fox affiliates based on the facts and circumstances present in this case.

**I. THE COMMISSION'S INDECENCY STANDARD VIOLATES THE FIRST AMENDMENT**

- A. *Given Dramatic Changes in Technology and the Media Marketplace Over the Last 25 Years, the Commission's Indecency Regime Is Unconstitutional on Its Face*
1. The Purported Justifications for Drastically Curtailing the First Amendment Rights of Broadcasters No Longer Retain Any Vitality

The Commission's indecency restriction prohibits the broadcast of patently offensive material that depicts or describes sexual or excretory organs or activities

between the hours of 6:00 a.m. and 10:00 p.m.<sup>15</sup> Patent offensiveness is "measured by contemporary community standards for the broadcast medium."<sup>16</sup> The underpinnings of this standard date back a quarter century to an extraordinarily narrow decision by a divided Supreme Court in *Federal Communications Commission v. Pacifica Foundation*.<sup>17</sup> The Court upheld the Commission's determination that George Carlin's "Filthy Words" monologue was indecent as broadcast.<sup>18</sup> The Court's opinion, though, was "an emphatically narrow holding"<sup>19</sup> based on the "uniquely pervasive presence" of the broadcast medium in the lives of all Americans and the fact that broadcasting is "uniquely accessible to children"<sup>20</sup> – justifications that have been profoundly undermined by the subsequent 25 years of technological and marketplace changes.

Television broadcasting is no longer as uniquely "pervasive" as it was in 1978 when *Pacifica* was decided. Cable and satellite now reach 88 percent of the nation's television households and offer literally hundreds of channels as well as the signals of broadcast stations.<sup>21</sup> Nor is broadcasting uniquely accessible to children.

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<sup>15</sup> See *In re Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, Policy Statement, 16 FCC Rcd 7999, ¶¶ 7-8 (2001) ("Indecency Policy Statement").

<sup>16</sup> *Id.* at ¶ 8.

<sup>17</sup> 438 U.S. 726, 750 (1978).

<sup>18</sup> See *id.*

<sup>19</sup> *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 127 (1989).

<sup>20</sup> *Pacifica*, 438 U.S. at 748-50.

<sup>21</sup> See *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Tenth Annual Report, 19 FCC Rcd 1606, ¶ 7 (2004) ("Tenth Annual Video Competition Report").

Today, the young have ready access to a panoply of video sources and no longer differentiate between broadcast and cable programming networks. In addition, they have unfettered access to the Internet notwithstanding the repeated unsuccessful attempts of Congress to regulate access.<sup>22</sup>

In 1978, the Court was also concerned that while "[o]ther forms of offensive expression may be withheld from the young without restricting the expression at its source,"<sup>23</sup> broadcasting could not be so limited. Technological advancements like the V-Chip (discussed in more detail below), however, now enable viewers to regulate access in their homes to protect children from programming their parents find unwelcome.

The courts have yet to evaluate the FCC's broadcast indecency restrictions in light of these transformative changes. In fact, the federal courts last considered the FCC's indecency standard nearly a decade ago. In *ACT III* the D.C. Circuit upheld the indecency standard, while recognizing that "[s]exual expression which is indecent but not obscene is protected by the First Amendment . . . ."<sup>24</sup> The court purportedly applied strict

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<sup>22</sup> See, e.g., *Ashcroft v. American Civil Liberties Union*, 124 S.Ct. 2783 (2004) (affirming grant of preliminary injunction against enforcement of Child Online Protection Act); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) (finding a ban on virtual child pornography unconstitutional); *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997) (finding unconstitutional the Communications Decency Act provisions seeking to protect minors from harmful material on the Internet). But see *United States v. American Library Ass'n*, 539 U.S. 194 (2003) (holding that the Children's Internet Protection Act, which required public libraries to use Internet filters as a condition for receipt of federal subsidies, did not violate the First Amendment).

<sup>23</sup> *Pacifica*, 438 U.S. at 749.

<sup>24</sup> *Action for Children's Television v. FCC*, 58 F.3d 654, 657 (D.C. Cir. 1995) ("*ACT III*") (citing *Sable*, 492 U.S. at 126).

scrutiny to the regulation, as it concluded it must "regardless of the medium."<sup>25</sup> It went on to state, however, that its "assessment of whether [the law] survives that scrutiny must necessarily take into account the unique context of the broadcast medium."<sup>26</sup> After accepting the *Pacifica* rationale for limiting the First Amendment protections of broadcasters, the court concluded that channeling indecent broadcasts to the late-evening and early-morning hours was permissible.<sup>27</sup>

Even 10 years ago, however, Chief Judge Edwards recognized that the *Pacifica* analysis was no longer tenable. In a vigorous dissent, he noted that "[t]here is not one iota of evidence in the record . . . to support the claim that exposure to indecency is harmful."<sup>28</sup> Moreover, he said that the law effectively "involves a *total ban* of disfavored programming during hours when adult viewers are most likely to be in the audience."<sup>29</sup> He added that because the ban "is not the least restrictive means to further compelling state interests, the majority decision must rest primarily on a perceived distinction between the First Amendment rights of *broadcast media and cable (and all other non-broadcast) media*."<sup>30</sup> But "it is no longer responsible for courts to provide lesser First Amendment protection to broadcasting" based on "alleged 'unique

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<sup>25</sup> *ACT III*, 58 F.3d at 660.

<sup>26</sup> *Id.*

<sup>27</sup> *See id.* at 656.

<sup>28</sup> *Id.* at 671 (Edwards, C.J., dissenting).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

attributes."<sup>31</sup> Moreover, he called it "incomprehensible" that the majority could be "blind to the utterly irrational distinction that Congress has created between *broadcast* and *cable* operators."<sup>32</sup> Chief Judge Edwards rejected the notion that the two media have any distinguishing characteristics.

2. In View of *Reno v. ACLU* the Current Broadcast Indecency Standard Is Unconstitutionally Vague

While the courts have not revisited the broadcast indecency standard since *ACT III*, the Supreme Court in *Reno v. ACLU* ruled that the indecency standard that Congress proposed for the Internet in the Communications Decency Act ("CDA") was unconstitutional. The CDA's definition of indecency was nearly identical to the broadcast standard – the only difference between the two definitions was the phrase "for the broadcast medium," which modifies contemporary community standards.<sup>33</sup> The Court's conclusion that the Internet standard was unconstitutionally vague applies with equal force to the Commission's broadcast indecency standard, especially in light of the profound erosion of the purported justifications for affording broadcasters lesser First Amendment protection.

The *Reno* Court found that the failure of the CDA to explain key terms in the definition of indecency would "provoke uncertainty among speakers" and prevent them from divining what speech violated the statute.<sup>34</sup> The vagueness was especially troubling because the regulation of indecency is inherently a content-based regulation of

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *See Reno*, 521 U.S. at 871 (quoting the Communications Decency Act, § 223(d)).

<sup>34</sup> *Id.* at 871 (citations omitted).

speech.<sup>35</sup> "The vagueness of such a regulation raises special First Amendment concerns because of its obvious chilling effect on free speech."<sup>36</sup> In addition, the severe criminal sanctions imposed by the CDA "may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images."<sup>37</sup>

Moreover, the Court found that the CDA's definition failed to account for the "literary, artistic, political, or scientific value" of the affected speech.<sup>38</sup> "This 'societal value' requirement . . . allows appellate courts to impose some limitations and regularity on the definition by setting, as a matter of law, a national floor for socially redeeming value."<sup>39</sup> Finally, unlike the *Miller* test which defines obscenity, the CDA definition of indecency does not limit the "open-ended term 'patently offensive'" with constitutional boundaries by referencing specifically defined state law.<sup>40</sup>

The Court's conclusions as to the CDA's definition of indecency apply equally to the FCC standard. Thus, taken individually, the lack of appropriate definition of key terms within the indecency standard, the threat of severe sanction<sup>41</sup> which may cause speakers to refrain from engaging in protected speech, the absence of any societal

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<sup>35</sup> *See id.*

<sup>36</sup> *Id.* at 871-72 (citing *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1048-51 (1991)).

<sup>37</sup> *Id.* at 872 (citing *Dombrowski v. Pfister*, 380 U.S. 479, 494 (1965)).

<sup>38</sup> *Id.* at 873.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* (citing *Miller v. California*, 413 U.S. 15, 24 (1973)).

<sup>41</sup> *See, e.g., In re Entercom Sacramento License, LLC*, 2004 WL 2330851, ¶ 16 (2004) ("We take this opportunity to note that similar violations of this nature by Entercom could well lead to more severe enforcement action, including commencement of license revocation proceedings.").

values requirement, or the failure to limit the ambiguous term "patently offensive" should each render the broadcast indecency standard unconstitutional – collectively, however, there is no doubt that the standard violates the First Amendment.

The Commission's unconstitutionally vague standard has, in fact, created "uncertainty among speakers" and caused "speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images."<sup>42</sup> For example, dozens of affiliates of the ABC Television Network refused to air ABC's unedited Veterans Day broadcast of the Oscar-winning theatrical *Saving Private Ryan* (which the network had broadcast on Veterans Day in 2001 and 2002), all citing the fear of FCC indecency enforcement action.<sup>43</sup> The film was introduced by U.S. Senator John McCain, who earlier had opined that the broadcast of the film would not be indecent.<sup>44</sup> One station provided a statement to its viewers apologizing for not airing the film and noted that "[t]he inconsistent manner in which the FCC is choosing to apply [its indecency] rules puts TV stations like ours in a most difficult position. . . . We regret that we are not able to broadcast a patriotic, artistic tribute to our fighting forces . . . ."<sup>45</sup> Another noted "[a]s is evidenced by recent decisions of the Federal Communications Commission, stations that air network programming with indecent or profane content are subject to significant

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<sup>42</sup> *Reno*, 521 U.S. at 871-72.

<sup>43</sup> John Eggerton & Allison Romano, *Pre-Empting Private Ryan*, Broadcasting & Cable, Nov. 10, 2004.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

finer and the threat of license revocation. For these reasons, although we have aired *Saving Private Ryan* in years past, we are pre-empting it."<sup>46</sup>

While the Commission's indecency standard modifies "contemporary community standards" with the words "for the broadcast medium," the FCC's regulation is no less flawed than the CDA.<sup>47</sup> The Commission has simply stated that "[t]he determination as to whether certain programming is patently offensive is not a local one and does not encompass any particular geographic area. Rather, the standard is that of an average broadcast viewer or listener and not the sensibilities of any individual complainant."<sup>48</sup> The Supreme Court has, in the context of obscenity, described the search for a national standard as "an exercise in futility" and noted that "our nation is simply too

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<sup>46</sup> *Id.* Certainly, the fear and confusion experienced by broadcasters that chose to pre-empt *Saving Private Ryan* was not unfounded. In March 2004, the Commission overturned existing precedent and held that an NBC broadcast containing the fleeting use of an expletive in a nonsexual context was actionably indecent. *See Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, Memorandum Opinion & Order, 19 FCC Rcd 4975 (2004) ("*Golden Globes*").

In addition, PBS recently deleted language from its *Prime Suspect* Masterpiece Theatre series, *see* Tony Mauro, *Stern's Raunch Is Better than Silence*, USA Today, May 11, 2004; the producers of *ER* eliminated a fleeting image of the breast of an 80-year-old woman receiving emergency care, *see* Scott Collins, et al., *The Decency Debate*, Los Angeles Times, Mar. 4, 2004; and a number of radio stations have eliminated or edited songs and cancelled live call-in shows, Mark Brown, *Hear No Evil*, Rocky Mountain News, Mar. 27, 2004.

The Commission's newly expanded indecency policy, substantially chilling protected speech (*see, e.g.*, Petition for Reconsideration of ACLU et al., File No. EB-03-1H-0110 (filed April 19, 2004)), is also vague and overbroad even under the *Pacifica* and *ACT III* standards – and thus unenforceable even as to conduct that might have been encompassed by the prior policy. *See, e.g., Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003).

<sup>47</sup> *See Indecency Policy Statement*, 16 FCC Rcd at ¶ 8.

<sup>48</sup> *See id.*

big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 states in a single formulation . . . ."<sup>49</sup> This lack of a clearly definable standard is just another example of the fatal imprecision of the Commission's indecency restriction.

While the *Reno* Court distinguished its decision in *Pacifica* because of the purportedly unique attributes of the broadcasting medium, it did not reexamine the underpinnings of that decision.<sup>50</sup> In any event, the "special justifications" for lesser First Amendment protection of broadcasting (including its "invasive nature,"<sup>51</sup> "the scarcity of available frequencies at its inception,"<sup>52</sup> and a "history of extensive government regulation"<sup>53</sup>) clearly no longer support disparate constitutional treatment. As explained above, and contrary to the Court's observation, limitation of television broadcasters' First Amendment rights cannot be justified "because warnings could not adequately protect the listener from unexpected program content."<sup>54</sup> Viewers are fully able to protect themselves because of the nearly ubiquitous availability of program ratings, which with the V-Chip enable viewers to block unwanted content from unsupervised children.

Even if scarcity could have once justified a restraint on speech, the rationale is inapposite in today's diverse media marketplace. The Commission itself has

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<sup>49</sup> *Miller*, 413 U.S. at 20, 30-33.

<sup>50</sup> *See Reno*, 521 U.S. at 866-67.

<sup>51</sup> *Id.* at 868 (citing *Sable*, 492 U.S. at 128).

<sup>52</sup> *Id.* (citing *Turner Broadcasting Systems, Inc. v. FCC*, 512 U.S. 622, 637-38 (1994) ("*TBS*").

<sup>53</sup> *Id.* (citing *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 399-400 (1969)).

<sup>54</sup> *Id.* at 867 (citing *Pacifica*, 438 U.S. at 748).

recently characterized that marketplace as one of extraordinary abundance. "Today we can access news, information, and entertainment in many enhanced and non-traditional ways via: cable and satellite television, digital transmission, personal and portable recording and playback devices, handheld wireless devices, and perhaps the most extraordinary communications development, the Internet. In short, the number of outlets for national and local news, information, and entertainment is large and growing."<sup>55</sup> Finally, a history of government regulation, which is itself predicated on notions of scarcity, can no longer support government interference with protected speech.<sup>56</sup> Outdated and outmoded government regulation cannot survive judicial review based on a rationale of regulation for regulation's sake.

3. Given the Ubiquitous Availability of Blocking Technologies, the Indecency Standard for Television Broadcasters Is Unconstitutionally Overbroad

Even if the Commission's indecency regulation could withstand attack on vagueness grounds – which it cannot – the current standard is hopelessly overbroad. In light of technological advancements, there are much less onerous means of serving the government's purported interests without depriving the majority of viewers of protected content. A "burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve."<sup>57</sup> Prior judicial willingness to overlook the standard's potential overbreadth was

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<sup>55</sup> *In re 2002 Biennial Regulatory Review*, Report & Order & Notice of Proposed Rulemaking, 18 FCC Rcd. 13620, ¶ 86 (2003).

<sup>56</sup> *See Reno*, 521 U.S. at 868 (citing *Red Lion*, 395 U.S. at 399-400, which describes extensive regulation of broadcasting based on the spectrum scarcity rationale).

<sup>57</sup> *Id.* at 874.

premised on the Commission's assurances that it would cautiously enforce the policy – commitments that the Commission has now abandoned. The Commission's current approach, moreover, is certainly not the least restrictive alternative in view of the advent of blocking technologies.

Only two members of the five-member *Pacifica* majority found it necessary to address an argument that the indecency definition was overbroad.<sup>58</sup> At the time, Justices Powell and Blackmun appeared to conclude that the definition was not overbroad "since the Commission may be expected to proceed cautiously, as it has in the past . . . ," thereby reducing any "undue 'chilling' effect on broadcasters' exercise of their rights."<sup>59</sup> Due to the lack of definitive direction from the High Court, *ACT I* also addressed the merits of a challenge that the definition was overbroad and concluded that it was not.<sup>60</sup> The *ACT I* court, however, specifically cited assurances from the Commission that, though it would not "defer absolutely to broadcasters' judgments of what is or is not indecent, . . . it will continue to give weight to reasonable licensee judgments when deciding whether to impose sanctions in a particular case. Thus, the potential chilling effect of the FCC's generic definition of indecency will be tempered by the Commission's restrained enforcement policy."<sup>61</sup> As explained more fully below, the Commission's recent changes to enforcement procedures (*e.g.*, the initiation of

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<sup>58</sup> See *Action for Children's Television v. FCC*, 852 F.2d 1332, 1339 (D.C. Cir. 1988) ("*ACT I*") (citation omitted).

<sup>59</sup> *Pacifica*, 438 U.S. at 761, n.4 (Powell, J., concurring) (citation omitted).

<sup>60</sup> See *ACT I*, 852 F.2d at 1340.

<sup>61</sup> *Id.* at n.14 (citing Justice Powell's "expectation that the Commission will continue to proceed cautiously").

proceedings even when no complaint is filed, consideration of complaints filed without a program tape or transcript, and the threat of license revocation) amount to a dramatic departure from its previously restrained approach and remove any basis for sustaining the rule despite its overbreadth.

While it may not have expressly dealt with the overbreadth argument, the Court in *Pacifica* did observe that "[b]ecause the broadcast audience is constantly tuning in and out, prior warning cannot completely protect the listener or viewer from unexpected program content."<sup>62</sup> Whatever validity this rationale may have had, a quarter-century of technological advancement has now eliminated any basis for continued curtailment of the First Amendment rights of broadcasters.

Today television viewers can block reception of any programming that they consider unsuited for a child audience. At the behest of Congress, in 1997 the Commission approved voluntary guidelines submitted by the entertainment industry to rate programming that contains sexual, violent or indecent material and implemented a system to facilitate the transmission of the ratings in such a way that enables parents and other consumers to block the display of programming they determine is inappropriate for them or their children, the so-called "V-Chip" technology.<sup>63</sup> As the Commission recently explained:

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<sup>62</sup> *Pacifica*, 438 U.S. at 749.

<sup>63</sup> *See In re Violent Television Programming and Its Impact on Children*, Notice of Inquiry, 19 FCC Rcd 14394, n.2 (2004).

"The ratings system, also known as the TV Parental Guidelines, was established by the National Association of Broadcasters, the National Cable Television Association and the Motion Picture Association of America. These ratings are displayed on the television screen for the first 15 seconds of rated programming and, in conjunction with the V-Chip, permit parents to block programming with a

there is a way that one can avoid objectionable programming . . . . Most television and cable networks voluntarily rate much of their programming to alert viewers if a show contains language or other material that a viewer may find inappropriate. The Act requires that all televisions 13 inches or larger manufactured after 1999 be equipped with a V-Chip, which can use the ratings to block individual programs or channels. (Set-top boxes are available to allow consumers with older sets that lack this capability to use V-Chip technology.)<sup>64</sup>

Fox rates all of its entertainment programs and, in fact, rated the April 7 episode of *Married By America* TV-14 D, L, S, which means that it "contains some material that many parents would find unsuitable for children under 14 years of age. Parents are strongly urged to exercise greater care in monitoring this program and are cautioned against letting children under the age of 14 watch unattended."<sup>65</sup> In particular, the D, L, S portion of the rating indicated that the program contained one or more of the following: intensely suggestive dialogue (D), strong coarse language (L), or intense

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certain rating from coming into their home. The TV Ratings system has been in place since 1997. It was designed to give parents more information about the content and age-appropriateness of TV shows." FOX, *TV Ratings System*, at <http://www.v-chip.org/fox/tvratings.html>.

A program can be rated TV-Y (All Children); TV-Y7 (Directed to Older Children); TV-Y7-FV (Directed to Older Children-Fantasy Violence); TV-G (General Audience); TV-PG (Parental Guidance Suggested); TV-14 (Parents Strongly Cautioned); or TV-MA (Mature Audience Only). *See id.*

<sup>64</sup> Letter from William D. Davenport, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, to Kenneth Severn, dated Apr. 21, 2004 (EB-03-IH-0644).

<sup>65</sup> *See* Declaration of Roland McFarland, Vice President, Broadcast Standards & Practices for Fox Broadcasting Company, attached hereto as Exhibit No. 1 (the "McFarland Declaration"); FOX, *TV Ratings System*, at <http://www.v-chip.org/fox/tvratings.html>.

sexual situations (S).<sup>66</sup> The broadcast also included a content advisory at the beginning of the program. The advisory warned the audience, using both a voice-over and on-screen text, that "Due to some sexual content, parental discretion is advised."<sup>67</sup>

Neither the courts nor the Commission has weighed the impact of the V-Chip on the constitutionality of the broadcast indecency regime.<sup>68</sup> While at the time of *Pacifica* it may not have been possible to keep the pig out of the parlor, today, the V-Chip and other blocking technologies enable individual citizens to make sure that the pig stays in the barnyard.<sup>69</sup> Prior warning can in fact protect a viewer from unexpected program content.

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<sup>66</sup> *Id.* All V-Chip television sets require a personal identification number (called a parental lock code), which acts as the password allowing access to change settings, activate and de-activate the V-Chip. After the parental lock code number is entered, all programs with a selected rating will be blocked. The information is stored in the TV's memory, and the V-Chip will continue to block programs with the selected ratings even when the television is turned off and back on. In addition to blocking based on ratings, many TV sets allow parents to block programs based on date, time or channel. For example, programming airing after 10 p.m., or on a particular channel can be blocked. *See* FOX, *Programming the V-Chip*, at <http://www.v-chip.org/fox/programming.html>.

<sup>67</sup> *See* McFarland Declaration, at 1.

<sup>68</sup> *See* ACT III, at 687, n.4 (Wald, J., dissenting) ("At the moment I write, Congress is actively considering requiring a 'V-Chip' in all new television sets that would enable parents to block offensive speech whenever broadcast and a rating system giving the advance information on questionable programs. As such technology advances and becomes universally available, *the government bears the continuing obligation to ensure that its means of regulating indecency are the least restrictive among all those available.*" (emphasis supplied)).

<sup>69</sup> *See* *Pacifica*, 438 U.S. at 750-51 (noting that the "Commission's decision rested entirely on a nuisance rationale" and as "Mr. Justice Sutherland wrote a 'nuisance may be merely a right thing in the wrong place – like a pig in the parlor instead of the barnyard'") (quoting *Euclid v. Amber Realty Co.*, 272 U.S. 365, 388 (1926)).

The Supreme Court has made it clear that unnecessarily broad content-based regulation will not survive scrutiny if there is a "a more specific technological solution that [is] available to parents who [choose] to implement it."<sup>70</sup> Thus, in *United States v. Playboy Entertainment Group, Inc.*, the Court struck down a statutory obligation requiring cable operators to fully scramble sexually-oriented programming, or otherwise limit its transmission.<sup>71</sup> The government failed to prove that the statute's scrambling or blocking requirements were the least restrictive means available to protect children. Distinguishing *Pacifica*, the Court noted that cable operators had the ability to block unwanted channels for individual subscribers and this targeted blocking was far less restrictive than an outright ban during certain hours of the day.

Cable systems have the capacity to block unwanted channels on a household-by-household basis. The option to block reduces the likelihood, so concerning to the Court in *Pacifica*, that traditional First Amendment scrutiny would deprive the Government of all authority to address this sort of problem. The corollary, of course, is that targeted blocking enables the Government to support parental authority without affecting the First Amendment interests of speakers and willing listeners – listeners for whom, if the speech is unpopular or indecent, the privacy of their own homes may be the optimal place of receipt. Simply put, targeted blocking is less restrictive than banning, and the Government cannot ban speech if targeted blocking is a feasible and effective means of furthering its compelling interests.<sup>72</sup>

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<sup>70</sup> *Ashcroft v. American Civil Liberties Union*, 124 S. Ct. 2783, 2794 (2004) (citing *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 825 (2000)).

<sup>71</sup> 529 U.S. 803. The Court explained that if speech is regulated based upon its content, the restriction “must be narrowly tailored to promote a compelling Government interest. If a less restrictive alternative would serve the Government’s purpose, the legislature must use that alternative.” *Id.* at 813 (citation omitted).

<sup>72</sup> *Id.* at 815 (citation omitted).

Likewise, the V-Chip enables consumers to block unwanted programming at any time and in a manner far more respectful of broadcasters' First Amendment rights, thereby rendering the outmoded indecency regime that relegates protected speech to the wee hours of the morning unconstitutionally overbroad.<sup>73</sup>

4. The Commission Has Never Even Attempted to Demonstrate the Requisite Harm to Children from Indecent Broadcasts

Given that the rationale for disparate treatment of broadcasting is no longer valid, the content-based indecency regulation should be subjected to the most exacting scrutiny under the First Amendment.<sup>74</sup> "In *TBS*, a plurality of the Court found that, while 'the Government's asserted interests are important in the abstract,' this does not mean that the regulations at issue in that case 'in fact advance those interests.'"<sup>75</sup> "When the Government defends a regulation on speech as a means to . . . prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.'"<sup>76</sup> The High Court again reaffirmed this required causal connection in *Ashcroft v. Free Speech Coalition*, where it struck down a statute that prohibited virtual child

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<sup>73</sup> See *Ashcroft v. ACLU*, 124 S. Ct. 2783 (2004) (affirming an injunction against enforcement of the Child Online Protection Act ("COPA"), which sought to criminalize the commercial posting to the Internet of material that is "harmful to minors" without a restriction on access, because the statute likely violates the First Amendment since the government had not shown that it was likely to prove at trial that COPA was less restrictive than blocking and filtering software).

<sup>74</sup> See *TBS*, 512 U.S. at 642 (The most exacting scrutiny should be applied "to regulations that suppress, disadvantage, or impose differential burdens on speech because of its content.").

<sup>75</sup> *ACT III*, 58 F.3d at 680 (Edwards, C.J., dissenting) (citing *TBS*, 512 U.S. at 664).

<sup>76</sup> *TBS*, 512 U.S. at 664 (quoting *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1455 (D.C. Cir. 1985)).

pornography, in part, because of an insufficient link to any harm to children.<sup>77</sup> The Commission has never made the required showing of harm to children from indecent broadcasts.<sup>78</sup> A proximate link between the Commission's broadcast indecency policy and harm to children must be established in order to protect the policy from constitutional challenge – without such a showing, the indecency scheme cannot survive scrutiny.

*B. The Indecency Rule Is Unconstitutional as Applied to the Licensees that Broadcast Married By America in View of the Decision's Radical Departure from Precedent and Its Abandonment of a Cautious Approach to Enforcement*

The Commission's issuance of the NAL unnecessarily chills speech and forces broadcasters to refrain from airing legally protected content in violation of their First Amendment rights. As shown below, the application of the vague definition of indecency to the broadcast at issue is a departure from prior Commission precedent and no broadcaster could have reasonably anticipated that the content would be found to violate the definition.

Moreover, the decision represents a stark departure from the cautious approach to enforcement which the Commission promised both the Supreme Court and the D.C. Circuit that it would embrace.<sup>79</sup> Unfortunately, the LOI exhibited no caution – it, among other things, sought to coerce WTVT(TV) to identify other stations that broadcast

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<sup>77</sup> 535 U.S. at 250 (finding the link between virtual child pornography and the sexual abuse of children contingent and indirect).

<sup>78</sup> The Commission has simply presumed such a link. *See In re Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464*, Report & Order, 8 FCC Rcd 704, 706 (1993) (stating that the harm may be presumed as a matter of law).

<sup>79</sup> *See supra* notes 59-62.

the program.<sup>80</sup> In addition, the LOI did not specify whether any viewer had complained about *Married By America*, but it nonetheless informed the licensee that the Commission was "investigating allegations that TVT License, Inc. may have broadcast indecent material on April 7, 2003" during an episode that included a segment about the contestants' bachelor and bachelorette parties.<sup>81</sup> In its response to the LOI, TVT License, Inc. urged the Commission to adhere to its self-described obligation to proceed cautiously and with appropriate restraint when enforcing the indecency rules, and declined on First Amendment grounds to provide the Commission with information about other licensees.<sup>82</sup> Under pressure from the Enforcement Bureau staff, TVT License, Inc. filed a supplemental response to the LOI listing the other licensees that it believed broadcast the material in question while reiterating its First Amendment objections.<sup>83</sup> The Commission then issued a notice of apparent liability for forfeiture to all 169 television stations that broadcast the April 7 episode of *Married By America*.<sup>84</sup>

The approach of the LOI is entirely inconsistent with the Commission's longstanding and First-Amendment sensitive practice of relying on the public to bring documented indecency concerns to its attention; the Commission "does not independently

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<sup>80</sup> See LOI, at 4.

<sup>81</sup> *Id.* at 1.

<sup>82</sup> See Letter from John C. Quale, Counsel to TVT License, Inc., to Melanie A. Godschall, dated August 11, 2003.

<sup>83</sup> See Letter from John C. Quale, Counsel to TVT License, Inc., to William D. Freedman, dated September 9, 2003.

<sup>84</sup> See NAL.

monitor broadcasts for indecent material."<sup>85</sup> Rather, "its enforcement actions are based on documented complaints of indecent broadcasting received from the public."<sup>86</sup> The Commission's prior reluctance to enforce the indecency rules absent public complaint was inextricably linked to its longstanding recognition that indecent speech is protected by the First Amendment. By relying on a complaint driven process, the FCC appropriately had limited the government from interfering with licensees' program decision-making.

The more active the role that government plays in monitoring programming content, the more likely the danger that licensees will engage in self-censorship, sacrificing their First Amendment rights.<sup>87</sup> Moreover, this practice constituted the only measure by which the Commission took account of the positions of local audiences. The Commission should have followed its previous practice of not relying on the assumption that licensees or "independent editorial entit[ies]" carrying the particular shows or programming under contractual or network arrangements necessarily air exactly the same material.<sup>88</sup> Compelling one broadcaster to report on the activities of another threatens to create an environment of coercion and mistrust within the industry,

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<sup>85</sup> *Indecency Policy Statement*, 16 FCC Rcd at ¶ 24.

<sup>86</sup> *Id.* See also *In re Infinity Broadcasting Operations, Inc., Licensee of Station WKRK-FM, Detroit, Michigan*, 18 FCC Rcd 6915, ¶ 6 (2003) ("*Infinity*") ("The Commission's indecency enforcement is based on complaints from the public"). Similarly, the section of the Commission's Internet site dedicated to indecency information instructs interested parties that "[e]nforcement actions in this area are based on documented complaints of indecent, profane or obscene broadcasting received from the public." See <http://www.fcc.gov/eb/broadcast/obscind.html>.

<sup>87</sup> See *supra* note 46 for examples of self-censorship.

<sup>88</sup> *In re Eagle Radio, Inc.*, 9 FCC Rcd 1294, ¶ 2 (1994).

further chilling speech. Moreover, the Commission should have sent LOIs only to stations that were the subject of a complaint or otherwise the target of intended FCC action, and each of those licensees should have been afforded the opportunity to respond. The Commission's blunderbuss approach is both unfair to licensees and contrary to the First Amendment.

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In sum, the Commission's indecency regime is no longer entitled to deference based on antiquated views of broadcasting and the media marketplace. In view of the plethora of competing media and available blocking technology, the standard cannot pass constitutional muster. Accordingly, the NAL should be rescinded.

## **II. THE APRIL 7, 2003 EPISODE OF *MARRIED BY AMERICA* WAS NOT ACTIONABLY INDECENT**

As the Commission notes, *Married By America* was a "reality-based" television program in which five single adults agreed to be engaged to and potentially marry a prospective spouse that they had not previously met.<sup>89</sup> The ultimate decision concerning which contestant had found the perfect match – and, therefore, was eligible to claim a prize worth up to \$500,000 – was to be decided by the viewing public via telephonic voting following the penultimate episode of the series (*i.e.*, following the April 7, 2003 episode). If the winning contestant proceeded to legally marry his or her selected spouse, the couple would receive the wedding gift worth up to \$500,000.

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<sup>89</sup> See NAL, ¶ 2.

The show winnowed down the field of potential couples during the course of several episodes by testing the character and compatibility of the couples in a variety of ways. At the end of designated episodes, one of the five engaged couples was eliminated by relationship experts. After the viewing audience had spent hours over the course of several weeks with each of the potential couples, the following announcement was made in the episode immediately prior to the penultimate episode:

The road ahead is challenging. What's coming up may tear them apart or make them strong enough to last a lifetime. Next week, the couples go their separate ways to celebrate their respective bachelor and bachelorette parties in none other than Sin City -- Las Vegas!

In the penultimate episode of the series, the two remaining couples – Jill and Kevin and Tony and Billie Jeanne – go to Las Vegas for a test of one of the most important character traits for any potential spouse: fidelity. With only the critical final episode remaining, the ability of the couples to withstand the temptations of a trip to Las Vegas laid the groundwork for a dramatic final stage in the march toward potential matrimony.

A. *While the Bachelor and Bachelorette Party Scenes Served to Intensify the Drama in the Married By America Series, They Included No Descriptions or Depictions of Sexual Organs or Activities*

The Commission focuses on just two scenes in reaching its conclusion that the April 7, 2003 episode of *Married By America* falls within the subject matter scope of its indecency rules (*i.e.*, material that "depicts or describes sexual or excretory organs or activities"). A careful review of those two scenes, however, demonstrates that neither of them describes or depicts sexual organs or activities. In support of its conclusion that the content did depict or describe sexual organs and activities, the Commission asserts that

the scenes showed "party-goers lick[ing] whipped cream from strippers' bodies in a sexually suggestive manner."<sup>90</sup> A frame-by-frame analysis of the episode, however, reveals that at no point was any individual shown licking whipped cream off any other individual.<sup>91</sup> In short, the Commission's description of the scenes is incorrect.

The second scene noted by the Commission involves "a man on all fours in his underwear as two female strippers playfully spank him."<sup>92</sup> Given that the man was wearing underwear, it is hard to imagine how spanking in this context could constitute a depiction of sexual activity. Indeed, the Commission's characterization of the spanking in *Married By America* is a stark departure from precedent. In a recent decision, the Commission concluded that it was not clear that a scene from an episode of *Will and Grace* with two women kissing and then "dry humping" depicted sexual activities.<sup>93</sup> According to the Commission, "'dry humping' is commonly understood to consist of two people rubbing their clothed bodies together for sexual stimulation."<sup>94</sup> In contrast, spanking is not commonly understood to be a sexual activity and was not presented as such in the *Married By America* episode in question. Accordingly, the Commission's reasoning in the NAL is inconsistent with the *Will and Grace* decision.

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<sup>90</sup> NAL, ¶ 8.

<sup>91</sup> A detailed recapitulation of the bachelor and bachelorette segment is attached as Exhibit No. 2 hereto.

<sup>92</sup> NAL, ¶ 8.

<sup>93</sup> *In re KSAZ License, Inc.*, Memorandum Opinion & Order, 19 FCC Rcd 15999 (2004) ("*Will and Grace*").

<sup>94</sup> *Id.* at n.3.

Because pixilation completely obscured any view of sexual organs in the episode, the Commission could not fairly conclude that the broadcast depicted sexual organs. In order to satisfy the first prong of its indecency analysis, therefore, the Commission was compelled to find that the episode depicted sexual activity. According to the Commission, "[a]lthough the episode electronically obscures any nudity, the *sexual nature* of the scenes is inescapable, as the strippers attempt to lure party-goers into sexually compromising situations."<sup>95</sup>

On this basis alone, the Commission then "conclude[s] that the broadcast satisfies the first prong of our indecency analysis . . . ." <sup>96</sup> Without discussion or analysis, the Commission apparently has expanded its definition of indecency to provide that any scene of a "sexual nature" depicts "sexual activity." "Sexual nature" is found nowhere in the Commission's *Indecency Policy Statement* nor in its rules, nor are we aware of any previous case relying on this legal standard to find that broadcast material violates the Commission's threshold requirements for an indecency violation. Similarly, there is no discussion about whether "sexually compromising situations" amount to "sexual activity" in either the Commission's *Indecency Policy Statement* or the Commission's rules, nor are we aware of its use in any Commission precedent. The Commission's use of these new phrases ("sexual nature" and "sexually compelling situations") only serves to further underscore the vagueness of its entire indecency regime.

Television programs too numerous to name and fitting into widely divergent genres – from *Friends* to *Law & Order: Special Victims Unit* – involve some

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<sup>95</sup> NAL, ¶ 8 (emphasis supplied).

<sup>96</sup> *Id.*

scenes that could be described as "sexual in nature" and occasionally rely on "sexually compromising situations" to develop the plot and intensify the drama or comedy for viewers. The Commission's new legal standard, "sexual nature," not only represents a sudden departure from precedent with no apparent legal basis whatsoever but also is so overbroad that it threatens to implicate the day-time and prime-time line-ups for nearly all broadcast television.

The Commission's unsupported assertion that the *Married By America* episode was "gratuitous" and "vulgar" further underscores its inability to articulate a valid basis for a finding that the broadcast falls within the subject matter jurisdiction of the Commission's indecency rules.<sup>97</sup> Subjective judgments by the Commission as to content are no basis for an indecency finding and are entirely inconsistent with a cautious approach to enforcement of the indecency restrictions. Even programming that depicts "sexually compromising situations," is "sexual in nature," appears to be "gratuitous" and "vulgar," or in the judgment of some observers is "tasteless," does not rise – or, in this case, fall – to a level that violates the indecency policy. As the Commission has previously observed, "[s]ubject matter alone is not sufficient to find material indecent, nor is it sufficient that some, or even most, people would find the material offensive."<sup>98</sup> As the Commission has also noted, "[p]rovocative programming will inevitably offend some listeners or viewers, but [the Commission] must always be mindful of the first

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<sup>97</sup> *Id.* at ¶ 12.

<sup>98</sup> See Letter from Investigations and Hearings Division, Enforcement Bureau, to Mr. Michael J. Palko, dated February 23, 2001 (cited in *In re Entercom Buffalo License, LLC*, Order, 17 FCC Rcd 11997, ¶ 3 (2002)).

amendment limitations on the government's ability to regulate the content of speech."<sup>99</sup>

Unfortunately, the Commission has disregarded its previous warnings and inappropriately classified what it privately considers offensive subject matter as legally indecent.

In short, the *Married By America* episode does not fall within the subject matter jurisdiction of the Commission's indecency rules because it does not describe or depict sexual organs or activities, and the agency therefore should rescind the NAL.

*B. Even if the Married By America Program Fell Within the Subject Matter Scope of the Commission's Indecency Rules – Which It Does Not – the Full Context in Which the Bachelor and Bachelorette Parties Appeared Clearly Shows that the Material Was Not Patently Offensive*

Under the Commission's indecency policy, a finding of indecency involves two fundamental determinations. First, as a threshold matter, the broadcast material in question must depict or describe sexual or excretory organs or activities.<sup>100</sup> If this threshold is satisfied, then the Commission must determine whether the broadcast material is patently offensive as measured by contemporary community standards for the broadcast medium.<sup>101</sup> While the Commission has never clearly articulated how a government agency comes to know the "contemporary community standards" for the broadcast medium nationwide – or indeed just what those standards are – it has laid out three principal factors that it uses in ascertaining patent offensiveness. They are: (i) the explicitness or graphic nature of the description or depiction of sexual organs or activities; (ii) whether the material dwells on or repeats at length the descriptions or depictions; and (iii) whether the material appears to pander or is used to titillate, or whether the material

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<sup>99</sup> *Infinity Broadcasting Corp. of Pennsylvania*, 3 FCC Rcd 930, ¶ 10 (1987).

<sup>100</sup> NAL, ¶ 7; *see also Indecency Policy Statement*, 16 FCC Rcd at ¶ 7.

<sup>101</sup> NAL, ¶ 7 (*citing Indecency Policy Statement*, 16 FCC Rcd at ¶¶ 7-8).

appears to have been presented for its shock value.<sup>102</sup> The Commission has emphasized that as part of any determination of whether material is patently offensive, the "*full context* in which the material appeared is critically important."<sup>103</sup>

1. The *Married By America* Episode Did Not Contain Any Depictions, Whether Graphic or Otherwise, of Sexual Organs or Activities, Could Therefore Not "Dwell On" or "Repeat" Such Prohibited Material, and Was Presented for an Important Dramatic Purpose and Not to Pander, Titillate, or Shock

Because the broadcast does not satisfy the threshold requirement for a finding of indecency, the three factors for considering whether the material was patently offensive are inapposite. Assuming the Commission continues to maintain that the episode did contain a depiction of sexual organs or activities, however, a careful examination of the three factors for determining whether a broadcast was patently offensive reveals that the *Married By America* episode is nowhere near the level required for a finding of patent offensiveness. Accordingly, even if the Commission proceeds to the second prong of its indecency analysis, there is no basis for finding that the *Married By America* episode contained material that was patently offensive.

As to the first factor (explicitness or graphic nature), the Commission asserts that "Fox obscures the depiction of sexual organs in the episode, but the pixilation does little to obscure the overtly *sexual* and gratuitous *nature* of the bachelor/bachelorette party scenes."<sup>104</sup> As discussed above, the "sexual . . . nature" standard is entirely new and the Commission's reliance on it is necessitated only by the fact that the episode depicts no

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<sup>102</sup> *Id.* at ¶ 9 (citing *Indecency Policy Statement*, at 16 FCC Rcd at ¶¶ 8-23).

<sup>103</sup> *Id.* (citing *Indecency Policy Statement*, at ¶ 9).

<sup>104</sup> *Id.* at ¶ 10 (emphasis supplied).

sexual activity, which is the relevant legal standard. The Commission supports its finding that the episode has a "sexual nature" by describing several scenes from the show, none of which depicts any form of sexual activity whatsoever.

For example, the Commission notes one scene that shows "partially clothed strippers, such as a topless woman with her breasts pixelated, straddling a man in a sexually suggestive manner."<sup>105</sup> The Commission, however, recently concluded that a scene depicting the title character of *Buffy The Vampire Slayer* kissing and straddling a man was not explicit nor was it calculated to pander to, titillate or shock the audience.<sup>106</sup> In the NAL, the Commission makes no attempt whatsoever to explain why the "straddling" scene from *Married By America* – which, unlike the scene in *Buffy The Vampire Slayer*, did not even involve kissing – was indecent when it found that a strikingly similar scene in *Buffy The Vampire Slayer* was not indecent.

The Commission also notes another scene in which two individuals kiss each other. Yet kissing is shown daily on television shows across the country. In another scene cited by the Commission, two "partially clothed strippers" were "rubbing a man's stomach."<sup>107</sup> A man's stomach, however, is not a sexual organ and rubbing it does not constitute a sexual activity. The Commission also notes a scene in which "a male stripper" was "about to put a woman's hand down the front of his pants."<sup>108</sup> The

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<sup>105</sup> *Id.*

<sup>106</sup> *See In re Complaints Against Various Broadcast Licensees Regarding Their Airing of The UPN Network Program "Buffy the Vampire Slayer" on November 20, 2001*, Memorandum Opinion & Order, FCC 04-196 (2004), at ¶ 6.

<sup>107</sup> NAL, ¶ 10.

<sup>108</sup> *Id.* (emphasis supplied).

Commission fails to note, however, that at no point did the program ever show anyone putting his or her hand down another individual's pants, even assuming *arguendo* that such an activity would be deemed sexual.

Finally, the Commission erroneously asserts that "one of the bachelorettes stradd[les] and touch[es] a topless female stripper and then lick[s] whipped cream off the stripper's stomach and bare chest while the stripper holds her own breasts."<sup>109</sup> As previously noted, there was no "licking whipped cream" on-camera, which in any event is not a sexual activity.

Though not expressly stated, the Commission apparently is basing its findings regarding the *Married By America* episode on innuendo. Under Commission precedent, however, innuendo cannot satisfy the threshold requirement of the Commission's indecency analysis unless "the sexual or excretory import was inescapable and understandable not only to adults but especially to children."<sup>110</sup> According to the Commission, "[a]lthough the nudity was pixilated, even a child would have known that the strippers were topless and that sexual activity was being shown."<sup>111</sup> Of course, even a child knows that clothing obscures nakedness but it would have been impossible for anyone to imagine any sexual activity in the *Married By America* episode since, as demonstrated above, none was occurring.

The Commission's treatment of pixilation, moreover, is entirely inconsistent with its decision in *Golden Globes*, where it noted that "technological

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<sup>109</sup> *Id.*

<sup>110</sup> *Sagittarius Broadcasting Corp.*, 7 FCC Rcd 6873, 6874 (1992).

<sup>111</sup> NAL, ¶ 10.

advances have made it possible as a general matter to prevent the broadcast of a single offending word *or action* without blocking or disproportionately disrupting the message of the speaker or performer."<sup>112</sup> The Commission specifically encouraged broadcasters to "bleep" or otherwise block possibly indecent or profane utterances from broadcasts.<sup>113</sup> Pixilation is an equally effective means of eliminating potentially indecent *visual* elements from a broadcast and should protect a broadcaster from any indecency sanction. Pixilation is commonly used by broadcasters to cover nudity and avoid potentially offending sensitive viewers and, by itself, in no way establishes that sexual activity was occurring. The NAL would nonetheless punish licensees for broadcasting pixilated nudity, a result that cannot be squared with *Golden Globes*.

In sum, there was no explicit or graphic depiction or description of sexual organs or activities in the *Married By America* episode broadcast on April 7, 2003.

As to the second factor, the Commission wrongly concluded that the episode dwelled on or repeated at length any purportedly indecent material. The NAL found that the entire segment on the parties was about six minutes in length. In fact, as TVT License, Inc. demonstrated in response to the LOI, the activities of the strippers were neither dwelled on nor repeated (the strippers appeared on screen for only 105 seconds) in the party vignette, which was itself only six minutes in a one hour program. The fact that the strippers were present at various times "throughout the accompanying scenes" (*i.e.*, during the six minute segment) does not undermine the fact that the material

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<sup>112</sup> See *Golden Globes*, 19 FCC Rcd 4975, at ¶ 11 (emphasis supplied).

<sup>113</sup> *Id.* at ¶¶ 11 & 17.

believed by the Commission to be "sexual in nature" was not repeated at length.<sup>114</sup> In any event, the *Married By America* episode depicted no sexual organs or activities whatsoever and, accordingly, there was no offending material to "dwell on" or "repeat."

Finally, the episode does not pander and the material is not used to titillate nor is it presented for "shock value." The Commission's highly inappropriate creative judgments aside, all of the scenes are an integral part of the storyline and the various participants' character development. *Married By America* was a real-life drama that chronicled the lives of couples as they prepared for a possible marriage. The bachelor party was a rite of passage for these newlyweds-to-be – as is the case for countless newlyweds-to-be all across America – and the temptations and consequences of the evening in Las Vegas were presented as an integral part of the storyline.

The Commission, for example, overlooks the fact that the vignette played an important dramatic purpose in the episode because Jill refused an invitation to lick whipped cream off a female stripper's midriff after Billie Jeanne apparently had done so (though no licking of whipped cream was shown on screen). Billie Jeanne notes, "Bottom line is that Jill is worried about what Kevin thinks and that's what bugged me." Jill counters, "Billie Jeanne got upset because she took a moment to reflect on what she just did – I think she kind of got embarrassed." Jill tells Billie Jeanne that she is concerned about upsetting Kevin's strict Catholic family. Billie Jeanne warns Jill to stay true to herself and not change for a man. But Jill explains that she knows who she is, and is "okay with what I did and didn't do."

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<sup>114</sup> See NAL, ¶ 11.

This conflict is precisely what forms the basis of the show's character development and drama. Viewers must take into account the value systems of Jill and Billie Jeanne as demonstrated by their actions in determining which of these two women is most compatible with her potential mate. Like Jill during her bachelorette party, Kevin – Jill's potential spouse – refused to engage in some of the playful activities that occurred during his bachelor party. Following the episode, Jill and Kevin were voted the most compatible couple by the audience.

As the Commission has previously noted, the *full context* in which the material appeared is critically important. Unfortunately, the Commission pays lip service to this concept in the NAL and makes no effort whatsoever to take into account the vignette's role in character development. According to the Commission, the program depicts the "prolonged appearance of strippers . . . and certainly goes well beyond that necessary for the 'character development' of the various participants."<sup>115</sup> The FCC's improper assumption of the role of producer and its second-guessing of creative determinations are entirely at odds with a cautious approach to enforcement and shows utter disregard for the First Amendment.

2. Given that the NAL Is Entirely Devoid of a Discussion of Contemporary Community Standards for the Broadcast Medium, the Commission Has Failed to Articulate a Reasoned Basis for Its Finding that the *Married By America* Episode Is Patently Offensive

When describing its indecency policies, the Commission notes that it measures patent offensiveness by the "contemporary community standards for the

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<sup>115</sup> *Id.* at ¶ 12.

broadcast medium."<sup>116</sup> The Commission, however, does not explain in the NAL how it determines what those contemporary community standards are or how they apply to the *Married By America* episode in question. The Commission merely makes the unsupported assertion that "[c]onsidering all three factors in our contextual analysis, we find that the broadcast material in question is patently offensive as measured by contemporary community standards."<sup>117</sup> Given that it did not articulate *any* contemporary community standards for the broadcast medium in the NAL, the Commission hardly could be said to "measure" the *Married By America* program by those standards. For this reason alone, the NAL fails to satisfy the mandate that the Commission engage in reasoned decision making and, therefore, should be rescinded.<sup>118</sup>

The Commission likewise failed to articulate how it measures contemporary community standards in its recently released decision concerning the Janet Jackson incident during the Super Bowl XXXVIII Halftime Show.<sup>119</sup> The closest the Commission came to explaining how it ascertains contemporary community standards was to note the number of complaints filed by the public – more than 500,000.<sup>120</sup> Measuring contemporary community standards for the broadcast medium by the number

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<sup>116</sup> *Id.* at ¶ 7 (citing *Indecency Policy Statement*, 16 FCC Rcd at ¶ 8).

<sup>117</sup> *Id.* at ¶ 13.

<sup>118</sup> *See, e.g., WLOS TV, Inc. v. FCC*, 932 F.2d 993, 995 (D.C. Cir. 1991). *See also* 5 U.S.C. § 706.

<sup>119</sup> *See In re Complaints Against Various Television Licensees Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show*, File No. EB-04-IH-0011, Notice of Apparent Liability for Forfeiture (rel. September 22, 2004) (the "*Super Bowl NAL*").

<sup>120</sup> *See id.*

of complaints generated by the public would be a dubious method at best. Even so, if judged by that standard, the Commission must conclude that *Married By America* did not violate contemporary community standards because even though 5.1 million television households watched the episode in question, only 90 "complaints" were filed with the Commission – and by only 23 people (since a number of individuals submitted duplicate complaints to multiple Commission staff).<sup>121</sup> All but four of the complaints were identical (apparently generated from the same web site) and *only one complainant professed even to have watched the program.*<sup>122</sup> Moreover, as best we can determine, the 169 television stations that are affiliated with the Fox Television Network received directly only 19 viewer comments, while the Fox Television Network also received 15 viewer comments – and some viewers in fact offered positive feedback about the

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<sup>121</sup> See Letter from William H. Davenport, Chief, Investigations and Hearings Division, Enforcement Bureau, to Brian D. Weimer, dated Nov. 12, 2004. The NAL initially asserted that the Commission had received 159 complaints about the program, but in response to a FOIA request, the Commission acknowledged that "the number of responsive complaints is less than the 159 complaints referenced in" the NAL. *Id.* The Commission also indicated that it had received an identical FOIA request from another source. *Id.* at 1-2. We note that Jeff Jarvis of the weblog "BuzzMachine" reports that he received a response from the Commission on November 12, 2004 to his FOIA request for copies of the complaints filed against the *Married By America* episode. See [http://www.buzzmachine.com/archives/2004\\_11.html](http://www.buzzmachine.com/archives/2004_11.html). Mr. Jarvis concludes that the "latest big fine by the FCC against a TV network . . . was brought about by a mere three people who actually composed letters of complaint. Yes, just *three* people." *Id.* Mr. Jarvis further complains that "[i]t is Constitutionally abhorrent that only three people can cause the government to abuse the First Amendment and attempt to censor and chill speech." *Id.*

<sup>122</sup> The Parents Television Council posted instructions on its Web site on how to fill out and send form email complaints to the Commission concerning the *Married By America* episode. The vast majority of the 90 complaints received by the Commission appear to have been generated by the Parents Television Council's email campaign.

program.<sup>123</sup> The Commission should not permit a tiny group of citizens who may not have seen the program to define the contemporary community standards of the broadcast medium for the entire nation. At a minimum, the licensees who were not the subject of a specific complaint should be dismissed from this action.

**III. EVEN IF THE COMMISSION CONCLUDES THAT THE PROGRAM WAS INDECENT, IT SHOULD NOT SANCTION ANY OF THE FOX AFFILIATES.**

*A. The Commission's Enforcement Approach Violates the Fox Affiliates' First Amendment Rights*

The Commission previously has pledged to enforce its indecency regulations with caution and appropriate restraint, respectful of the critical Constitutional sensitivities attendant to content regulation. Indeed, as noted above, the Commission promised both the Supreme Court and the D.C. Circuit that it would pursue a restrained approach to indecency enforcement, and that promise helped sway the courts' decisions to permit indecency regulation despite serious First Amendment reservations.<sup>124</sup> Consistent with this pledge, the Commission historically has pursued indecency investigations only

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<sup>123</sup> 25 of these 169 television stations are owned and operated by Fox Television Stations, Inc. or subsidiaries of Fox Television Holdings, Inc., and 144 are affiliates. Only 7 of the 25 Fox O&Os received complaints (a total of 16) and only 3 of the affiliates received complaints (a total of 3).

<sup>124</sup> *See Pacifica*, 438 U.S. at 761, n.4 ("[S]ince the Commission may be expected to proceed cautiously, as it has in the past, I do not foresee an undue 'chilling' effect on broadcasters' exercise of their rights.") (Powell, J., concurring); *ACT I*, 852 F.2d at 1340, n.14 ("[T]he FCC has assured this court, at oral argument, that it will continue to give weight to reasonable licensee judgments when deciding whether to impose sanctions in a particular case. Thus, the potential chilling effect of the FCC's generic definition of indecency will be tempered by the Commission's restrained enforcement policy.")

against those licensees about which it has received a documented complaint.<sup>125</sup>

Furthermore, to avoid unnecessarily chilling free speech, the Commission generally has provided licensees accused of broadcasting indecent material with an opportunity to refute the allegation *prior* to any finding that they are apparently liable for a sanction.<sup>126</sup>

In this case, however, the Commission has not provided Fox affiliates with any indication as to whether their stations were the subject of complaints. Moreover, the Commission issued the NAL to more than 100 Fox affiliates even though it only sent a single station (WTVT, a Fox-owned station) a letter of inquiry regarding the program. Thus, even if a station had been the subject of a viewer complaint, none of the Fox affiliates were given the chance to defend themselves against the initial charges. The First Amendment compels the Commission to act with caution. The prudent approach would have been to treat each licensee individually, only sending letters of inquiry to those licensees about which a viewer had complained – and only issuing notices of apparent liability after providing licensees with an opportunity to respond to a letter of inquiry. In contrast, the Commission's tactics in this case constitute precisely the opposite of a restrained approach to indecency enforcement.

Ultimately, the Commission's aggressiveness will only lead to further chilling of affiliates' free speech rights. If a licensee is subjected to an indecency enforcement action even though it was not the subject of a complaint – or worse, if a licensee is not given an opportunity to refute an indecency allegation before it is threatened with a sanction – broadcasters surely will continue to exercise self-censorship

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<sup>125</sup> See *Indecency Policy Statement*, 16 FCC Rcd at ¶ 24.

<sup>126</sup> See *id.*

and refrain from airing even legal content. In an atmosphere of coercion and fear, this type of speech chilling is a severe threat to the First Amendment, a threat substantial enough to give both the Supreme Court and the D.C. Circuit pause in upholding the Commission's indecency rules.<sup>127</sup> In short, the Commission's unrestrained approach in this case constitutes not only a breach of its promise to the courts to act cautiously, but also a violation of the Fox affiliates' First Amendment rights.

*B. Fundamental Fairness Dictates that the Commission Should Rescind the NAL in Its Entirety with Respect to the Fox Affiliates*

Constitutional infirmities aside, the Commission's decision to sanction the Fox affiliates for their broadcast of *Married By America* was fundamentally unfair. Because of the nature of the reality program, the Fox affiliates did not have any opportunity to review the April 7 episode prior to broadcast. The Commission mistakenly assumed that *Married By America* was a taped series capable of advance review and preemption. In fact, the first time that Fox affiliates saw the episode was during its transmission to the audience. Much like live television programming, reality programming has unique attributes that contribute to its audience appeal and distinguish it from scripted dramas and comedies. This is especially true of programs that incorporate audience participation and voting, such as *Married By America*. When a nationwide audience is given the chance to influence and vote on a show's outcome, the producers cannot film and edit the program weeks in advance, as they might be able to do for a scripted series.<sup>128</sup> On the contrary, the voting component compels producers to prepare, film, compile and edit the entire series on an extremely time-constrained

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<sup>127</sup> See *supra*, at 22-24.

<sup>128</sup> See McFarland Declaration, at 2.

schedule.<sup>129</sup> The audience participation factor dramatically alters the timing for the production of these types of programs, and the tight schedule makes it difficult for affiliates to have a meaningful opportunity to review in advance the program's content.

As explained by Roland McFarland, Vice President, Broadcast Standards & Practices for FBC, in the case of *Married By America*, the audience played a key role, both in deciding at the outset of the series which individual contestants would be paired together as couples and in deciding toward the end of the series which couple deserved the \$500,000 grand prize.<sup>130</sup> In fact, the final audience vote took place after the broadcast of the April 7 episode in question. The program was designed to permit viewers to watch the contestants' relationships develop over the course of the period between the first audience votes (on March 3 and 5) and the final vote (on April 7). For example, by the time that viewers voted at the conclusion of the April 7 episode, they were able to evaluate the contestants' relationships based on the time that had elapsed since the couples became engaged following the first audience vote. Consequently, there was no way for the producers to film the April 7 episode weeks in advance. Moreover, programs with audience participation require producers to exercise extra vigilance to protect the integrity of the voting process. *Married By America* producers in particular were cognizant of the need to keep the content of the April 7 episode, which had the potential to influence the allocation of prize money, confidential to ensure that the contestants had a level playing field when it came time for the vote. Advance information about the content, especially given how fast information travels in the Internet age, could have been

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<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

used by supporters of particular contestants in an effort to unfairly influence the outcome of the vote.<sup>131</sup>

Given the short production timeframe, and the need for confidentiality, producers of reality programming simply cannot deliver to the network broadcast-ready episodes weeks or even days in advance. Instead, in the reality genre (especially if the program involves audience participation), individual episodes generally are completed and delivered to the network very near to the time that they are scheduled to be broadcast – on the day of the broadcast in the case of the April 7 episode of *Married By America*. Consequently, FBC did not deliver the April 7 episode to its affiliates prior to air time; the first time that the Fox affiliates saw the episode was during its transmission to the audience, just like a live sports event.

The Commission has recognized in the past that affiliates should not be sanctioned for the broadcast of indecent material during live network programming. In its decision regarding the Super Bowl XXXVIII Halftime Show, the Commission refused to fine or otherwise sanction any of the CBS affiliates even though they aired allegedly indecent material.<sup>132</sup> The Commission found "no evidence that the licensee of any of the [affiliate stations] was involved in the selection, planning or approval of the apparently indecent material."<sup>133</sup> Chairman Powell's concurring statement added that "fundamental

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<sup>131</sup> *Id.*

<sup>132</sup> *See Super Bowl NAL.*

<sup>133</sup> *Id.* at ¶ 25.

fairness" compelled the conclusion that affiliates should not face a penalty for airing content that they did not have a reasonable opportunity to review in advance.<sup>134</sup>

The Commission should have reached the same conclusion with respect to the Fox affiliates that broadcast the April 7 episode of *Married By America*. Just like the CBS affiliates that aired the Super Bowl XXXVIII Halftime Show, the Fox affiliates played no role in the production of the *Married By America* episode in question, and they bore no responsibility for the selection of its content. Moreover, the Fox affiliates were given no opportunity to review the episode in advance, since, like live television, FBC delivered the episode to its affiliates at the same time that it was broadcast.

For that matter, the Fox affiliates – like the CBS affiliates that aired the Super Bowl XXXVIII Halftime Show – had no reason to assume that the episode in question had any chance of running afoul of the Commission's indecency rules. In general, the FBC provides affiliates with weekly synopses of its upcoming network programming through its Fox cybermailer system. Since the producers were still completing the *Married By America* episode in the days before it aired, however, the cybermailer synopsis for that episode did not provide specific details about the episode. Thus, although the promotional announcement for the episode in question indicated that it would cover the couples' bachelor and bachelorette parties in Las Vegas, the affiliates were not provided with any specifics concerning the content of the episode.<sup>135</sup>

Equally significant, one of the key assumptions underlying the Commission's decision to sanction the Fox affiliates is erroneous. Specifically, the NAL

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<sup>134</sup> *Id.* (separate statement of Chairman Michael Powell).

<sup>135</sup> A copy of the cybermailer for the episode in question was submitted with Fox's response to the letter of inquiry and is appended hereto as Exhibit No. 3.

attempted to distinguish *Married By America* from the Super Bowl XXXVIII Halftime Show on the grounds that Fox's program was a "taped episode in a taped series, and the affiliates could have preempted it, as at least one affiliate did."<sup>136</sup> As noted above, however, the program was not a series taped in advance like a scripted program. Rather, it was a reality program with audience participation that was not delivered to affiliates in advance of air time. Moreover, contrary to the assertion made in the NAL, *not a single Fox affiliate chose to preempt the episode in question based on indecency concerns.*

The Commission suggests that all Fox affiliates could have preempted the program since "at least one did."<sup>137</sup> That affiliate, however, did not preempt the episode due to any concerns about compliance with the Commission's indecency rules. Rather, Capitol Broadcasting Company preempted the remainder of the *Married By America* series after airing just two episodes, and it did so on the grounds that, in the licensee's opinion, the program demeaned the institution of marriage.<sup>138</sup> The Commission was thus incorrect in assuming that Capitol's actions were based on the April 7 episode, and in inferring from Capitol's action that all other affiliates had an opportunity to preempt the program. One licensee's decision – based entirely on factors unrelated to indecency –

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<sup>136</sup> NAL, ¶ 16.

<sup>137</sup> *Id.* (noting that Fox affiliate WRAZ-TV, Raleigh-Durham, N.C., licensed to Capitol Broadcasting Company, did not air the episode in question).

<sup>138</sup> *See WRAZ-TV/FOX 50 To Preempt Future Broadcasts of Married By America*, Capitol Broadcasting Company Press Release, dated Mar. 9, 2003 (noting that the station "decided to preempt future broadcasts of the Fox network reality series *Married By America* due to content that demeans and exploits the institution of marriage"). *See also* Adrienne Johnson Martin, *Fox Station Pulls 'Married By America'*, *The News & Observer*, Mar. 11, 2003.

does not provide any support for the Commission's decision to sanction Fox affiliates in this case.

In addition, even though the Commission in the *Super Bowl NAL* "urge[d] [affiliates] to take reasonable precautions in the future,"<sup>139</sup> such as the use of delay technology, that warning should not be used against the Fox affiliates here. *Married By America* aired nearly nine months before Super Bowl XXXVIII, not to mention almost a year-and-a-half before the Commission issued the *Super Bowl NAL*. Thus, the Commission should not draw any negative inferences from the Fox affiliates' behavior in this case. Like the CBS affiliates at the time of the Super Bowl, the Fox affiliates that aired *Married By America* could not possibly have been on notice that they would be sanctioned under the circumstances present in this case.<sup>140</sup>

Regardless, the Commission's unconstitutionally vague definition of indecency makes it impossible for broadcasters to know what type of content will draw a sanction. As described above, the Commission had to depart from precedent in this case – determining content to be indecent even though the program did not depict or describe any sexual or excretory organs or activities – in order to sanction Fox and the Fox affiliates. Even if the episode had been filmed, edited and produced weeks in advance, none of the affiliates could have known that airing the program would have subjected it to an indecency sanction. In this type of environment, there simply is no way for broadcasters to make rational decisions about what to air – the only choice left is speech

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<sup>139</sup> See *Super Bowl NAL*, at ¶ 25.

<sup>140</sup> See *Golden Globes*, 19 FCC Rcd 4975, at ¶ 15 (citing *Trinity Broadcasting of Florida, Inc. v. FCC*, 211 F.3d 618 (D.C. Cir. 2000)).

chilling self-censorship, which is now occurring as broadcasters refuse to air perfectly legal programming fully protected by the First Amendment.

In sum, the Commission has proffered no satisfactory rationale for fining or otherwise penalizing the Fox affiliates that aired the *Married By America* episode in question. Indeed, despite essentially identical circumstances, the Commission unjustifiably has treated the Fox affiliates entirely differently than it treated the CBS affiliates that aired the Super Bowl XXXVIII Halftime Show. Given its misunderstanding about the timing and manner in which *Married By America* was produced and delivered, and its erroneous assumption that a Fox affiliate preempted the program on indecency grounds, the Commission should rescind the NAL with respect to all Fox affiliates. Leaving the NAL in place with respect to any Fox affiliate would not only result in a gross violation of the First Amendment, it also would be a fundamentally unfair decision in light of all of the facts and circumstances.

#### CONCLUSION

Recognizing that indecent programming is entitled to First Amendment protection, the FCC has in the past made good on its commitment to the courts to exercise considerable restraint in enforcement of its indecency regulations. The Supreme Court has made clear that the definition of indecency is inherently vague and unconstitutional. While broadcasters have been afforded second-class treatment on the basis of a 25-year old Supreme Court decision, that precedent has been undermined by dramatic changes in technology and the media marketplace. The FCC, therefore, should rescind the NAL given the patent unconstitutionality of the indecency regime. In any event, a review of the program segment in question confirms that it contains no material

that was indecent under FCC precedent. Unable to point to any depiction of sexual or excretory organs or activities in the episode, the NAL strains to expand the scope of the definition and in doing so only highlights the vagueness of the Commission's definition. If the Commission nonetheless declines to rescind the NAL, it should exempt the affiliates from sanction. Because *Married By America* is a reality program with an audience voting element, it was not delivered by FBC to the affiliates prior to air time. The affiliates had no reason to believe, moreover, that the program might run afoul of the Commission's indecency restrictions. In sum, the Commission should eschew the role of arbiter of taste and, recognizing that the foundation for disparate treatment of broadcasters under the First Amendment has crumbled under the weight of technological and marketplace changes, rescind the NAL as to all stations.

Respectfully submitted,

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WDKY LICENSEE, LLC  
WEMT LICENSEE L.P.  
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NATCHEZ LICENSE CORP.  
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WPGH LICENSEE, LLC  
WRLH LICENSEE, LLC  
WSMH LICENSEE, LLC  
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WUTV LICENSEE, LLC  
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**ATTACHMENT A**

The following licensees, by and through their above-signing counsel or officer,  
hereby join in this Opposition to Notice of Apparent Liability for Forfeiture:

<b>Licensee</b>	<b>NAL Account No(s).</b>	<b>Call Sign(s)</b>
Fox Television Stations, Inc.	20043208305	WJBK(TV) KMSB-TV WOGX(TV) KRIV(TV) WOFL(TV) KSTU(TV) WTTG(TV) WFXT(TV) KDVR(TV) KTTV(TV) WFLD(TV) WAGA(TV) WNYW(TV) WHBQ-TV WTFX(TV)
Fox Television Holdings, Inc., parent of:  KDFW License, Inc. KSAS License, Inc. KTBC License, Inc. KTVI License, Inc. TVT License, Inc. WBRC License, Inc. WDAF License, Inc. WGHP License, Inc. WITI License, Inc. WJW License, Inc.	20043208305	KDFW(TV) KSAZ-TV KTBC(TV) KTVI(TV) WTVT(TV) WBRC(TV) WDAF-TV WGHP(TV) WITI(TV) WJW(TV)
California Oregon Broadcasting, Inc.	20043208309	KLSR-TV
Channel 40, Inc.	20043208310	KTXL(TV)
Chesapeake Television Licensee, LLC	20043208311	WBFF(TV)
Columbus (WTTE-TV) Licensee, Inc.	20043208312	WTTE(TV)
Comcorp of Baton Rouge License Corp.	20043208313	WGMB(TV)
Comcorp of Texas License Corp.	20043208314	KPEJ(TV) KMSS-TV KWKT(TV)
Compass Communications of Idaho, Inc.	20043208315	KFXP(TV)
Davis Television Clarksburg, LLC	20043208316	WVFX(TV)
Davis Television Wausau, LLC	20043208317	WFXS(TV)
Falls Broadcasting Company	20043208319	KXTF(TV)
Fort Smith 46, Inc.	20043208320	KPBI-CA
GE Media, Inc.	20043208321	WFXB(TV)
Grant Broadcasting Systems II, Inc.	20043208322	WFXR-TV
Grant Media LLC	20043208323	WLAX(TV)

Greater Nebraska Television, Inc.	200432080324	K11TW
Huntsville Television Acquisition Corp.	200432080326	WZDX(TV)
Idaho Independent Television, Inc.	200432080327	KTRV(TV)
Independence Television Company	200432080328	WDRB(TV)
John Harvey Rees	200432080330	KFQX(TV)
Journal Broadcast Corporation	200432080331	WSYM-TV
KABB Licensee, LLC	200432080333	KABB(TV)
KADN-15, Inc.	200432080334	KADN(TV)
KBSI Licensee, L.P.	200432080335	KBSI(TV)
KDSM Licensee, LLC	200432080336	KDSM-TV
KEVN, Inc.	200432080337	KEVN-TV
KMSB-TV, Inc.	200432080340	KMSB-TV
KOKH Licensee, LLC	200432080341	KOKH-TV
KQDS Acquisition Corp.	200432080343	KQDS-TV
KTVU Partnership	200432080344 200432080345 200432080346	KRXI-TV KFOX-TV KTVU(TV)
KVOA Communications, Inc.	200432080347	K47DF
KVVU Broadcasting Corporation	200432080348	KVVU-TV
Lingard Broadcasting Corporation	200432080349	WLOV-TV
Marquette Broadcasting, Inc.	200432080350	WMQF(TV)
Meredith Corporation	200432080351	KFXO-LP WHNS(TV) KPTV(TV)
Montana License Sub, Inc.	200432080353	KMMF(TV)
Montgomery Communications, Inc.	200432080354	KTMJ-CA
Morris Network of Mississippi, Inc.	200432080355	WXXV-TV
Mountain Licenses, L.P.	200432080356	KAYU-TV KCYU-LP KFFX-TV
National Communications, Inc.	200432080357	KVHP(TV)
Nexstar Broadcasting, Inc.	200432080358	WTVW(TV) WFFT-TV KARD(TV) WQRF-TV KDEB-TV WFXV(TV)
North Carolina Broadcasting Partners	200432080359	WCCB(TV)
Ottumwa Media Holdings, LLC	200432080360	KYOU-TV
Pacific Media Corporation	200432080361 200432080362	KDFX-CA KECY-TV
Peak Media of PA Licensee, LLC	200432080364	WWCP-TV
Piedmont Television of Anchorage License LLC	200432080365	KTBY(TV)
Piedmont Television of Eastern Carolina License LLC	200432080366	WFXI(TV)
Piedmont Television of Macon License LLC	200432080367	WGXA(TV)
Piedmont Television of Youngstown License LLC	200432080368	WYFX-LP
Prime Cities Broadcasting, Inc.	200432080369	KNDX(TV) KXND(TV)
Quad Cities Television Acquisition Corp.	200432080370	KLJB-TV
Quincy Broadcasting Co.	200432080371	WGEM-TV
Ramar Communications II, Ltd.	200432080372	KJTV-TV
Raycom America License Subsidiary, LLC	200432080373	WFXL(TV)

Raycom America License Subsidiary, LLC Raycom America License Subsidiary, LLC Raycom America License Subsidiary, LLC Raycom National License Subsidiary, LLC Raycom National License Subsidiary, LLC Raycom National License Subsidiary, LLC Raycom National, Inc.		WACH(TV) WDFX-TV WTNZ(TV) KASA-TV WXIX-TV KXRM-TV WPGX(TV)
Raycom National, Inc.	200432080374	WFLX(TV)
Red River Broadcast Co.	200432080375	KVRR(TV)
Rockfleet Broadcasting II, LLC	200432080376	WFXQ-TV
Sage Broadcasting Corporation	200432080377	KIDY(TV)
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Sainte Sepulveda, Inc.	200432080379	KBVU(TV)
Seal Rock Broadcasters, LLC	200432080380	KCBA(TV)
Second Generation of Iowa, Ltd.	200432080381	KFXA(TV)
Shockley Broadcasting, LLC	200432080382	KXLT-TV
Smith Media License Holdings, LLC (as successor to Smith Broadcasting of Vermont, LLC)	200432080383	WFFF-TV
Southeastern Media Holdings, Inc.	200432080384 200432080385 200432080386	WFXG(TV) WXTX(TV) WSFX-TV
Springfield Broadcasting Partners	200432080387	WRSP-TV
Stainless Broadcasting, L.P.	200432080388	WICZ-TV
Star Broadcasting Limited	200432080389	KXVA(TV)
Surtsey Media, LLC	200432080391	KVCT(TV)
Tanana Valley Television Company	200432080392	KFXF(TV)
Tribune Television Company	200432080393	WPMT(TV) WXIN(TV) WTIC-TV
Tribune Television Holdings, Inc.	200432080394	WXMI(TV)
Tribune Television Northwest, Inc.	200432080395	KCPQ(TV)
TV 67, Inc.	200432080396	WOHL-CA
United Communications Corporation	200432080397	WNYF-CA
Warwick Communications, Inc.	200432080398	KFXK(TV)
WAVY Broadcasting, LLC	200432080399	WVBT(TV)
WDKY Licensee, LLC	200432080400	WDKY-TV
WDSI License Corp.	200432080401	WDSI-TV
WEMT Licensee, L.P.	200432080402	WEMT(TV)
White Knight Broadcasting of Natchez License Corp.	200432080403	WNTZ(TV)
WMSN Licensee, LLC	200432080404	WMSN-TV
WNAC, LLC	200432080405	WNAC-TV
Wolf License Corp.	200432080406	WOLF-TV
Woods Communications Corporation	200432080407	WCOV-TV
WPGH Licensee, LLC	200432080408	WPGH-TV
WRGT Licensee, LLC	200432080409	WRGT-TV
WRLH Licensee, LLC	200432080410	WRLH-TV
WSJV Television, Inc.	200432080411	WSJV(TV)
WSMH Licensee, LLC	200432080412	WSMH(TV)
WSYT Licensee, L.P.	200432080413	WSYT(TV)
WTAT Licensee, LLC	200432080414	WTAT-TV
WTLH License Corp.	200432080415	WTLH(TV)
WUHF Licensee, LLC	200432080416	WUHF(TV)

WUPW Broadcasting, LLC	200432080417	WUPW(TV)
WUTV Licensee, LLC	200432080418	WUTV(TV)
WVAH Licensee, LLC	200432080419	WVAH-TV
WYDC, Inc.	200432080420	WYDC(TV)
Wyomedia Corporation	200432080421 200432080422	K26ES KLWY(TV)
WYZZ Licensee, Inc.	200432080423	WYZZ-TV
WZTV Licensee, LLC	200432080424	WZTV(TV)
Blue Bonnet Communications, Inc.	20043208306	KUIL-LP
Bluenose Broadcasting of Savannah LLC	20043208307	WTGS(TV)
Broadcasting Licenses, L.P.	20043208308	KMVU(TV)

**EXHIBIT NO. 1**

**Declaration of Roland McFarland, Vice President, Broadcast Standards & Practices,  
Fox Broadcasting Company Declaration of Roland McFarland, Vice President,  
Broadcast Standards & Practices, Fox Broadcasting Company**

DECLARATION

I, Roland McFarland, hereby state as follows:

1. I am Vice President, Broadcast Standards & Practices for Fox Broadcasting Company ("FBC"). I submit this Declaration in support of the Opposition to the Notice of Apparent Liability for Forfeiture, dated December 3, 2004, by Fox Broadcasting Company and certain television broadcast stations affiliated with the Fox Television Network, with regard to the episode of *Married By America* that aired April 7, 2003.
2. In my position with FBC, I oversee the process by which all of the entertainment programming broadcast on the Fox Television Network is assigned a content rating. The rating assigned to the *Married By America* series (and appropriately encoded in the broadcast for compatibility with the V-chip) was TV-14 (D, L, S), indicating that the program contained themes and subject matter which many parents would find unsuitable for children under 14 years of age. The rating conveyed the message that parents were strongly urged to exercise greater care in monitoring this program and were cautioned against letting children under the age of 14 watch unattended. In particular, the D, L, S portion of the rating indicated that the program contained one or more of the following: intensely suggestive dialogue (D), strong coarse language (L), or intense sexual situations (S). Furthermore, during the broadcast of the April 7, 2003 episode of the program, FBC included a content advisory at the beginning of the show. The advisory warned the audience, using both a voice-over and on-screen text, that "Due to some sexual content, parental discretion is advised."
3. The *Married By America* series was produced on an extremely time-constrained schedule, both because it incorporated audience participation and because of the need for confidentiality.
4. At the outset of the series, the program enabled the viewing audience to vote by telephone to choose which potential spouse would be paired with each of the show's five original contestants. That vote took place at the conclusion of the episodes broadcast on March 3 and March 5, 2003. The viewing audience was given another chance to participate in the show's outcome following the broadcast of the seventh episode, which aired on April 7, 2003. At the conclusion of that episode, the audience again had the opportunity to vote by telephone – this time to decide which of the two

remaining couples was most likely to have a successful marriage. The couple that won the audience's vote was entitled to a prize worth up to \$500,000, if they had chosen to get married on the series finale.

5. During the intervening weeks between the two audience votes, the program chronicled the couples' interactions and tested their character and compatibility. The producers of *Married By America* filmed, edited and compiled the program so that viewers could watch the characters' relationships as they were developing week-by-week. For example, the seventh episode, which aired on April 7, 2003, was literally filmed and edited in the week leading up to April 7.
6. FBC and *Married By America's* producers also were cognizant of the need to keep confidential the content of the April 7, 2003 episode until its air-time. Since that episode included an audience vote – a vote that would determine the winner of a potential half-million dollar prize – FBC and the producers wanted to ensure that the contestants had a level playing field when it came time for the nationwide vote. Advance information about the content could have been used by supporters of particular contestants in an effort to unfairly influence the outcome of the vote.
7. For all of these reasons, the producers could not deliver to FBC a broadcast-ready episode of *Married By America* months, weeks or even days in advance of each broadcast. For the same reasons, it was impossible for FBC to distribute the series, including the April 7 episode, to television stations affiliated with the Fox Television Network in advance of each episode's scheduled air time – much like a live sports event.
8. According to ratings data supplied by Nielsen Media Research, the show received a 4.8 rating/7 share, which means that about 5.1 million households were tuned to the April 7, 2003 episode of *Married By America*.

I declare under penalty of perjury that the foregoing is true and correct. Executed on December 2, 2004.

/s/ Roland McFarland  
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**EXHIBIT NO. 2**  
**Recapitulation of Certain Scenes from the April 7, 2003**  
**Episode of *Married By America***

The following is a recapitulation of the bachelor and bachelorette party segment of the April 7 episode:

- The couples find invitations to celebrate their respective bachelorette and bachelor parties in Las Vegas. Jill is concerned about being away from Kevin. Although he is excited about having a bachelor party in Las Vegas, Tony acknowledges past infidelity and worries about his ability to remain faithful to Billie Jeanne.
- The participants fly to Las Vegas on a private airplane and arrive at the Aladdin Hotel. Jill's cousins and friends show up at the hotel as a surprise, as do Billie Jeanne's friends from home. The women celebrate the bachelorette party in a two-story suite in the hotel and are dancing and partying when male strippers arrive.
- A male stripper, wearing shorts, enters the bachelorette party and begins dancing with the guests. A female guest is then shown lying on the floor with a male stripper dancing over her. Whipped cream is positioned on the female's legs just below her skirt line. The program cuts to a new scene as the stripper is apparently about to lick the whipped cream. A woman is then shown dancing up against a male stripper from behind. At one point, the male pulls the female's hands around to the front of his body. At all times, the male was wearing shorts. The program then cuts to a new scene. The male places whipped cream on his chest, and the program shows one of the female guests apparently preparing to eat the whipped cream, but cuts to a new scene.
- Two female strippers are then shown arriving at the bachelor party – one is wearing a dress that apparently does not cover the area of her buttocks, which is pixilated (*i.e.*, fully obscured by blurring of the video). The two female strippers remove Tony's shirt and pants, leaving him wearing boxer shorts. One of the female strippers hits his buttocks (which was covered with shorts) with a belt.
- Returning to the bachelorette party, Jill's friends are shown bringing in a female stripper. The female stripper is then shown dancing with Billie Jeanne and Jill while sitting on their laps. The stripper is apparently unclothed from the waist up, but her hands cover her breasts. Later, the female stripper is shown with

whipped cream on her midriff. Billie Jeanne joins in the stripper's performance and is shown preparing to kiss the female stripper after apparently licking the whipped cream when the program cuts to a new scene. Yet when Jill is encouraged to do the same, she passes, creating tension between the two of them. Billie Jeanne notes, "Bottom line is that Jill is worried about what Kevin thinks and that's what bugged me." Jill counters, "Billie Jeanne got upset because she took a moment to reflect on what she just did – I think she kind of got embarrassed." Jill tells Billie Jeanne that she is concerned about upsetting Kevin's strict Catholic family and is not interested in doing anything with another woman. Billie Jeanne warns Jill to stay true to herself and not change for a man. But Jill explains that she knows who she is, and is "okay with what I did and didn't do."

- At the bachelor party, a female stripper pulls Kevin onto the couch and begins to undress. Shown from behind, she is apparently unclothed from the waist up. Kevin, however, is not comfortable with this. His friend steps in to interrupt the woman, knowing that Kevin is not happy. He says, "I know [Kevin] didn't want to do that but was just doing it for everyone else. Kevin is about morals and values. He doesn't believe in strippers." Later, the female stripper is standing in front of Kevin, apparently naked from the waist up. Her upper body is pixelated. Tony then goes into the back room with one of the women and they kiss. "Nothing wrong with kissing a stripper before you're married," Tony explains. "Kissing a stripper after you're married -- that's when the trouble begins."
- The next morning, Billie Jeanne's friend Jeanmarie brings her breakfast so that the two can talk privately. She asks whether Billie Jeanne is nervous about her decision to marry so soon. Billie Jeanne is sure that Tony won't disappoint her. She also thinks they can start a family together. On the other side of the hotel, Tony has the same conversation with his friend Bender. Bender asks Tony about his exploits with the stripper. Tony confirms that they merely kissed. "What I did in Vegas, I don't consider cheating at all," Tony explains. "After I walk down the aisle, I will not be kissing any strippers. Or anybody else."
- The bachelor/bachelorette parties ran for six minutes in an hour-long program. The male and female strippers appeared on camera for approximately 105 seconds.

**EXHIBIT NO. 3**

**Copy of Fox Broadcasting Company Cybermailer Regarding the April 7, 2003  
Episode of *Married By America***

Monday April 7, 2003

09:00 – 10:00P

MARRIED BY AMERICA (MBA-108) (TV-14: D, L, S)  
This groundbreaking series follows five singles who put their trust in the American viewing public to play matchmaker. These men and women and their potential spouses are successful in every aspect of their lives, except at finding a mate by conventional means. Once face-to-face, these new couples will embark on a journey toward matrimony in hopes that they have indeed found their one true love. The five engaged couples have been narrowed down to two by the relationship experts on the show (DR. JENN BERMAN, MS. P. AND DON ELIUM). Tonight America will once again be given the opportunity to vote by telephone for the couple they feel is the perfect match.