

No. 08-0841-ag(L)

In the
United States Court of Appeals for the Second Circuit

ABC INC. *et al.*,
Petitioners,
v.
FEDERAL COMMUNICATIONS COMMISSION *et al.*,
Respondents.

On Petition for Review of an Order of the Federal Communications Commission

BRIEF FOR *AMICI CURIAE*
CENTER FOR CREATIVE VOICES IN MEDIA AND
FUTURE OF MUSIC COALITION IN SUPPORT OF PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici curiae* Center for the Creative Community, Inc. d.b.a. Center for Creative Voices in Media, Inc. (“Center”) and Future of Music Coalition (“FMC”) respectfully submit this corporate disclosure statement.

The Center is a nonprofit corporation which does not issue stock. It is not a subsidiary or affiliate of any publicly owned corporation.

FMC is a nonprofit corporation which does not issue stock. It is not a subsidiary or affiliate of any publicly owned corporation.

Respectfully submitted,

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CONSENT TO FILE

This brief is filed pursuant to Rule 29(a), FRAP. The parties have consented to the filing of this brief.

INTEREST OF *AMICI CURIAE*

Amicus curiae Center for Creative Voices in Media (“CCV” or “Center”) is an organization dedicated to protecting and promoting the interests of its members, who create and provide artistic content to broadcast programs. The Center’s members include writers, producers, actors, authors, and other creative professionals (collectively referred to as “creators”). Similarly, *amicus curiae* Future of Music Coalition (“FMC”) is an organization that examines the challenging issues at the intersection of music, law, technology and policy. FMC achieves this through continuous interaction with its primary constituency – musicians – and in collaboration with other creators’ and citizen groups.

The effect of the Commission’s arbitrary decision in *In the Matter of Complaints Against Various Television Licensees Concerning Their February 25, 2003 Broadcast of the Program “NYPD Blue,”* 23 F.C.C.R. 3147 (2008), on the creative community is substantial. See, e.g., “*Big Chill: How the FCC’s Indecency Decisions Stifle Free Expression, Threaten Quality Television and Harm America’s Children.*”¹ Creators

¹The white paper was submitted in response to the Commission’s request for comment on its reconsideration of a March, 2006 *Omnibus Order* resolving a number

are at the forefront in the actual process of creating and delivering speech. Although the Commission's enforcement proceedings are directed at licensees, the pressure of stiff indecency penalties is passed on to the creators who actually produce the programming. This creates an inhibiting environment which directly interferes with the process of artistic and creative expression which lies at the heart of First Amendment protection.

The Commission's action in this case blurs the lines of what it will consider an actionable display of partial and fleeting nudity in a non-sexual situation. Thus, the constraint generated by the Commission's action affects creators in a number of ways. For example, in some instances, licensees have mandated that creators edit their programming simply as a precautionary measure [App. A 21], and the inevitable tendency to err on the side of caution means that the impact of the Commission's action is often broader than its decision would suggest. In other cases, licensees have flatly refused to air certain programming for fear of being subject to complaints of indecent programming. [App. A 5] As a result, the inconsistent and confusing nature of the FCC's action will result in uncertainty as to what constitutes "indecent" programming.

of indecency complaints. *In the Matter of Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 F.C.C.R. 2664 (2006). A Motion for Leave to Accept Appendix to Brief of *Amici Curiae* is being filed contemporaneously with this Brief. Thus, for the Court's convenience, this document is reproduced here as Appendix A.

The net effect of these restrictive pressures is incalculable. The freedom of creators to express themselves has been stifled because creators are now under a great deal of pressure to speculate as to how far their creativity and expression can reach before it crosses the line of what constitutes an actionable complaint. The Commission's decision, therefore, has resulted in a palpable chill on free expression.

The Center's and FMC's members are also viewers and listeners of television and radio, albeit with a heightened interest in observing and building upon the work of other creators in their industry. Artists, be they painters, writers, playwrights, or television creators, do not work in isolation, but rather within the context of each other's works. Creators often build upon or distinguish their work from that of their peers. Thus, a critical aspect of the creative process is to have access to diverse, protected programming, which enables and fosters further creative expression.

The Center's and FMC's members are also "ordinary" viewers and listeners of broadcast programming. In their "off duty" and recreational viewing and listening by themselves and in the company of friends and family, they partake of television and radio just as the rest of the public does. As individual viewers and listeners, they are entitled to expect a diversity of creative expression. Instead, the Commission's confusing and inconsistent indecency decisions prevent viewers and listeners from receiving access to protected expression.

The Commission has created, without logic, an environment where viewers and listeners are prevented from receiving protected expression. Consequently, the Commission's decision has interfered with their rights to have access to diverse sources of information as is guaranteed by the Communications Act. *Ellis v. Tribune Television Co.*, 443 F.3d 71, 80 (2d Cir. 2006); *Office of Commc'n of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966); *see also Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969).

SUMMARY OF THE ARGUMENT

Amici curiae CCV and FMC support Petitioners' arguments and do not repeat them here. Rather, CCV and FMC submit this brief to emphasize that, in establishing standards for evaluating this and other indecency enforcement proceedings, the Commission has relied on a flawed complaint process, which is fraught with abuse and further demonstrates the arbitrariness of the Commission's decision. CCV and FMC also demonstrate how, as a consequence, creators, as producers of the programming aired by licensees, are directly, uniquely, and immediately impacted. The arbitrariness of the FCC's decision has left creators in a precarious position since they no longer have the ability to determine accurately what type of expression constitutes indecent speech. This will impermissibly stifle the expression of creators as well as result in economic consequences for creators and performers.

Creators are not the only ones who have suffered from the Commission's action. The viewing and listening public has also had to bear the consequences of the FCC's inconsistency, in the process losing its expectation to receive diverse expression as is guaranteed by the First Amendment.

ARGUMENT

Amici curiae support Petitioners' arguments and do not repeat them here. Clearly, the Commission's application of the Communications Act was vague and arbitrary, and cannot be reconciled with prior FCC precedents, much less the Supreme Court's decision in *FCC v. Pacifica Found.*, 438 U.S. 726 (1978). CCV and FMC appear here to emphasize how the Commission's regime chills free speech rights and stifles creative expression.

I. THE FCC EMPLOYS A FLAWED COMPLAINT PROCESS.

The FCC has, until now, followed indecency enforcement policies designed to minimize adverse impacts on free expression. Among other things, it has been the FCC's practice to enforce its indecency standard only after it has received complaints over specific programs. However, the complaint process has the potential to be abused.

Citizen groups have encouraged their members to file form complaints with the Commission, regardless of whether those filing the complaint have actually seen or

heard the programming at issue.² [App. A 33] These citizen groups further make the complaint process easier for their members by sending out emails through a listserv. [App. A 33] The emails contain links, which when clicked on, send pre-written complaints to the Commission. [App. A 33] In many instances, these prepackaged complaints are sent to each of the five Commissioners and to other FCC offices, generating what the FCC has counted as six or more complaints with one simple click. [App. A 33] The Commission accepts them without regard to the fact that the individual can send in more than one complaint through a simple click on a link. [App. A 33]

Indeed, in the instant case, the FCC noted that it relied on complaints received from citizen groups. Specifically, the FCC stated it “received numerous complaints, including thousands of letters from members of various citizen advocacy groups.” *Notice of Apparent Liability for Forfeiture, In the Matter of Complaints Against Various Television Licensees Concerning Their February 25, 2003 Broadcast of the Program “NYPD Blue,”* 23 F.C.C.R. 1596, 1600 (2008). However, simply relying on a flawed complaint process to implement an indecency regime can only be deemed arbitrary.

²With respect to the current complaints regarding the *NYPD Blue* episode, the Commission has stated it later attempted to confirm that the individual had actually seen the episode complained of by the viewer. *In the Matter of Complaints Against Various Television Licensees Concerning Their February 25, 2003 Broadcast of the Program “NYPD Blue.”* 23 F.C.C.R. 3147, 3157 (2008).

II. THE COMMISSION’S DECISION IS CHILLING SPEECH AND STIFLES CREATIVE EXPRESSION.

The Commission’s action has denied creators their right to create constitutionally protected programming and will continue to chill airing of material that is controversial and potentially valuable, but not indecent. Additionally, because of the potential for hefty fines, creators and performers will also have to deal with economic setbacks.

A. The Decision Will Have a Significant Impact on Speech and Expression.

As a result of the Commission’s arbitrary decision in this case, creators will have the difficult, almost impossible, task of trying to determine what type of programming the Commissioners will find acceptable. An incorrect decision could lead to hefty fines on broadcasters, and potentially, on creators.³ Moreover, the enactment of the Broadcast Decency Enforcement Act of 2005 has increased ten-fold, to \$325,000, the maximum penalty for broadcasting obscene, indecent, or profane language. Pub. L. 109-235, 120 Stat. 491 (to be codified at 47 U.S.C. §503(b)(2)(C)(ii)).

Adding to the confusion, the same show aired in different time zones simultaneously can cause stations in one zone to be fined, while stations in others are not. This effectively eliminates the 10 p.m. to 6 a.m. “safe harbor” for potentially “indecent” material in primetime national broadcasts. [App. A 15-16] As a result, creative

³*See infra*, Section B (describing broadcaster’s demands for indemnification).

expression will be stifled because creators will be forced to edit programs that should be constitutionally protected or they will completely refrain from broadcasting certain programs.

These concerns are not merely conjecture. Indeed, after the Commission fined multiple stations in its 2006 *Omnibus Order* for “fleeting expletives,” 21 F.C.C.R. at 2720, creators were subject to the suppression of their creativity. For example, acclaimed Emmy and Oscar winning producers Tom Fontana and Barry Levinson received a call from concerned WB Network executives about their pilot episode of *The Bedford Diaries*, a drama focusing on the lives of six contemporary New York City college students. [App. A 21] The premiere episode, which involved a group of students attending a class on human sexuality, had already been approved by WB’s standards and practices department. [App. A 21] A week before the show was scheduled to air, the network ordered Fontana and Levinson to delete a number of specific scenes, including one that depicted two girls in a bar kissing on a date and another of a girl unbuttoning her jeans. [App. A 21]

Although Fontana refused to make the edits, the network itself exercised its right to air an edited version of the program. [App. A 21] WB executives publicly acknowledged that the decision to censor Fontana’s new show was entirely driven by concerns raised by the *Omnibus Order* and that they did not believe the original cut of the episode

was indecent. [App. A 21] Rather, the network said it acted “out of an abundance of caution.” [App. A 21]

Another example of the effect of the Commission’s arbitrary decisionmaking was evident in PBS’s attempt to broadcast an appropriate verison of Ken Burns’ documentary *The War*. PBS officials attempted to seek guidance from the Commission to determine where they could draw the line over some of the language used in the documentary, but were unable to get such guidance. [App. A 18] As a result, PBS released two different versions of the documentary because some stations feared Commission sanctions more than others. While PBS was willing to create two versions of *The War*, such vagueness can especially harm less well-known creators, whose work may simply be censored excessively or not even broadcast by stations who fear excessive fines, or whose project may simply not be funded. Thus, while a broadcaster’s confusion and resulting caution is understandable, its adverse impact on creators is no less unfortunate.

The First Amendment demands greater restraint and more attention to the free flow of information. Due to uncertainty of the meaning of indecency and the steep hike in fines, broadcasters’ overabundance of caution is robbing the public of the option of viewing constitutionally-protected content. Such stricken content may be “challenging,

controversial, original, uncomfortable, in bad taste, and/or offensive,” but not “indecent.” [App. A 9]

B. The Decision Will Have A Significant Economic Impact on Creators.

FCC sanctions are imposed on broadcast licensees. However, ultimately it is the creators and performers who suffer the economic consequences of an indecent finding. Indeed, some creators have been forced to indemnify their employers. *See, e.g.*, Frank Ahrens, *Six-Figure Fines for Four-Letter Words Worry Broadcasters*, WASH. POST, July 11, 2006, at A1.⁴ Some have been forced to also invest in indecency insurance policies in the event the Commission at some future date determines a program to be indecent or profane. *Id.* Although well-established creators have the luxury of working in broadcast television or other media, less established and financially secure creators may be denied the broadcast forum for their work for financial reasons. [App. A 27] This exacerbates creators’ inability to be compensated for creative work. *Id.* Thus, the findings adopted by the *Forfeiture Order* puts creators at risk not only creatively, but also economically.

⁴For example, PBS issued new guidelines for producers, including “the producer’s warranty that its program complies with all necessary rights, technical requirements and FCC regulations, including the FCC’s indecency rules.... The obligation to indemnify includes the cost of defending any indecency complaints and the cost of any fines or penalties imposed by the FCC.” *See* Karen Everhart, *PBS Wards Off Fines by Fixing Cartoons From Distant Past*, CURRENT, Oct. 10, 2006, available at <http://www.current.org/fcc/fcc0618indecency.shtml> (reproducing PBS guidelines).

III. THE COMMISSION VIOLATED THE RIGHTS OF VIEWERS AND LISTENERS TO ACCESS DIVERSE INFORMATION FROM A DIVERSITY OF SOURCES.

Creators are not the only ones affected by the FCC's action. The Commission's responsibility to ensure that public airwaves are used in the public interest includes the affirmative responsibility to ensure that the listening and viewing public has access to diverse sources of expression. *Red Lion*, 395 U.S. at 390; *Action for Children's Television v. FCC*, 852 F.2d 1332, 1340 (D.C. Cir. 1988) (Ginsburg, J). However, the effect of the FCC's action is to censor expression that in some cases will not be objectionable, while in other cases the same expression could be deemed indecent. Such a determination simply depends on whether the majority of five FCC Commissioners finds the expression offensive under contemporary community standards. The result of such an arbitrary regime is that the listening and viewing audience suffers because it no longer has access to a wider array of speech.

As mentioned above, such a consequence is not speculative. The result is that creators may be unwilling to produce compelling or thought provoking programming, instead playing it safe with generic programming. Thus, as viewers, creators are now handicapped in their ability to receive such compelling or thought provoking expression that would then allow them to build on or challenge such expression.

Moreover, the limits on permissible expression also harm “ordinary” viewers. These viewers are entitled “to receive suitable access to social, political, esthetic, moral, and other ideas and experiences....” *Red Lion*, 395 U.S. at 390. When talented creative artists lose the ability to exercise creative freedom, the American public also loses. Although a regulatory regime may have laudable goals, if it censors the free expression of material that is not indecent, it overlooks the valuable role controversial, creative programming can play in our society. [App. A 25] However the Commission inconsistently defines what is suitable programming, and such decisions result in the elimination or restriction of content that is constitutionally protected. Consequently, “ordinary” viewers are deprived of expression they are entitled to receive.

CONCLUSION

For all these reasons, this Court should reverse and set aside the Commission’s decision, and grant all such other relief as may be just and proper.

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APPENDIX A

BIG CHILL: HOW THE FCC'S INDECENCY DECISIONS
STIFLE FREE EXPRESSION, THREATEN QUALITY TELEVISION
AND HARM AMERICA'S CHILDREN

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I.

Executive Summary

Creative media artists share the concerns of many Americans about the quality of programming on broadcast television. The goal of these artists and other free expression advocates is not to encourage the broadcast of “indecent” material, but rather to preserve the already inadequate amount of broadcast television programming that is creative, original, high quality, challenging, and not indecent. Former Federal Communications Commission (FCC) Chairman Newton Minow once famously referred to television as a “vast wasteland.” One unintended consequence of the FCC's recent indecency decisions is to make that television wasteland even vaster.

The reason is that the Commission’s pronouncements on what constitutes “indecency” under its rules are inconsistent and confusing. The Commission claims these decisions offer “substantial guidance” about how it will rule on future indecency complaints. But the reality is that these decisions leave broadcasters and creative media artists unable to predict with any degree of certainty whether or not a future FCC will judge today’s newly created content “indecent” when it renders its decision a year or two after the content airs.

With the recent tenfold increase in indecency fines, broadcasters and creative media artists simply cannot afford to risk the possibility that the FCC will judge their newly created content “indecent.” When the high cost of potential fines is combined with the high degree of uncertainty about what actually constitutes “indecency,” the result is a high amount of risk avoidance. Broadcasters and creative media artists must self-censor large amounts of broadcast content that might potentially generate an indecency fine, no matter how unlikely. In other

words, good business judgment dictates that they throw out the Constitutionally-protected free expression “baby” with the indecent “bathwater.” The one-two punch of inconsistent and confusing “guidance,” combined with a tenfold increase in fines, means that the “chilling effect” on free speech is quickly becoming a new Ice Age.

Recently, certain CBS stations aired that network’s third broadcast run of its award-winning *9/11* documentary before 10 p.m., judging it to be not indecent under FCC rules, while other CBS stations pushed the same show back to the post-10 p.m. indecency “Safe Harbor” or preempted it entirely, judging that it might be indecent under FCC rules.¹ This is clear evidence that FCC indecency decisions are indeed inconsistent and confusing, and result in chilling Constitutionally-protected free expression.

Despite its graphic language and images, no doubt many families chose to watch this *9/11* documentary together, as a way for parents to introduce their children in a sensitive and supervised way to the horrors and heroism of that defining day in our nation’s history. Unfortunately, however, as a direct consequence of the FCC’s inconsistent and confusing FCC indecency decisions, other families had that opportunity denied to them. Here is a dramatic example of those decisions’ “chilling effect” on free expression, and the tangible harm done to not only broadcasters and creative media artists, but also to America’s families and children.

Rather than serve the public interest, the Commission’s decisions have harmed the public’s interest – including the interest of America’s children – in viewing high quality television. They threaten free expression, the underpinning of our nation’s democracy, requiring

¹ Larry Neumeister, *Some CBS affiliates worry over 9/11 show*, ASSOCIATED PRESS, Sept. 3, 2006, available at, http://news.yahoo.com/s/ap/20060903/ap_en_tv/cbs9_11_film.

one of the most important and powerful sectors of our nation's media to self-censor content that is not indecent, and therefore Constitutionally-protected.

The writers, producers, directors, performers, and others for whom the Center for Creative Voices in Media advocates are uniquely harmed by the Commission's inconsistent and confusing indecency decisions. The FCC's indecency rules are key considerations in their creative process. Those indecency rules must be crystal clear and consistently applied in order to prevent speech that is not indecent, and therefore Constitutionally-protected, from being censored. That is not the case today, as the CBS *9/11* documentary case clearly illustrates.

In the process of developing an idea into a finished show, the FCC's indecency decisions trickle down a chain of network and production company executives and lawyers, network Standards and Practices departments, producers, and others, to ultimately "guide" the creative talent as to what exactly constitutes "indecency" under the FCC rules and is therefore out of bounds. When the raw material for these indecency analyses – the FCC's own indecency decisions and statements – are inconsistent and confusing, each link in that review chain will likely choose to avoid risk and "play it safe."

As creative artists and producers know, there are already lots of reasons for broadcasters to say "No" to the production and airing of challenging, controversial, and/or quality programming. The FCC's indecency decisions provide many new powerful reasons to say "No" -- fear of heavy FCC fines, loss of license, potential postponement to the "Safe Harbor" when a smaller audience is watching, potential production of a show for broadcast that must then be shelved or televised on cable because it is later determined to be too risky, etc. More and more

content that is very likely not indecent either falls to the cutting room floor or is never created in the first place because it may be “close to the line -- wherever that line is.”

As described in this report, four members of the Center for Creative Voices in Media’s distinguished Board of Advisors – Steven Bochco, Tom Fontana, Vin Di Bona, and Peggy Charren – have all personally been affected by, or witnessed, the chilling effect of the FCC’s inconsistent and confusing indecency decisions. And, while well-established talents like Bochco, Di Bona, and Fontana can continue to work in broadcast television, or can choose to take their talent to less restrictive environments such as cable television, less financially-secure and well-established creative artists may not have the same options, and as a result are uniquely harmed by FCC rulings that chill creative freedom.

II.

Introduction

In March of 2006, the Federal Communications Commission issued the latest in a series of rulings regarding “indecent” material on broadcast television. The Commission said these rulings responded to the fact that “Americans have become more concerned about the content of television programming, with the number of complaints annually received by the Commission rising from fewer than 50 in 2000 to approximately 1.4 million in 2004.”² The Commission

² *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, Notices of Apparent Liability and Memorandum Opinion and Order, FCC 06-17 at 2 (March 15, 2006) (hereinafter “March 15th Omnibus Order”).

stated that these March decisions provided “substantial guidance” to broadcasters, creative media artists, and the public, about what was legally indecent under FCC rules, and what was not.³

Nearly fifty television programs were mentioned in the FCC's decisions, and the subject matter of the shows varied widely. Emmy- and Peabody Award- winning producer Vin Di Bona, was surprised to learn his show, ABC's *America's Funniest Home Videos*, one of America's longest running, most popular, and most family-friendly shows, was the subject of an FCC indecency investigation.⁴ One viewer in Rochester, New York filed a complaint with the Commission concerning a video that featured a naked infant falling back onto his pacifier. Di Bona says he understands the need for standards, particularly during times when young children may be watching, but he found the specific complaint against his show to be utterly without merit. “The issue here is a child falls back on as pacifier and he gets up and the pacifier is stuck in his butt, and it's the funniest thing you've ever seen,” Di Bona said. “I'm sure when the FCC reviewed it, and I'm very familiar with several of the commissioners on the FCC, I'm sure they had a laugh at it.”⁵

Nevertheless, on the basis of one complaint from the sixteen year-old family show's millions of viewers, the Commission subjected the “butt plug” video (the Commission's term) to its multi-part indecency analysis. It found the segment, which had been submitted to the show by the infant's amused parents, to be "marginally explicit," but went on to determine that it was

³ “Taken both individually and as a whole, we believe that [the findings announced in the *March 15th Omnibus Order*] will provide substantial guidance to broadcasters and the public about the types of programming that are impermissible under our indecency standard.” *Id.* at 2.

⁴ *Id.* at 62–63.

⁵ Podcast interview with Jonathan Rintels, Executive Director, Center for Creative Voices in the Media, May 25, 2006, *available at*, <http://creativevoices.libsyn.com/>.

not “patently offensive” under contemporary community standards for the broadcast medium, noting that “no single factor generally provides the basis for an indecency finding.”⁶ *America's Funniest Home Videos* was one of several programs found in March to be not indecent by the Commission.

But not all of the programs included in the FCC's opinion and order got off so easily. Several other shows were found to have violated the Commission's indecency rules, and some, though not all, networks and affiliates who aired the "indecent" programming were subject to monetary penalties. Among the indecent programs: several episodes of ABC's *NYPD Blue*,⁷ an episode of CBS's hit show *Without a Trace*,⁸ and *The Blues: Godfathers and Sons*,⁹ a PBS documentary.

In these and other indecency decisions, the FCC has inconsistently and confusingly applied its indecency rules. As a result, there is a large “grey area” of content which may be arguably indecent or not indecent. The FCC will not make advisory or prospective decisions on whether or not such “grey area” content actually is indecent under its rules. Pressure groups urge their mailing list members to file indecency complaints to the FCC on much content that is arguably indecent or not. Thus, in the process of creating and airing programming, broadcasters and creative media artists, knowing that these pressure groups will likely file complaints, must

⁶ *March 15th Omnibus Order*, FCC 06-17 at 62–63.

⁷ *Id.* at 36–39.

⁸ *Complaints Against Various Television Licensees Concerning Their December 31, 2004 Broadcast of the Program “Without a Trace,” Notice of Apparent Liability for Forfeiture*, FCC 06-18 (March 15, 2006).

⁹ *March 15th Omnibus Order*, FCC 06-17 at 23–27.

try to divine whether some future FCC might judge this “grey area” content as “indecent,” with only these inconsistent and confusing precedents as guideposts.

Meanwhile, the FCC’s maximum indecency fines have increased tenfold under new legislation recently signed into law.¹⁰ In March 2006, with fines just one tenth of the current amount, the FCC fined CBS stations a total of over three million dollars for a single broadcast of the show *Without a Trace*.¹¹ Today, the risk to a single television station of being wrong about how a future FCC might rule on indecency has risen to \$325,000. For a national broadcast network, the risk of being wrong about a future FCC indecency decision is now in the tens of millions of dollars.

With the risk of creating and broadcasting content within the “grey area” now increased tenfold, broadcasters and creative media artists have predictably chosen to allow little “grey area” content to reach the public airwaves. Rather, they “play it safe” and self-censor “grey area” content out of “an abundance of caution” to avoid having a future FCC potentially censor it for them, with the significant financial penalties and threats to licenses that entails.

The problem, of course, is this: Not all of that “grey area” content is indecent. Indeed, most of it is probably not indecent. It may be challenging, controversial, original, uncomfortable, in bad taste, and/or offensive – but it’s not “indecent” under the FCC’s rules. And because it’s not indecent, it is Constitutionally-protected. Broadcasters and creative media artists have a right to air it, and the public has a right to view it.

¹⁰ Pub. L. No. 109–235 § 2 (codified as 47 U.S.C. § 503(b)(2)(C)).

¹¹ *Complaints Against Various Television Licensees Concerning Their December 31, 2004 Broadcast of the Program “Without a Trace,” Notice of Apparent Liability for Forfeiture*, FCC 06-18 (March 15, 2006).

Those Constitutionally-protected rights are imperiled by the FCC's recent indecency decisions. The practical result of combining inconsistent and confusing indecency enforcement with a tenfold increase in indecency fines is that broadcasters and creative media artists must throw out the Constitutionally-protected free expression "baby" with the indecent "bathwater." What was a "chilling effect" on free speech is quickly becoming a new Ice Age.

III.

The FCC's Indecency Decisions are Inconsistent and Confusing

Since the brief exposure of singer Janet Jackson's breast during the 2004 Super Bowl XXXVIII Halftime Show, the Commission has made it clear that it will aggressively punish broadcast "indecency." However, the Commission has been unclear when it comes to defining precisely what is "indecent" under its rules. Rather than provide additional guidance to broadcasters, creative media artists, and the public about what is and is not indecent, the Commission's recent series of decisions have instead created additional confusion. Since it announced new rules in its 2004 *Golden Globes II* decision,¹² the Commission's indecency rulings, taken together, have been consistent only in their inconsistency.

In 2003, applying its then long-standing indecency rules and rulings, the FCC found that the isolated utterance of the word "fucking" by U2 lead singer Bono during a live NBC

¹² *Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards," Memorandum Opinion and Order*, FCC 04-43 (March 3, 2004) (hereinafter "Golden Globes II").

television broadcast of the *Golden Globe Awards* was not indecent.¹³ One year later, however, prompted by lawmakers and advocacy groups to take a harder line with respect to broadcast decency, the Commission reversed its decision in *Golden Globes I*.¹⁴ Instead, it ruled NBC stations were indeed guilty of indecency under new, prospective indecency rules that overturned earlier Commission precedents. The Commission stated that “broadcasters are on clear notice that, in the future, they will be subject to potential enforcement action for any broadcast of the “F-Word” or a variation thereof in situations such as that here.”¹⁵ This decision appeared to many to be “clear notice” that the use of the F-word in almost all circumstances was indecent, regardless of context.

But then, just a few months later, the FCC made exceedingly unclear what it had called its “clear notice.” When ABC aired Steven Spielberg's World War II epic *Saving Private Ryan* unedited on Veterans' Day in 2004, 66 of the network's more than 220 affiliate stations refused to broadcast the film. Citing the FCC's *Golden Globes II* decision and its “clear notice,” they feared that the film's repeated use of “fuck,” “shit,” and other crude language would cause the Commission to fine them for indecency.

Four months after *Ryan* aired, however, the FCC ruled that it was not indecent, and that those 66 ABC affiliates had misread its *Golden Globes* decision. According to the FCC, the expletives in *Ryan* were “essential to the ability of the filmmaker to convey to the viewers the

¹³ *Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards,”* 18 FCC Rcd 19859 (Oct. 3, 2003) (hereinafter “Golden Globes I”).

¹⁴ *Golden Globes II*, FCC 04-43 at 6.

¹⁵ *Id.*

extraordinary conditions” facing the soldiers in the film.¹⁶ The Commission determined that "the expletives uttered by these men as these events unfold realistically reflect the soldiers' strong human reactions to, and, often, revulsion at, those unspeakable conditions and the peril in which they find themselves."¹⁷ Suddenly, again, the F-word might not be indecent under FCC rules – it depended on the context.

Saving Private Ryan was a fictional, scripted dramatic film performed by actors. To be consistent, the rationale behind the FCC’s determination that *Ryan* was not indecent should seemingly apply to other fictional, scripted portrayals of our nation’s uniformed officers exhibiting “strong human reactions” as they realistically respond, often in revulsion, to extraordinary conditions, challenges, and peril. But, the Commission, while finding the use of expletives “essential” to the realistic depiction of American soldiers, last March declared them indecent when used in the realistic depiction of American police officers in *NYPD Blue*, a multiple Emmy-Award winning hit television series that ultimately ran for 12 critically-acclaimed years on ABC. *Blue* was ruled indecent because its cops, while exhibiting strong human reactions as they realistically responded, often in revulsion, to extraordinary conditions, challenges, and peril, uttered the words “shit” and “bullshit.”¹⁸

In finding *Blue* indecent, the Commission expanded its Golden Globes ruling on “fuck” to the word “shit,” and its variants, stating that “shit” is “one of the most vulgar, graphic and

¹⁶ *Complaints Against Various Broadcast Licensees Regarding Their Broadcast on November 11, 2004, of the ABC Television Network’s Presentation of the Film “Saving Private Ryan,” Memorandum Opinion and Order*, FCC 05-23, 6 (Feb. 3, 2005).

¹⁷ *Id.*

¹⁸ *March 15th Omnibus Order*, FCC 06-17 at 36–39.

explicit descriptions of excretory activity in the English language. Its use invariably invokes a coarse excretory image.”¹⁹ The Commission then concluded that “the ‘S-Word’ is patently offensive under contemporary community standards for the broadcast medium. It offered no qualitative or quantitative evidence – no data, no polling, no surveys, nothing -- to support these sweeping assertions.

The Commission’s unsupported conclusion and rationale would likely come as a surprise to many who know real New York City cops, or who walk that city’s streets, or who had been among the 39 million Americans who viewed CBS’s *9/11* documentary in its first airing on March 2002 and heard NYC firefighters repeatedly using that word.²⁰ Not just in New York, but in many American cities, and among many diverse communities, the word “shit” has nothing to do with excrement, and everything to do with disbelief, disagreement, and disgust. In many communities, and to many Americans, it is simply not accurate to say that it “invariably invokes a coarse excretory image.”

NYPD Blue creator Steven Bochco, whose other distinguished works include the famed television series *Hill Street Blues* and *L.A. Law*, maintains *Blue* was never indecent. Given the intense subject matter of the show and its nationwide audience’s expectation of – and desire for – a realistic depiction of New York’s cops and criminals, Bochco says *Blue*’s harsh vocabulary was entirely in keeping with the context of the show, and also entirely consistent with “contemporary community standards for the broadcast medium.”

¹⁹ *Id.* at 38.

²⁰ Paul J. Gough, *Wary of FCC Rules, CBS Sets Updated ‘9/11’*, HOLLYWOOD REPORTER, August 10, 2006, available at: http://www.hollywoodreporter.com/thr/television/article_display.jsp?vnu_content_id=1002984894

Indeed, the language cited by the FCC as being indecent when said by NYC police in multiple 2003 episodes of *Blue* had already been said by NYC firefighters and other first responders in the March 2002 broadcast of the CBS *9/11* documentary. With the FCC having never conducted an indecency investigation concerning that March 2002 show, which it routinely does if just one complaint is filed, it is likely that not one of the 39 million Americans who watched that broadcast actually filed an indecency complaint. This calls into serious question the validity of the Commission's assertion that the S-word is patently offensive under contemporary community standards for the broadcast medium.

“In a show like *NYPD Blue* —where the kinds of stories you're telling involve some of the really worst elements of society, and you're telling stories about the men and women who protect our streets and protect us from that criminal element There's a context to that kind of storytelling that I think allows you to much more vigorously and appropriately defend the use of certain kinds of language,” Bochco says.²¹ But while the hard-hitting, gritty realism of *Blue* may have made the series groundbreaking, original, and hugely popular across the nation, it did not persuade the Commission. As Bochco noted, “that sort of sense of context doesn't seem to hold much sway with the FCC these days.”²²

The Commission's decision on *Blue* was confusing and seemingly contrary to reality in other ways. For example, the Commission considered the utterances of “dick” and “dickhead” in *Blue*. It ruled that while these words were indeed references to sexual organs and “undeniably coarse and vulgar, they do not have the same level of offensiveness as the ‘F-Word’ or ‘S-

²¹ Podcast interview with Jonathan Rintels, Executive Director, Center for Creative Voices in the Media, May 25, 2006, available at, <http://creativevoices.libsyn.com/>.

²² *Id.*

Word.” The Commission concluded these words were not “sufficiently shocking to support a finding that they are patently offensive.”²³ Therefore, the Commission ruled, “dick” and “dickhead” were not indecent.

Again, in this ruling, the Commission offered no evidence to support these generalizations and assertions. And it’s arguable that in many communities, calling someone a “dick” or “dickhead” is far more shocking and offensive, far more likely to invariably invoke an image of a sexual organ, and far more likely to be answered by a punch in the nose or worse, than calling someone a “bullshitter” or “full of shit.” The latter are commonplace in many communities, including schoolyards and ball fields. Indeed, recently ESPN instituted a five second delay in its live coverage of the Little League World Series of baseball because the field microphones captured the young players uttering variants of “shit” and “fuck.”

These are not the only inconsistencies and problems in the FCC’s *Blue* decision that cause confusion. In the Eastern and Pacific Time zones, where ABC broadcast *Blue* starting at 10 p.m. local time, the show was not indecent because it was within the FCC’s indecency “Safe Harbor” that starts at 10 p.m. But in the Central and Mountain Time zones, where primetime network television broadcasting traditionally starts one hour earlier, ABC stations aired the same shows beginning at 9 p.m. local time. In these time zones, the very same episodes of *Blue* were indecent because they aired outside of the Safe Harbor. In Tennessee, split between Eastern and Central time zones, *Blue* was not indecent in Knoxville, but it was indecent in Nashville, even though the same show was playing in both cities simultaneously. Indeed, in its *Without a Trace* decision, also released in March, the FCC itself was confused by where that show was indecent

²³ *March 15th Omnibus Order*, FCC 06-17 at 37–38.

and where it was not indecent, ultimately reversing its findings of indecency against stations that it later realized were broadcasting in the Eastern rather than the Central time zone.²⁴

For those primetime network television programs targeted to a grown-up audience that start in the last hour of primetime, which is 10 p.m. Eastern time, but 9 p.m. in the Central and Mountain zones, the practical consequence of the FCC's decisions is that the "Safe Harbor" has been eliminated. This is completely contrary to the intent in creating the "Safe Harbor."

Dramatic scripted programming on commercial television is not the only place where inconsistent and confusing FCC indecency decisions cause the censoring of programming that is decent and not subject to indecency rules. Famed American filmmaker Martin Scorsese's PBS documentary *The Blues: Godfathers and Sons* was declared indecent by the Commission because the real-life bluesmen said "fuck" and "shit." KCSM-TV, the California PBS station that received the one viewer complaint filed at the FCC against the film, aired the documentary unedited in March 2004. In March 2006, the Commission found the station liable for a \$15,000 indecency fine.²⁵ Dave Mandelkern, president of the San Mateo County Community College District Board of Trustees, the station's licensee, defended the documentary, and his station's decision to air it. "We're an educational television station," Mandelkern said. "We're airing an educational documentary by a highly-acclaimed producer and it's basically being treated as if it were a piece of pornography."²⁶ Despite cries for consideration of context, and comparisons to

²⁴ Todd Shields, *FCC Makes Goof on Indecency Fine*, MEDIA WEEK, March 29, 2006, available at http://www.mediaweek.com/mw/news/tvstations/article_display.jsp?vnu_content_id=1002274445

²⁵ *March 15th Omnibus Order*, FCC 06-17 at 23-27.

²⁶ Suzanne Bell, *College threatens legal action over \$15,000 FCC indecency fine*, STUDENT PRESS LAW CTR. NEWSFLASH, June 5, 2006, available at, <http://www.splc.org/newsflash.asp?id=1273>.

Saving Private Ryan, the majority of the Commission maintained in its ruling that *The Blues* was indecent.

Among many accomplishments in his extraordinary filmmaking career, Martin Scorsese directed three films that the American Film Institute judged to be among the “100 Greatest American Movies of All Time” – *Raging Bull*, *Taxi Driver*, and *Goodfellas*.²⁷ Nevertheless, substituting its creative judgment for Scorsese’s, the Commission majority found that “This case is unlike *Saving Private Ryan*, where we concluded that deleting offensive words ‘would have altered the nature of the artistic work and diminished the power, realism and immediacy of the film experience for viewers.’”²⁸

The Commission’s attempt to distinguish *The Blues* from *Ryan* does not add up. If anything, a nonfiction documentary should certainly enjoy at least the same consideration of context and quality as a fictional, scripted, acted dramatic film – even as great a film as *Ryan*. Scorsese’s film accurately and beautifully captured the unique character and community of the bluesmen by using their often rough language. The context and quality of this real-life documentary film should have mattered to the Commission, as it did when the Commission held that the scripted rough language uttered by actors playing fictional soldiers in *Saving Private Ryan* was not indecent.

²⁷ AMERICAN FILM INSTITUTE, available at <http://www.afi.com/tvevents/100years/movies.aspx>.

²⁸ *March 15th Omnibus Order*, FCC 06-17 at 25–26.

As for the “substantial guidance” that the FCC says its decisions provide to broadcasters and creative artists,²⁹ what if a broadcaster wanted to air in primetime a documentary created by one of America’s great filmmakers about World War II soldiers that contains rough language such as both “shit” and “fuck”? Based on *Ryan*, would such a film be found not indecent in a future FCC enforcement proceeding? Or based on *The Blues*, should the broadcaster censor the rough language in the film, or air it in the Safe Harbor, because the FCC would now find it indecent?

It turns out this is no hypothetical question. Famed filmmaker Ken Burns’s powerful 14-hour documentary about World War II, *The War*, is scheduled to air for the first time on PBS this fall from 8 p.m. to 10 p.m. The documentary contains both “fuck” and “shit,” as well as other material that might potentially subject its broadcasters to an FCC indecency fine. Because of their legitimate concern and confusion over how the FCC might rule on possible indecency complaints lodged against Burns’ film, PBS has decided to give its member stations the option to “play it safe” and air Burns’ documentary after 10 p.m. in the FCC Safe Harbor.³⁰ PBS president and CEO Paula Kerger said the reason for the decision concern that stations that broadcast this program would get hit with fines. “When you have stations whose operating budgets in some cases are only a couple million dollars, even frankly the old fines, once you factor in all the legal work and so forth, were daunting. The fines now would put stations out of business, and we cannot allow that to happen.”³¹

²⁹ *Id.* at 2.

³⁰ See Matea Gold, *PBS “War” Battle Plans*, L.A. TIMES, July 6, 2006, available at, <http://www.latimes.com/entertainment/news/la-wk-pbsforweb27jul27,0,666090.story>.

³¹ *Id.*

Prior to making this decision, Kerger walked the halls of the FCC, hoping to glean some insight for PBS member stations into how the Commission might rule on *The War*. According to a report in *Broadcasting & Cable*, she came away from “meetings with four of the five FCC commissioners with ‘no clear guidance’ on how to proceed.”³² Said Kerger, “They think that they are communicating [their indecency policy] clearly to all broadcasters about what the standards should be. My point is that we don’t have the resources to figure out what they’re thinking.”³³

IV.

The “Chilling Effect” of the FCC’s Recent Indecency Rulings

The inconsistent and confusing approach of the FCC to regulating broadcast content has left networks, affiliates, writers, producers, and directors with the impression that when it comes to the FCC's interpretation of "indecency," the only thing certain is uncertainty. With maximum indecency fines recently increased tenfold, the exponentially-increased financial risk in airing potentially “indecent” material, coupled with that huge uncertainty, makes it highly likely that programming that is not indecent will be left on the cutting room floor. But the true cost of censorship is not just monetary. It must also be measured by that which Americans are denied the opportunity to see: the innovative and compelling creative works that are kept off the air because the easiest way to avoid FCC indecency fines is to avoid airing anything that comes close to crossing the indecency line, wherever that may be.

³² Jim Benson, *PBS to Revisit Stricter Profanity Policy*, BROADCASTING & CABLE, July 26, 2006, available at, <http://www.broadcastingcable.com/article/CA6356639.html>.

³³ *Id.*

Emmy- and Oscar-winning producers Tom Fontana and Barry Levinson know this cost well. The pilot episode of their WB Network series, *The Bedford Diaries*, featured a group of college students enrolled in a class on human sexuality. The premiere episode had been approved by the WB and was already scheduled to air when Fontana and Levinson received a phone call from an anxious network executive. Concerned about the recent FCC fines for “indecent” programming that had just been released days earlier, the chairman of the WB Network, Garth Ancier, wanted the producers to delete specific scenes from the episode, including one that depicted two young women kissing on a dare, and another scene that depicted a young woman unbuttoning her jeans.³⁴

“I said ‘no’,” Fontana reported. “I told him I found the (FCC) ruling incomprehensible. He said the censor would do the edit.” Fontana and Levinson protested that their original cut of *The Bedford Diaries* pilot was not indecent. And the WB network publicly agreed with them. Nevertheless, acting out of what it called “an abundance of caution,” the network chose to air the edited version of the show. “In more than 20 years in the business, this is the most chilling thing I’ve ever faced,” said Fontana.³⁵

The WB Network is not the only broadcaster exercising an “abundance of a caution” when it comes to keeping material off the air that could potentially generate an FCC indecency fine. In April 2004, the producers of the television show *Masterpiece Theater* chose to not make available to PBS member stations the original version of the critically-acclaimed British series

³⁴ Bill Carter, *WB Worried About Drawing Federal Fines, Censors Itself*, N.Y. TIMES, March 23, 2006, at E1.

³⁵ *Id.*

Prime Suspect. Instead, *Masterpiece Theater* offered public television stations the option of airing either the lightly or the heavily edited version.³⁶

Another example of the “chilling effect” of the FCC’s inconsistent and confusing indecency decisions is the refusal of several CBS affiliates to air at its scheduled time that network’s powerful Peabody-award winning *9/11* documentary, despite the fact that the documentary has aired twice before.³⁷ In the film, real-life New York firefighters and other public servants at the World Trade Center utter audible profanities as they heroically try to deal with that day’s horror. With the American Family Association (AFA), one of the pressure groups flooding the FCC with indecency complaints, already urging its members to complain to the FCC if the documentary airs, many smaller market stations are either pushing back the documentary to the Safe Harbor time of 10 p.m., or not airing it at all.³⁸

The dilemma that CBS stations faced on the *9/11* documentary is this: Does this show fall within the narrow exception to the FCC’s general prohibition of “shit” and “fuck” contained in its *Saving Private Ryan* decision? Or would those words in this film that profiles NYC firefighters be considered analogous to those words in *NYPD Blue*, a television series that realistically profiles NYC police officers, and therefore be found indecent by the FCC? Does the fact that this film is a documentary about real-life NYC firefighters argue for or against including it in the *Ryan* exception? What about the FCC’s finding that those words were indecent in *The Blues*, another high quality documentary?

³⁶ Jacques Steinberg, *Eye on F.C.C., TV and Radio Watch Words*, N.Y. TIMES, May 10, 2004.

³⁷ Larry Neumeister, *Some CBS affiliates worry over 9/11 show*, ASSOCIATED PRESS, Sept. 3, 2006, available at, http://news.yahoo.com/s/ap/20060903/ap_en_tv/cbs9_11_film.

³⁸ *Id.*

Since the CBS *9/11* documentary has aired twice before without being declared indecent, can CBS stations presume it would not be indecent on its third broadcast? No. Said FCC spokeswoman Tamara Lipper, “We respond to viewer complaints. We haven’t seen the broadcast in question. It’s up to individual stations to decide what they should air or not air.” While she noted that “the historical context of 9/11 is important to the context of the broadcast,” she could not say whether the Commission might ultimately find the show indecent when it rules on the complaints that the AFA has promised to file.³⁹

Recently, it was reported that *Eyes on the Prize*, the Peabody Award-winning 14-hour documentary of the Civil Rights Movement, which premiered on PBS in 1987 and reran in 1993 without generating any FCC indecency enforcement action, may now be censored by PBS stations for fear of FCC fines over its language.⁴⁰ Says PBS chief Paula Kerger of the dilemma over whether to censor *Prize*, “In order to tell these stories well, the language needs to stay. It’s very clear this is relevant.” Yet PBS stations must take seriously the possibility of even a single complaint to the FCC, as the fine levied by the FCC against *The Blues* demonstrates. It costs WGBH \$30,000 in legal fees just to file a response to an FCC inquiry, and a \$325,000 fine could bankrupt smaller stations.⁴¹ “I’m somewhere between concerned, angry and sad,” PBS exec Margaret Drain says. “When you censor language, you’re altering reality. I don’t think that’s healthy in an open and democratic society. We ought to be mature enough to make judgments for ourselves.” Kerger and Drain are both concerned that the FCC is “breeding an atmosphere of

³⁹ *Id.*

⁴⁰ Gail Shister, *Shadow of censorship over ‘Prize’*, PHILADELPHIA INQUIRER, September 20, 2006, available at http://www.philly.com/mld/inquirer/news/magazine/daily/15559691.htm?source=rss&channel=inquirer_daily

⁴¹ *Id.*

fear" among filmmakers and that they will begin censoring themselves. According to Drain, the result will be that "You get nothing but the safest of the safe. No one takes chances or risks. If you're doing stories about history, the content isn't always safe. You have to capture reality as it exists."⁴²

Here, squarely, is the very real harm that the FCC's inconsistent and confusing indecency enforcement poses to broadcasters, creative media artists, and the public. Programs like *The War*, *Eyes on the Prize*, *NYPD Blue*, *The Blues: Godfathers and Sons*, and *9/11* are precisely the kind of quality television that many Americans want to see, and that comes along far too rarely. While some of those shows may not be appropriate for children, others are precisely the kind of television programming that many adults want to watch together with their children and grandchildren, as a family. Indeed, they are precisely the kind of quality programming that in their public speeches, many FCC Commissioners urge broadcasters to create and air to fulfill their responsibilities as trustees of the publicly-owned airwaves. But with local stations forced to broadcast these shows in the Safe Harbor of 10 p.m. or later, or not airing them at all, they may not draw the audience necessary to support their creation. Americans will be denied the opportunity to view the high quality shows that they want to see on television.

As the dilemma of broadcasters over whether and when to air these high quality television shows vividly illustrates, the costs of the FCC's inconsistent and confusing indecency decisions are not hypothetical. Nor are they simply monetary. These decisions severely restrict the Constitutional rights of broadcasters, creative media artists, and the public to air, create, and view high-quality, challenging, and important programming that is not indecent.

⁴² *Id.*

The problem is not limited to programming that has already been created and might now be judged by the FCC to be indecent. It also extends to programming that, for fear of FCC indecency fines, may never be created, or may be created but then suffer creatively from being watered down. When *NYPD Blue* ended its run in 2005, it had provided millions of loyal viewers with over a decade of thought-provoking, informative, and highly entertaining dramatic television. Given the show's long-running success, it is easy to forget that controversy almost prevented the series from ever airing. Even before *Blue* premiered, self-styled indecency watchdog groups were campaigning to get it cancelled, and many local ABC affiliates initially refused to air the program. Despite that loss of affiliates, ABC decided to air the first episode of *NYPD Blue* unedited. Once the American public was given the opportunity to view *Blue* and decide for itself whether the show had merit, it became one of the most-watched shows on television. The opposition to *Blue* was soon overwhelmed by praise for the show's quality and originality.

But today, that story might not have such a happy ending for the American public. Steven Bochco, *NYPD Blue*'s talented creator, believes a similarly provocative series would not stand a chance of being broadcast now, in the "play it safe" and "abundance of caution" environment caused by the combination of vastly increased fines and inconsistent FCC enforcement.⁴³ The cost of losing this kind of non-indecent programming, according to Bochco, "is in variety. The cost is in choice. The cost is in having a strong, competitive creative environment which really draws out the best that the creative community has to offer."⁴⁴ These

⁴³ Podcast interview with Jonathan Rintels, Executive Director, Center for Creative Voices in the Media, May 25, 2006, available at, <http://creativevoices.libsyn.com/>.

⁴⁴ *Id.*

hidden costs are imposed not only on the broadcasters, writers, directors, and producers of creative programming, but on the American audience as well.

When talented creative artists lose the ability to exercise creative freedom, the American public also loses. Regardless of how laudable its goals, a regulatory regime that censors the free expression of material that is not indecent overlooks the valuable role controversial, creative programming can play in our society. Three decades ago, the nation was riveted by a broadcast mini-series that featured bare breasts, graphic scenes of violence and rape, and repeated use of the inflammatory and hateful “N-word.” Nevertheless, *Roots* was watched by tens of millions of Americans, including children, and became one of the highest rated shows in the history of television. Many cultural observers pointed to the impact of *Roots*, and the discussions it engendered in schools and around the family dinner table, as a turning point in race relations in America.

Despite this remarkable legacy, *Roots* might never again be shown in its original form on broadcast television. At a panel discussion during the 2004 National Association of Broadcasters Convention, the opening scene of *Roots*, featuring a historically-accurate depiction of bare breasted women in an African village, was screened. Afterwards, the then-head of the FCC Enforcement Bureau told the audience of broadcasters seeking guidance about FCC indecency rules that he could not say whether or not the 27 year-old *Roots* would be found “indecent” by today’s Commission.⁴⁵ With such “guidance,” should broadcasters now shoulder the risk of airing *Roots* again on broadcast television? Should creative artists and broadcasters invest time and money to develop another show like *Roots*? The loss to the public when powerful and

⁴⁵ Comments of David Solomon, Chief, FCC Enforcement Bureau, at NAB 2004 Convention Panel attended by Jonathan Rintels, Executive Director, Center for Creative Voices in the Media, April 2004.

important shows like *Roots* are shelved because of concerns that the FCC may, potentially, find them indecent, is immeasurable.

Importantly, programs like *Roots*, *Eyes on the Prize*, and *The Blues* do more than entertain. They tell the stories of – and give voice to -- the politically-marginalized. When these works are censored or shelved, those voices are silenced. For some communities and cultures that may use indecent speech to differentiate themselves from those in power, such as those portrayed in these programs, censoring that speech renders them voiceless in our nation's political dialogue. Their stories may go untold.

That creative works with political overtones are at risk as a result of the FCC's inconsistent and confusing regulation of indecency seems irrefutable, given the impact of the Commission's recent decisions on hard news programs. Louis Wiley Jr., executive editor of PBS's award-winning investigative reporting show, *Frontline*, has complained of having to engage in "absurd contortions to deal with indecency concerns," including editing the language of a Gulf War veteran recounting the intense emotions of soldiers in the field.⁴⁶ Wiley has expressed concern that worries over potential FCC fines will result in more than just increased editing. "A few strong words are not the only thing that may leave the air. Entire topics may be off-limits. Today, it is unlikely that even a heavily edited version of *Frontline*'s powerful investigation of the porn industry, *American Porn* (2002), could be repeated at 9 p.m."⁴⁷ Considerable portions of *American Porn*, according to PBS's website, are concerned with "the politics of porn," actions of prosecutors, and court decisions – all topics and speech with significant and important political content.

⁴⁶ Louis Wiley, Jr., *Censorship at Work*, CURRENT, July 17, 2006, available at, <http://www.current.org/fcc/fcc0613indecency.shtml>.

⁴⁷ *Id.*

Famed children's television advocate Peggy Charren, founder of Action for Children's Television and winner of the Presidential Medal of Freedom, fears that the FCC's overly-broad and inconsistent decisions about indecency may effectively prevent creative works with political overtones from ever reaching mainstream audiences, and she believes the result will be a weakening of American democracy. "By censoring that kind of speech, we're eliminating the opportunity for people to say what they really think, and saying what you really think is the essence of living in a democracy that is working," Charren said.⁴⁸

The impact of the FCC's broad new indecency policy has been pervasive, but some feel its chilling effects more than others. Well-established talents like Burns, Bochco, Fontana, Levinson, and Scorsese can continue to work in broadcast television, largely on their own terms, or they can choose to take their talent elsewhere, to the less restrictive environments of independent film and cable television. But less financially-secure and well-established creative artists may not have the same options, and as a result are uniquely harmed by FCC rulings that chill creative freedom.

America's Funniest Home Videos producer Vin Di Bona is also the Chairman of the Caucus for Television Producers, Writers, and Directors. Di Bona says the FCC's recent indecency rulings are a particular cause of concern to Caucus members, who are often the advocates of more controversial story ideas. "As independent television producers, writers and directors," Di Bona said, "we often bring to the networks and the public... stories that might not otherwise get told in the more corporate environment of in-house writers, production companies and producers. Because of that, our material is going to be more challenging for the networks

⁴⁸ Podcast interview with Jonathan Rintels, Executive Director, Center for Creative Voices in the Media, May 25, 2006, available at, <http://creativevoices.libsyn.com/>.

and the media airwaves. We hope that in trying to tell more open stories, more unique stories, that we are not penalized for that.”⁴⁹

Television programming is extremely expensive to develop and produce. The process of developing an idea into a finished show can take years, and the FCC’s indecency decisions are a key consideration in that process. Those decisions are reviewed and analyzed by a chain of network and production company executives and lawyers, network Standards and Practices departments, producers, and others, to ultimately “guide” the creative talent as to what exactly constitutes “indecency” under the FCC rules and is therefore out of bounds. When the raw material for these indecency analyses – the FCC’s own indecency decisions and statements – are inconsistent and confusing, each link in that review chain will likely choose to avoid risk and “play it safe.”

As creative artists and producers know, there are already lots of reasons for broadcasters to say “No” to the production and airing of challenging, controversial, and/or quality programming. The FCC’s indecency decisions provide many new powerful reasons to say “No” -- fear of heavy FCC fines, loss of license, potential postponement to the “Safe Harbor” when a smaller audience is watching, potential production of a show for broadcast that must then be shelved or televised on cable because it is later determined to be too risky, etc. More and more content that is very likely not indecent either falls to the cutting room floor or is never created in the first place because it may be “close to the line -- wherever that line is.”

⁴⁹ Podcast interview with Jonathan Rintels, Executive Director, Center for Creative Voices in the Media, May 25, 2006, *available at*, <http://creativevoices.libsyn.com/>.

V.

The FCC's Indecency Decisions Harm Children

The FCC's newly aggressive approach to cracking down on so-called "indecent" content has been defended primarily on the grounds that it is necessary to protect the interests of America's children. Yet, in the eyes of many, the FCC's indecency decisions have had the unintended consequence of harming children. They have caused the already small number of high-quality and thought-provoking television programs -- precisely the kinds of programs that many parents want their children to watch -- to be censored, canceled altogether, or postponed to a late hour when children are in bed. .

Peggy Charren is a member of Creative Voices' Board of Advisors and one of nation's best-known and most-respected advocates for quality children's television programming. In 1968, when Charren founded Action for Children's Television (ACT), her primary concern was the lack of meaningful programming for preteens and teenagers on broadcast television. "There was programming for parents and their very young children to watch together, but there was very little for the older child and that's still true. Even with cable and satellite and all the other choices available, there still isn't very much out there for this age group," says Charren.⁵⁰

Today, she views the entire debate over indecent language as a distraction, diverting the focus of networks, parents, and the FCC away from the critical lack of valuable, educational television programming for young people. "[T]hat's what the industry should be doing. The

⁵⁰ *Id.*

industry shouldn't be worrying about a swear word," Charren said.⁵¹ With increased technology like Tivo and the V-Chip, and the television rating system, parents are more capable than ever before of monitoring their children's television viewing.

By causing quality television to disappear, the FCC has taken a powerful tool out of the hands of parents who use television to open up a dialogue with their kids about controversial topics like violence, poverty, racial disparity, and cultural diversity, says Charren. Consider how many parents watched *Roots* with their children and then engaged in a dialogue with them about the issues raised by that provocative program. Consider how many parents or grandparents did the same with *Saving Private Ryan*.⁵² And consider how many parents or grandparents would want that same opportunity to share the issues and history raised in the upcoming Ken Burns documentary, *The War*, but may be denied that opportunity as a result of the FCC's failure to provide useful guidance as to what does and does not constitute indecency.

When *The Blues* was found indecent by the FCC, much of the discussion concerned the "chilling effect" on broadcasters and artists. Charren felt that discussion did not go far enough: "It's not just about what message does it send to a Martin Scorsese, it's what message does this send to America's children?" "If we protect children from speech," said Charren, "we restrict them from participating in what makes this country we're living in. I fear the whole country may be wrapped up in eliminating speech that we need to hear and that children need to hear."⁵³

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

VI.

The FCC Indecency Complaint Process is Broken

In the opening paragraph of its March indecency decisions, the FCC stated that “Americans have become more concerned about the content of television programming, with the number of complaints annually received by the Commission rising from fewer than 50 in 2000 to approximately 1.4 million in 2004.”⁵⁴

How valid are those statistics? What exactly constitutes an FCC “complaint?”

According to a report by the *Wall Street Journal*, of the 6,500 complaints that the FCC counted about an episode of CBS’s hit show *Without a Trace*, which featured a brief scene of a teen sex orgy, all but three appeared to originate as computer-generated form letters.⁵⁵ Nevertheless, the FCC imposed a \$3.6 million fine on CBS and its affiliates, even though the *Trace* scene was hardly remarkable to anyone who has ever watched music videos or soap operas.

The Parents Television Council (PTC) claims credit for submitting thousands of complaints to the FCC about the April 7, 2003 episode of Fox’s *Married by America* that the Commission ultimately fined \$1.2 million. But blogger Jeff Jarvis, former TV Guide critic, used the Freedom of Information Act to discover that “all but two came from the so-called Parents Television Council’s automated kvetch-machine.”⁵⁶

⁵⁴ *March 15th Omnibus Order*, FCC 06-18 at 2.

⁵⁵ Amy Schatz, *Networks Fight Rising Number of FCC Fines*, WALL STREET JOURNAL, May 19, 2006, available at http://online.wsj.com/article/SB114800498637957462.html?mod=todays_us_marketplace.

⁵⁶ Jeff Jarvis, *The outcry over indecency is a big lie*, THE BUZZMACHINE, Nov. 10, 2005, available at, <http://www.buzzmachine.com/index.php/2005/11/10/the-outcry-over-indecency-is-a-big-lie/>.

According to an investigation by the conservative Progress and Freedom Foundation, the vast majority of complaints received by the FCC come from those who have signed up for an email list-serve operated by the PTC or other pressure groups like American Family Association (AFA).⁵⁷ When these groups believe a broadcast show is indecent, they solicit these email list-serves to click on a link that will automatically send a pre-written complaint to the FCC. A single click on one of these email complaint forms generates an email complaint to each Commissioner's office and other FCC offices. Under FCC procedures, each of these complaints is counted separately. Thus, one click from a complainant on one of these email solicitations can generate six or more counted "complaints" to the FCC.⁵⁸

To make these numbers even shakier, there is usually no statement in these emailed complaints that the complainer or his/her children actually viewed the broadcast of the show that they claim offended them. Indeed, these pressure organizations usually warn their members in advance on their websites to not watch the offending shows. Thus, it is likely that few of the complainants that send the complaints cited by the FCC even watch the broadcast of the shows they complain about. For those who insist on seeing the allegedly indecent moment in the show, some of these pressure groups include a link in their list-serve complaint solicitation to a brief clip posted on their own websites of the allegedly "indecent" portion of the show, seen in isolation and out of context.

For the FCC to cite these "thousands" or even "hundreds of thousands" of complaints as justification for its stepped-up and highly confusing indecency enforcement, without determining

⁵⁷ ADAM THIERER, THE PROGRESS & FREEDOM FOUNDATION, EXAMINING THE FCC'S COMPLAINT DRIVEN BROADCAST INDECENCY ENFORCEMENT PROCESS (2005), *available at*, <http://www.pff.org/issues-pubs/pops/pop12.22indecencyenforcement.pdf>.

⁵⁸ *Id.*

whether the complainants actually viewed the broadcast of the show they are complaining about, is extremely troubling. By not doing so, the Commission makes broadcasters, creative media artists, and the public all potential victims of click-fraud.

VII.

Conclusion

Creative media artists share the concerns of many Americans about the quality of programming on broadcast television. The goal of these artists and other free expression advocates is not to encourage the broadcast of “indecent” material, but rather to preserve the already inadequate amount of broadcast television programming that is creative, original, high quality, challenging, and not indecent. Former Federal Communications Commission (FCC) Chairman Newton Minow once famously referred to television as a “vast wasteland.” One unintended consequence of the FCC's recent indecency decisions is to make that television wasteland even vaster.

Rather than serve the public interest, the unintended consequence of the Commission’s inconsistent and confusing indecency decisions is to harm the public’s interest – including the interest of America’s children – in vibrant, diverse, high quality television. They threaten free expression, the underpinning of our nation’s democracy, requiring one of the most important and powerful sectors of our nation’s media to self-censor content that is not indecent.

Broadcast speech that is not indecent is Constitutionally-protected. Broadcasters and creative media artists have a right to air it, and the public has a right to hear it. Those Constitutionally-protected rights are imperiled by the FCC’s recent indecency decisions. The practical result of combining inconsistent and confusing indecency enforcement with a tenfold

increase in indecency fines is that broadcasters and creative media artists must throw out the Constitutionally-protected free expression “baby” with the indecent “bathwater.” What was a “chilling effect” on free speech is quickly becoming a new Ice Age.

Indecency rules must be crystal clear and consistently applied in order to protect speech that is not indecent, and therefore Constitutionally-protected, from being censored. That is not the case today.

The Center for Creative Voices in Media (CCVM) is a nonprofit 501(c)(3) organization dedicated to preserving in America’s media the original, independent, and diverse creative voices that enrich our nation’s culture and safeguard its democracy. Creative Voices’ Board of Advisors includes respected media scholars and artists, including numerous winners of Oscars, Emmys, Tonys, and other awards for creative excellence, who are all committed to fostering free expression in the broadcast community.

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Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

I hereby certify that (1) this brief complies with the type-volume limitation of Fed. R. App. 32(a)(7)(B) because the brief contains 2531 words, excluding the parts of the brief exempted by Fed. R. App. 32(a)(7)(B)(iii); and (2) this brief complies with the typeface requirements of Fed. R. App. 32(a)(5) and the type-style requirements of Fed. R. App. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect 12 in 14-point Times New Roman type.

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I hereby certify that the text of the E-Brief (PDF file) of *Amicus Curiae* and the paper copies are identical. I further certify that this brief complies with the protection requirement for briefs in digital format of Local Rule 32(a)(1)(E) because the Portable Document Format (PDF) file of the brief has been scanned for viruses using Symantec AntiVirus Corporate Edition and no virus has been detected.

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