

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

GILLETT COMMUNICATIONS OF
ATLANTA, INC., d/b/a WAGA-TV5,

Plaintiff,

v.

DANIEL BECKER, DANIEL BECKER
FOR CONGRESS COMMITTEE, and
THE FEDERAL COMMUNICATIONS
COMMISSION,

Defendants.

CIVIL ACTION

FILE NO. _____

**MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFF'S APPLICATION FOR TEMPORARY RESTRAINING
ORDER AND PETITION FOR DECLARATORY JUDGMENT**

Pursuant to Rules 220-1 and 220-3 of the Local Rules for the Northern District of Georgia, Plaintiff Gillett Communications of Atlanta, Inc. d/b/a WAGA-TV5 ("WAGA-TV"), files this Memorandum of Law in support of its Application for Temporary Restraining Order and Petition for Declaratory Judgment as follows:

I. INTRODUCTION AND BACKGROUND

Defendant Daniel Becker is a legally qualified candidate for the United States Congress in Georgia's Ninth Congressional District. Mr. Becker's campaign committee has asked to purchase time on WAGA-TV to air a thirty-minute paid political program on Sunday, November 1, 1992 between 4:00 p.m. and 5:00 p.m., immediately following the broadcast of the National Football League game between the Atlanta Falcons and the Los Angeles Rams.

The videotape of Mr. Becker's thirty-minute paid political program provided to WAGA-TV contains graphic, violent, bloody and shocking depictions and descriptions of female sexual organs, dismembered and aborted fetuses, fetal body parts, actual abortions being performed by dismemberment, the crushing of a fetus' skull as part of an abortion procedure, and detailed footage of first and second trimester abortions being performed. The videotape includes graphic, bloody depictions of the uterus, female sexual organs, excreted uterine fluid, dismembered fetal body parts, and other products of conception.¹ The offending portions of the videotape depict these sexual organs, activities, and materials in a manner which is patently offensive according to contemporary community standards.

Mr. Becker's request to air the advertisement at the stated time places WAGA-TV in an untenable position under existing law and presents a conflict between two bedrock principles of broadcast regulation: On one hand, federal law prohibits WAGA-TV from censoring paid political programming and from denying "reasonable access" to candidates requesting airtime. See 47 U.S.C. §§ 312(a)(7) and 315(a). On the other hand, 18 U.S.C. § 1464 and 47 U.S.C. § 312(a)(6) impose felony criminal and administrative sanctions for airing "indecent" material. See, e.g., Action for Children's Television v. F.C.C., 932 F.2d 1504 (D.C. Cir. 1991) (felony to broadcast "indecent" material unless

¹ The video tape is attached as Exhibit "A" to the Affidavit of Mr. Jack Sander.

at an hour when risk of children in the audience can be minimized). Thus, if WAGA-TV airs Mr. Becker's shocking and indecent program at the requested time, it will violate 18 U.S.C. § 1464 which constitutes grounds for the revocation of its broadcast license, and will suffer irreparable harm to its reputation and standing in the community. However, if WAGA-TV airs Mr. Becker's program at any time other than that requested by Becker and his Campaign, it will violate the "reasonable access" and "no censorship" provisions of 47 U.S.C. §§ 312(a)(7) and 315, which also constitutes grounds for revocation of its license. Thus, no matter which course of action WAGA-TV pursues with respect Mr. Becker's program, it faces the genuine threat of serious criminal and administrative sanctions. As a result of the immediacy of this controversy, and the uncertainty of WAGA-TV's legal situation, declaratory and injunctive relief is crucial in this matter.

WAGA-TV submits that its conflicting legal and moral obligations can be harmonized, and the interests of the children in WAGA-TV's viewing audience can be protected, only by a declaration from this Court that Becker's program can only be broadcast during the "safe harbor" hours between 12:00 midnight and 6:00 a.m. when the risk of children being in the audience is minimized. Further, WAGA-TV asks the Court to enjoin the Federal Communications Commission from taking any regulatory or other action against WAGA-TV, either for channeling the program to the safe harbor hours, or in the alternative, for broadcasting this

shocking and indecent program at a time when children will likely be in the viewing audience in large numbers.

II. ARGUMENT AND CITATION OF AUTHORITIES

A. 18 U.S.C. § 1464 PROHIBITS THE BROADCAST OF BECKER'S PAID POLITICAL PROGRAM DURING THE TIME REQUESTED BECAUSE IT IS INDECENT.

Broadcasting indecent material during certain parts of the day violates 18 U.S.C. § 1464. That statute provides as follows:

§ 1464. Broadcasting obscene language

Whoever utters any obscene, indecent or profane language by means of radio communications shall be fined not more than \$10,000 or imprisoned not more than two years, or both.

Id. This prohibition has been uniformly held to apply to television as well as radio broadcasts. See e.g., Action for Children's Television v. FCC, 932 F.2d 1504 (D.C. Cir. 1991) ("ACT II"). In addition to the criminal penalties contained in the statute itself, violation of section 1464 constitutes grounds for revocation of a broadcaster's FCC license, as well as the imposition of other administrative sanctions. 47 U.S.C. §§ 312(a)(6), 315.

As interpreted under the First Amendment, however, 18 U.S.C. § 1464 does not provide a blanket prohibition against indecent material; it merely requires that the indecent material be broadcast when the risk of children being in the audience can reasonably be minimized. Typically, the FCC allows the broadcast

of such material during the "safe harbor" period between 12:00 midnight and 6:00 a.m. See FCC Proceeding to Implement Regulations to Restrict Broadcasting of Indecent Programming, 1992 FCC LEXIS 5392 (September 17, 1992). The broadcast of "indecent" material at any time other than these "safe harbor" hours constitutes grounds for revocation of WAGA-TV's broadcast license.

The FCC defines indecency as

language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs.

In re Sagittarius Broadcasting Corp., Memorandum Opinion and Order, released October 23, 1992 (copy attached). This definition was specifically upheld in Act II, supra. The linchpin of indecency enforcement is the protection of children from inappropriate broadcast material. Action for Children's Television v. FCC, 852 F.2d 1332, 1340 (D.C. Cir. 1988) ("Act I"). In fact, the whole purpose of indecency enforcement is to "shelter children from exposure to words and phrases their parents regard as inappropriate for them to hear", or in this case, to see. Id.

The extent to which a broadcast is indecent focuses on whether it is readily understandable to children in the audience. See Sagittarius, at 3. Whether material is patently offensive is a factual determination, based on careful consideration of context, such as whether the words (or pictures) in context are vulgar or shocking, the manner in which they are portrayed,

whether they are isolated or fleeting, and the work's relative merit. Infinity Broadcasting Corp., 3 F.C.C. Rcd. 930, 931-32 (1987).

The videotape presented to WAGA-TV by Becker and his Campaign is clearly indecent under these standards. The videotape contains, among other things, graphic, violent, bloody and shocking depictions and descriptions of female sexual organs; actual abortions being performed by dismemberment of the fetus; dismembered and bloody aborted fetuses and fetal body parts; a graphic, violent and shocking description of the crushing of a fetus' skull as part of an abortion procedure; and detailed footage of first and second trimester abortions being performed. The videotape includes graphic and shocking depictions of the uterus and female sexual organs, excreted uterine fluids, dismembered fetal body parts, fetal sexual organs and other products of conception. The offending portions of this videotape depict these sexual organs, activities and materials in terms patently offensive under contemporary community standards for the broadcast medium. See Sander Aff., ¶¶ 3-11; Pepper Aff., ¶¶ 5-11.

The reaction of WAGA-TV's callers to Mr. Becker's previous, less graphic political advertisements underscores the fact that the material in this 30-minute program is patently offensive as measured by contemporary community standards. See Sander Aff., ¶¶ 5-8; Pepper Aff., ¶¶ 5, 7. One of Becker's previous political ads was aired at 7:58 p.m. on Sunday, July 19, 1992 on WAGA-TV -- as late as possible during the day part requested. In the forty-

eight hours after the ad ran, WAGA-TV received 160 telephone calls from viewers, all of whom opposed the broadcast of such graphic material without warning at such an early family viewing hour. Sander Aff., 7. Many of these calls were from parents who were watching television with their children when the ad was aired. The callers stated that the ad upset them and their children, and that their children asked questions they could not answer or did not plan to discuss with them until later in their lives. In the view of these parents, the ad was an unexpected intrusion into a very personal matter. Sander Aff., 8.

In response to these calls and in anticipation of future requests from Becker's Campaign, WAGA-TV petitioned the FCC for a declaratory ruling prior to the August 11, 1992 run-off election concerning the ads. The FCC did not respond until nearly two weeks after the election was held, thereby providing no guidance to WAGA-TV in time for it to act. Moreover, the FCC only allowed WAGA-TV to run an "advisory" warning parents of the graphic nature of the upcoming ad.

After consulting with its attorneys, WAGA-TV determined that further efforts before the FCC would be futile and impractical, and did not appeal its decision at that time. Pepper Aff., ¶ 8. Now, given the extremely short time period before Becker seeks to broadcast his program and the fact that WAGA-TV will suffer irreparable harm to its reputation and standing in the community if it airs the program, WAGA-TV has no practical alternative but to petition this Court for relief. Pursuing further administrative remedies with the FCC would be completely futile

and any such "remedy" would be wholly inadequate given this threat of irreparable harm. Pepper Aff., ¶ 9-11. See Atlantic Richfield Co., v. United States Department of Energy, 769 F.2d 771 (D.C. Cir. 1984).

WAGA-TV's market research indicates that approximately 178,000 children between the ages of 2 and 17 will be watching television during this Sunday afternoon time period, and that an estimated 65,000 children of that age will be watching the Atlanta Falcons game immediately preceding the time Becker wants to broadcast his paid political program. See Sander Aff., ¶ 3. It is safe to assume that many of these children will be unsupervised by any adult, and yet will be exposed to the gruesome display in Becker's paid political program.

The FCC has stated that indecent material is still indecent even though it appears within the context of otherwise valuable programming. See, e.g., Eastern Education Radio, 24 FCC 2d 408, 413 (1970). Courts have agreed, stating "that serious merit need not, in every instance, immunize indecent material from FCC channeling authority." Action for Children's Television v. FCC, supra, 852 F.2d at 1339. Consequently, the indecent material in Becker's program may be channeled to the "safe harbor" hours even though the gruesome images are imbedded in an otherwise valuable political program.

As a result of the clearly indecent nature of Mr. Becker's videotape, WAGA-TV faces the genuine threat of serious criminal prosecution and administrative sanctions for broadcasting it at any time other than the "safe harbor" between midnight and 6:00

a.m. In addition, WAGA-TV's reputation and standing in the community will be irreparably damaged if it is required to broadcast Mr. Becker's shocking and indecent program during a part of the broadcast day when a such significant number of children will be in the viewing audience. Sander Aff., ¶ 7-11.

B. UNDER 47 U.S.C. §§ 312(a)(7) and 315(a), WAGA-TV CANNOT CENSOR OR "CHANNEL" A LEGALLY QUALIFIED CANDIDATE'S PAID POLITICAL PROGRAMS

Under 47 U.S.C. § 312(a)(7), a broadcast station must provide a legally qualified candidate for federal political office "reasonable access" to its broadcast facilities. Under 47 U.S.C. § 315(a), such access must be provided equally to all candidates, and the broadcaster may not censor the material presented for broadcast in any way. Section 315(a) provides as follows:

§ 315. Candidates for public office

(a) Equal opportunities requirement; censorship prohibition . . .

If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: Provided, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section.

47 U.S.C. § 315(a) (emphasis added). Violation of either of these "reasonable access" or "no censorship" provisions constitutes grounds for revocation of the broadcaster's license and other administrative sanctions:

§ 312. Administrative sanctions

(a) Revocation of station license or construction permit.

The Commission may revoke any station's license or construction permit -- ...

(7) For willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.

47 U.S.C. § 312(a)(7). See also 47 U.S.C. § 503(b)

(administrative sanctions include forfeiture).

In Codification of the Commission's Political Programming Policies, 7 FCC Rcd 678 (1991), on reconsideration, _____ FCC Rcd _____, FCC 92-210 (released June 11, 1992), the Commission endorsed and reaffirmed, inter alia, the following guidelines used in evaluating "reasonable access":

The "reasonable access" provisions of Section 312(a)(7) of the Communications Act require that, absent certain unusual circumstances, a legally qualified candidate for federal office be afforded program-length time in periods of the broadcast day in which there is maximum audience potential (i.e., "prime time" for television and "drive time" for radio) as well as during other periods of the broadcast day. 7 FCC Rcd at 681; Commission Policy in Enforcing Section 312(a)(7) of the Communications Act, supra, 68 FCC2d 1079 at 1090.

* * *

A station is prohibited from using a denial of "reasonable access" to a federal candidate as a means of censoring or otherwise exercising control over the content of any political "uses" by the candidate (e.g., by rejecting such uses for non conformance with any of the

station's suggested guidelines). 7 FCC Rcd at 681; 68 FCC2d at 1093 and 1094.

Id.

Although the Commission has suggested that "there may be circumstances when a licensee might reasonably refuse broadcast time to political candidates during certain parts of the broadcast day," the only specific instance in which the Commission has approved a licensee's refusal to sell air time to candidates involved a candidate's request for time during a newscast. New Primer on Political Broadcasting and Cablecasting, 69 FCC 2d 2209, 2289 (1978). In fact, in CBS, Inc. v. FCC, 453 U.S. at 367, 101 S. Ct. at 2813 (1981), the Supreme Court held that broadcasters may not direct candidates to unwanted times of the day or evening without violating the "reasonable access" provisions of the statute, and the Commission has ruled that candidates are entitled specifically to access to "prime time." See Report and Order in the Matter of Commission Policy in Enforcing Section 312(a)(7) of the Communications Act, 68 FCC 2d 1079, 1090 (1978).

In short, WAGA-TV cannot "channel" political programming to specific times of the broadcast day without depriving federal candidates of their rights to determine how best to conduct their campaigns. As a result, WAGA-TV cannot channel Mr. Becker's shocking and obscene program to times of the day when the likelihood of children being in the viewing audience is minimized without violating the "reasonable access" and "no censorship" requirements of federal law and facing the genuine threat of

administrative sanctions, including revocation of its broadcast license.

C THIS COURT SHOULD DECLARE THAT WAGA-TV CAN CHANNEL BECKER'S PROGRAM TO THE TIME OF DAY WHEN CHILDREN ARE NOT LIKELY TO BE IN THE VIEWING AUDIENCE

Although restrictions on the broadcast of indecent material cannot be absolute, such restriction may "do that which is necessary to restrict children's access to indecent broadcasts." ACT II, 932 F.2d at 1509. That is all WAGA-TV asks the Court to do in this case. WAGA-TV asks the Court to declare that (1) Mr. Becker's videotape is indecent under 18 U.S.C. § 1464, and that (2) WAGA-TV is only required to broadcast it during the "safe harbor" period between midnight and 6:00 a.m. This result would provide Mr. Becker "reasonable access", and yet protect the children in WAGA-TV's viewing audience from the shocking and indecent portions of his program.

The United States Supreme Court has recognized the unique accessibility of broadcasting to children as a justification for the regulation of indecent broadcasts. FCC v. Pacifica Foundation, 438 U.S. 726, 749 (1978). More recently, the Court recognized broadcasting's unique technological inability to shield the unwilling listener, especially a child, from receiving indecent messages. Sable Communications of California, Inc. v. FCC, 492 U.S. 115 (1990). It is easy to foresee a child watching television on Sunday afternoon without any adult supervision. Perhaps the child is watching the Atlanta Falcons football game,

or perhaps the child is merely switching channels. In any event, such a child who runs across Mr. Becker's program is likely to be severely traumatized by the shocking, graphic, and indecent depictions of female sexual organs, dismembered fetal body parts, and excreted material from the uterus. The mere presence of an "advisory", whether contained in the body of the program or immediately preceding it, is highly unlikely to discourage young children from watching the program. For this reason, this is precisely the type of material that should be channeled to the safe harbor hours after midnight to protect children from unwarranted psychological and emotional trauma.

Such a decision would comport with the FCC's latest ruling on this subject. In that ruling, the FCC found that "indecent" material creates an exception to the "reasonable access" requirements of Section 312(a)(7). In a memorandum, dated January 6, 1984, from then Commission Chairman Mark S. Fowler to Congressman Thomas Luken, the Commission stated that:

A broadcaster would be justified in refusing access to a candidate who intended to utter obscene or indecent language, because Section 312(a)(6) ... must be granted to carve an exception to Section 312(a)(7). ... The application of both traditional norms and statutory construction as well as an analysis of the legislative evolution of Section 315 [of the Communications Act] militate in favor of reading 18 USC Section 1464 as an exception to Section 315.

See Exhibit "B", attached hereto. This Memorandum represents the latest, best word from the Commission on the interplay between the "indecentcy" and "reasonable access", "no censorship"

statutes. WAGA-TV simply asks this Court to apply the FCC's latest opinion to this case.

Congress has mandated that television licensees pay particular attention to the needs and interests of children in their audience. See, e.g., Children's Television Act of 1990, Pub. L.No.101-437, 104 Stat. 996-1000, codified at 47 USC §§ 3030(a), 3030(b). The Commission has also promulgated rules implementing the Act. See, e.g., 47 C.F.R. § 73.3526(a)(8)(ii) and (a)(8)(iii). The Act and the Rules require that WAGA-TV be sensitive to and respond to the needs and interests of children in its audience. WAGA-TV, therefore, is responding to that mandate by seeking this declaratory ruling permitting it to protect the thousands of children in its viewing audience from a political advertisement that many of them cannot understand, and that may cause many of them to experience permanent psychological and emotional damage.

The Supreme Court has held that it is the "right of the viewers and listeners" that is "paramount". Columbia Broadcast System v. Democratic National Committee, 412 U.S. 94, 111, 93 S. Ct. 2080, 2090 (1973). Here, of course, there are two segments of the audience -- the electorate and young children -- that have strikingly dissimilar needs. The Supreme Court has stated the purpose of the "reasonable access" and "no censorship" provisions of the Communications Act as follows:

The candidates have the ... opportunity to make their views known so that the electorate may intelligently evaluate the candidate's personal

qualities and their positions on vital public issues before choosing among them on election day.

Buckley v. Valeo, 424 U.S. 1, 52-3, 96 S. Ct. 612, 651 (1976).

Beyond doubt, traumatizing children with shocking and indecent footage of female sex organs and excreted, dismembered fetal body parts does nothing to advance the statutory purpose of informing the electorate. Moreover, Becker may still put his videotape before the electorate during the safe harbor hours between midnight and 6:00 a.m. when children are not likely to be in the audience.

For these reasons, WAGA-TV respectfully submits that the requested ruling will strike a fair and equitable balance between two laudable legislative enactments. Channeling "indecent" political advertisements to time periods when the electorate, rather than young children, are in the audience will afford candidates the reasonable access to which they are entitled while, at the same time, preserving the long-standing and well-articulated interests in not subjecting children to indecent material.

CONCLUSION

For the reasons stated herein, WAGA-TV respectfully urges the court to issue an order restraining Becker and the Becker Campaign Committee from insisting upon airing their political advertising at the time requested, restraining the FCC from sanctioning WAGA-TV for either channeling the ad to between the hours of 12:00 midnight and 6:00 a.m. or for broadcasting it at the time requested, and also to issue a declaratory ruling that

the program is indecent, and may be channeled to that part of the broadcast day in which children do not constitute a significant part of the audience, specifically 12:00 midnight to 6:00 a.m., without violating any of WAGA-TV's legal obligations.

Respectfully submitted, this 28 day of October, 1992.

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DA: 92-1444

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

In the Matter of)
)
 Liability of Sagittarius)
 Broadcasting Corporation,)
 Infinity Broadcasting Corporation)
 of Pennsylvania &)
 Infinity Broadcasting Corporation)
 of Washington, D.C.)
)
 Licensees of Radio Stations)
 WXRK(FM, New York, New York)
 WYSP(FM), Philadelphia, Pennsylvania, &)
 WJFK(FM), Manassas, Virginia)
)
 For a Forfeiture)

MEMORANDUM OPINION AND ORDER

Adopted: October 16, 1992

Released: October 23, 1992

By the Chief, Mass Media Bureau:

1. The Chief of the Mass Media Bureau, acting pursuant to authority delegated by Section 0.283 of the Commission's Rules, has under consideration: (1) a Notice of Apparent Liability (NAL), 5 FCC Rod 7291 (MSB 1990), issued to the Sagittarius Broadcasting Corporation, licensee of radio station WXRK(FM), New York, New York, Infinity Broadcasting Corporation of Pennsylvania, licensee of radio station WYSP(FM) Philadelphia, Pennsylvania, and Infinity Broadcasting Corporation of Washington, D.C., licensee of radio station WJFK(FM), Manassas, Virginia, (collectively "Infinity"), in the amount of six thousand dollars (\$6,000), two thousand dollars (\$2,000) for each station; and (2) Infinity's February 11 and June 11, 1991, responses to the NAL.

2. The NAL was assessed for an apparent willful or repeated violation of 18 U.S.C. § 1464, prohibiting the broadcast of indecent material.¹ Pursuant to Sections 312(a)(6) and 303(b)(1)(D) of the Communications Act of 1934, as

¹ "Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than \$10,000 or imprisoned not more than two years, or both." 18 U.S.C. § 1464.

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amended, the Commission has statutory authority to take appropriate administrative action when licensees broadcast material in violation of 18 U.S.C. § 1464. The Commission has defined indecency as "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs."² See Action for Children's Television v. FCC, 932 F.2d 1504 (D.C. Cir. 1991) ("ACT I"). In FCC v. Pacific Foundation, 38 U.S. 726 (1978) ("Pacific"), the Supreme Court upheld the Commission's authority to regulate indecent broadcasts and the U.S. Court of Appeals for the D.C. Circuit has upheld the Commission's authority to restrict the broadcast of indecent material when there is a reasonable risk that children may be in the audience. Action for Children's Television v. FCC, 852 F.2d 1332 (D.C. Cir. 1988) ("ACT I").

3. A complainant alleged that on December 16, 1988, radio station WXRK aired indecent material on the Howard Stern Show, which airs from 6 to 10 a.m. on weekdays. Upon review of the complainant's tape recording of the broadcast, the Bureau sent the licensee a letter of inquiry ("LOI"). Based upon the broadcast and the licensee's response, the Bureau concluded that the material aired by WXRK, and simultaneously carried on WYSP and WJFK, apparently violated 18 U.S.C. § 1464, and issued a Notice of Apparent Liability for \$6000 (\$2000 to each of the three commonly-owned stations).

4. Infinity reiterates and augments many of the arguments from its response to our LOI: The Stern broadcast was not descriptive of sexual or excretory organs or activities; it was no worse than other cases the Bureau has dismissed; there is no reasonable risk of children in the WXRK audience from 6 to 10 a.m.; the determination of what is "patently offensive" for the radio should be a purely local standard; and WYSP and WJFK should not be fined as they were not the targets of any complaint. For the reasons outlined below, we find Infinity's arguments unpersuasive, and affirm the NAL's findings.

The Stern Broadcast Was Sufficiently Descriptive of Sexual Activities to Warrant an Indecency Finding.

5. Infinity reiterates its argument that the Stern material, consisting of "isolated words and phrases that were in and of themselves innocuous" was not "descriptive" of sexual or excretory activities or organs under the Commission's indecency definition. The Bureau responded that "detailed descriptions" were not a prerequisite to an indecency finding, citing Letter to Carl J. Wagner (WFRQ(FM) and WNDR(AM)), 6 FCC Red 3692 (MWB 1990). Infinity taxes the Bureau to task for changing the indecency definition in a 1990

² Though Infinity correctly points out that, since the Infinity Reconsideration decision, the definition has evolved through case law to include the words "material," "depicts" and "in context," the altered definition merely emphasizes the importance of context, and clarifies its application to the visual medium of television. The meaning remains the same. In fact, it was this definition that the ACT II court upheld.

decision to eliminate the requirement of "descriptive" language or material altogether and applying it retroactively to Infinity.

6. The Commission has not eliminated the "description" requirement from the indecency definition. Infinity misinterprets the Bureau's statement by placing the emphasis on the word "description" rather than "detailed." Because the linchpin of indecency enforcement is the protection of children from inappropriate broadcast material, (ACT I, supra, at 1340), the extent to which a description is "detailed" enough is gauged by whether it is readily understandable to children in the audience. Thus, the amount of detail in a particular sexual or excretory description that is found indecent will vary according to context. The Wagner decision is illustrative only of an indecency finding in which the discussion, though descriptive, was not "detailed" in nature, and yet could be understood by children. By the same token, although the sexual and excretory discussions in the Stern broadcast did not contain "detailed descriptions," they were sufficiently descriptive to be understandable to children.

Whether Material is Patently Offensive is a Matter for the Commission to Decide on a Case-by-Case Basis with Reference to Contemporary Community Standards for the Broadcast Medium

7. In its response to the LOI, Infinity cited several other broadcast indecency cases that the Commission dismissed as not actionable. Using a comparison of words and phrases, Infinity argued that the Stern excerpts were no worse, and in some instances more innocuous than, other broadcasts the Commission has determined were not patently offensive. Infinity expressed its belief that the Commission was not treating similarly-situated parties in a similar manner, in violation of Melody Music v. FCC, 345 F.2d 730 (D.C. Cir. 1965). While rejecting that argument as unavailing on the basis of differing contexts in different cases, the Bureau did distinguish a representative example, the dismissal of an indecency complaint against television station KSTL, St. Louis, Missouri, for a broadcast of "Geraldo" entitled "Unlocking the Great Mysteries of Sex." We stated that while the program discussed sexual techniques in frank terms, it was not intended to pander or titillate and was not otherwise vulgar or lewd. NAL, 5 FCC Red at 7292 n.3. Infinity now resurrects its Melody Music argument, that the Bureau's treatment was "arbitrary" and "incorrect," and that the Bureau is "legally required" by Hait Radio v. FCC, 418 F.2d 1153, 1156 (D.C. Cir. 1969) and other cases, to make a factual comparison of the particulars of those broadcasts the Commission determined were not indecent. Infinity also argues that by distinguishing the Geraldo broadcast on the basis that it was a "serious discussion," the Bureau is making an unconstitutional distinction between humorous and serious material.

8. As a preliminary matter, the Commission is not required to make factual distinctions among all broadcasts in the indecency area. The Melody Music case requires the Commission, when treating similarly-situated parties differently, to align the relevance of those differences to the Communications Act. 345 F.2d at 733. In that case, and its progeny, parties had taken the same course of action in violation of the Act. Id. at 732. In the indecency

area, whether material is patently offensive is a factual determination, based on careful consideration of context, such as whether the words in context are vulgar or shocking, the manner in which they are portrayed, whether they are isolated or fleeting, and the work's relative merit. Infinity Broadcasting Corporation of Pennsylvania (Reconsideration), 3 FCC Rod 930, 931-32 (1987).³ Thus, indecency determinations are highly fact-specific and are necessarily made on a case-by-case basis.⁴ As a result, two parties would not be similarly-situated for purposes of analysis under Melody Music, unless both the substance of the material they aired and the context in which it was broadcast were substantially similar. In fact, we noted in the NAL that licensees that broadcast the same material under similar conditions receive like dispositions. NAL, supra, at 7292 n.4. What Infinity attempts, however, is to retrieve words and phrases from the context of the entire Stern broadcast and compare them to the same words or similar phrases from entirely different broadcast contexts. The Commission has refused to find that discrete words and phrases, in and of themselves, are indecent per se, in the absence of a contextual framework. Letter to William J. Byrnes, Esquire (WBAI(FM)), 63 RR 2d 216 (MMB 1987), rev. denied sub nom. Pacific Foundation, Inc., FCC 87-215, released June 16, 1987. Consequently, we find unavailing Infinity's contention that it has been disparately treated because words or ideas conveyed in the four-hour Stern broadcast were the same as or similar to those found in brief songs, dialogues or one-hour programs broadcast by other stations that have not been sanctioned.

9. In any event, the cases cited by Infinity as demonstrating the disparate treatment it has received are distinguishable. Considering that the purpose of indecency enforcement is to "shield children from exposure to words and phrases their parents regard as inappropriate for them to hear," (ACT I, supra, at 1340), the salient question in examining a broadcast is whether the sexual or excretory import was inescapable and understandable not only to adults but especially to children. In particular, Infinity challenges the Bureau to reconcile the Stern decision with the Bureau's determination that a daytime radio broadcast of the song "Slip It In" was not indecent. See letter to Ms. Julie Magrell, dated October 26, 1989 (MMB)(dismissing indecency complaint against WSPN(FM), Saratoga Springs, New York). In that case, a review of the audiotape reveals that the individual words, in the context of the music, are barely audible, and thus would not be easily understood by children (or for that matter adults, without the aid of a written transcript). Further, there is not a single graphic or explicit reference to sexual or excretory organs or activities. The sexual import of the song was barely intelligible, much less inescapable to adults, so children who may have

³ Even in the area of obscenity, the Supreme Court left the determination of what is "patently offensive" to the inferior federal courts. See U.S. v. Various Articles of Obscene Merchandise, 600 F.2d 394, 403 (2d Cir. 1979).

⁴ To the extent that Infinity's argument resembles a vagueness challenge, we note that our original and revised indecency definitions have survived vagueness challenges. ACT I, 852 F.2d at 1334; ACT II, 932 F.2d at 1508.

randomly tuned into WSPN⁵ during the airplay of "Slip It In" would not have been likely to continue listening. If they had, they would not have been likely to discern the song's sexual meaning. See Infinity Reconsideration, 3 FCC Rod at 933. The Stern broadcast, on the other hand, made frequent, explicit, patently offensive references to sexual intercourse, orgasm, masturbation, and other sexual conduct, as well as to breasts, nudity, and male and female genitalia, so that children who may have tuned in at any given moment of the broadcast would have been able to understand the context.⁶

10. We reject Infinity's suggestion that the Bureau is elevating serious over humorous material by finding the Stern broadcast actionably indecent. In Pacific, the Supreme Court acknowledged that the Commission targeted the Carlin monologue for its patent offensiveness, not for its political or humorous content. 438 U.S. at 746. Similarly, the humorous nature of the Stern broadcast is ancillary to its patent offensiveness. Indeed, the Commission has found that a broadcast of excerpts from a play seriously addressing the topic of AIDS was indecent, and that the public value of the subject matter would not save it from an indecency finding. Infinity Reconsideration, para., at 932. What we do consider in examining context, however, is the relative merit of the work, of which seriousness may be one element. For example, in Letter to Mr. Peter Branton, 6 FCC Rod 610 (1991), the Commission upheld the dismissal of an indecency complaint against a station airing excerpts from a National Public Radio broadcast that included the repetitious use of the word "fuck." The Commission found that the use of the word in context, a legitimate news report, did not lend itself to a "pandering" or "titillating" interpretation. In a similar complaint dismissal, the Commission found that the material in "Teen Sex, What About the Kids?" was clinical or instructional in nature and not presented in a pandering, titillating or vulgar manner. King Broadcasting Co. (KING-TV), 5 FCC Rod 2971 (1990). These cases reflect our even-handed approach to both humorous and serious material.

11. In any event, the case Infinity relies upon, Hustler Magazine v. Falwell, 485 U.S. 46 (1988) does not support the proposition that all types of material are entitled to the same degree of First Amendment protection. In Hustler, the Supreme Court refused to accord less First Amendment protection for speech that, though not defamatory, intentionally inflicts emotional distress on a public figure. Id. at 56. While the Court discussed the

⁵ In the parlance of the radio industry, the practice of random tuning behavior, in which listeners use radio scanning devices to rapidly tune through the entire channel menu, is known as "grazing." Enforcement of Prohibitions Against Broadcast Indecency in 19 U.S.C. § 1464 ("Report on 24-hour Ban"), 5 FCC Rod 5297, 5307 (1990)(subsequent history omitted).

⁶ Infinity attempts to demonstrate the Bureau's enforcement inconsistency by pointing to the dismissal of a complaint against a 1989 Stern broadcast which, Infinity argues, involved the "same context." For the reasons stated above, however, different episodes of the same program do not necessarily possess substantially similar "contexts" for purposes of an indecency determination.

contribution of satirical cartoons to the public debate, it also recognized that the government could limit speech that is "vulgar, offensive, and shocking," ratifying Pacific. Id.

12. We reiterate from the NAL our view that, notwithstanding the precedential value of indecency cases decided subsequent to the Stern broadcast, Infinity was on notice that the material it aired might be indecent. The only precedent at that time was the 1987 Infinity case in which WYSP was cited for a similar Stern broadcast. Infinity Broadcasting Corporation of Pennsylvania, 2 FCC Rod 2705 (1987). We might be inclined to accord Infinity's judgment more deference if there had been no relevant precedent at that time. See Infinity Reconsideration, supra, at 933 (and cases cited therein).

Infinity's Station-Specific Poll Did Not Address the Reasonable Risk of Children in the New York Radio Listening Audience During the Stern Show.

13. Infinity challenges the Bureau's rejection of its Gallup poll, commissioned to show that since no children in the New York metropolitan area listen to the Stern show, there is no reasonable risk of children in WYRK's audience. In arguing that its poll is dispositive of the "reasonable risk" question, Infinity takes exception to the Bureau's suggestion in the NAL that, under new enforcement standards counseled subsequent to the Stern broadcast, a station would have to show that children are not in the audience on a market-wide, rather than a station-specific, basis. We based this suggestion on the Commission's 1990 report supporting a congressionally-mandated 24-hour prohibition against broadcast indecency, which allowed broadcasters to demonstrate that "only 'a few of the most enterprising and disobedient young people' are in the broadcast audience in the station's market at the time of the broadcast in question." Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464, 5 FCC Rod 5297, 5309 (1990) (quoting Seale Communications of California, Inc. v. FCC, 492 U.S. 115, 109 S.Ct. 2889 (1989)). Infinity's survey is specific to the WYRK audience, but does not address the New York (or for that matter, Philadelphia and Washington, D.C.) radio listening audience in general. We found that Infinity had failed to show that children who may tune into a particular station while "grazing" though different frequencies would not be listening to the Stern show. NAL, 5 FCC Rod at 7292.

14. Subsequent to the issuance of the NAL, the U.S. Court of Appeals for the D.C. Circuit vacated the Commission's report, ruling that it was "return[ing] the Commission to the position it briefly occupied after ACT I, and prior to the congressional adoption of the appropriations rider." ACT II, supra at 1510. Infinity argues that its station-specific Gallup poll is a definitive disposition of the "reasonable risk" question, because the ACT II court has directed the Commission to initiate a proceeding to determine the times at which indecent material may be aired, taking into account the concerns raised in ACT I, inter alia, "the paucity of station- or program-specific audience data expressed as a percentage of the relevant age group population." ACT II, supra at 1510; ACT I, supra, at 1341. The ACT I court's discussion as to the Commission's lack of evidentiary support for its

original midnight-to-6 a.m. channeling rule specifically did not address the Commission's daytime enforcement. Infinity's argument, that both ACT I and ACT II compel the Commission to reexamine those factors even with respect to daytime broadcasts, appears to rely on the one line of dicta in ACT I in which the court suggests that the Commission "would be acting with utmost fidelity to the first amendment were it to reexamine, and invite comment on, its daytime, as well as evening, channeling prescriptions." Id. While Infinity is correct in stating that the courts have not yet been asked squarely to address the issue, neither the ACT I nor the ACT II decisions stayed the Commission's daytime indecency enforcement, or required specific proof of a "reasonable risk" of unsupervised children in the audience during daytime hours pending the outcome of a proceeding to determine a new channeling rule.

15. With respect to Infinity's argument regarding the sufficiency of its poll, we believe that the only acceptable evidence sufficient to rebut the presumption that there is a reasonable risk of unsupervised children in the general radio listening audience is a market-wide showing that "only 'a few of the most enterprising and disobedient young people' are in the broadcast audience in the station's market at the time of the broadcast in question." 24-Hour Day, 5 FCC Rod at 5309. See Evergreen Media Corporation of Chicago AM, 6 FCC Rod 502, 503 (MMS 1991) (no specific probative evidence submitted to rebut daytime presumption). The ACT II court did not invalidate the presumption that if children in a given market are in the broadcast audience, they will tune into a particular station when "grazing" through different channels on their radios. In fact, the Pacific case recognized broadcasting's unique accessibility to children as a justification for the Commission's regulation of the indecent broadcast in that case. Pacific, 438 U.S. at 749. More recently, the Sable case recognized broadcasting's unique technological inability to shield the unwilling listener, especially a child, from receiving an indecent message. Sable, 509 U.S. at 2837. Thus, Infinity's assertion that no unsupervised children listen to the Howard Stern show does not eliminate or reduce the reasonable risk that there are a significant number of children in the New York, Philadelphia, and Washington, D.C. audiences who "graze" the dial with regularity and may be "taken by surprise by an indecent message." Id.

The Bureau Properly Applied a Nongeographical Standard for Measuring Whether The Stern Broadcast Was Patently Offensive.

16. Infinity reiterates its argument that the proper standards for measuring "patent offensiveness" are varying local ones, rather than contemporary community standards for the broadcast medium. Again, Infinity cites several obscenity cases, such as Miller v. California, 413 U.S. 15 (1973), and Parisius v. U.S., 418 U.S. 87 (1974), to support its proposition, and points to localism as the cornerstone of radio regulation under Section 307(b) of the Communications Act. According to Infinity, the phrase "contemporary community standards for the broadcast medium" (Infinity's emphasis) does not contemplate a national standard. Infinity also takes issue with the Bureau's assertion that both Pacific and ACT I have upheld the nonlocal aspect of the Commission's indecency definition.

17. Infinity's assertion that the Miller and Hamling obscenity standards govern the Commission's statutory indecency standard is simply wrong, and reflects a misreading of those cases. The courts have consistently recognized a legal distinction between obscene speech, which has no First Amendment protection and may be totally prohibited, and indecent speech, which has First Amendment protection and may only be "channeled." Pacifico, SUPRA; Sable, SUPRA; ACT I, SUPRA. But see Barnes v. Glen Theatre, Inc., 59 U.S.L.W. 4744 (1991) (upholding prohibition of nude dancing despite 1st speech element).⁷ In any event, the Supreme Court found in Miller that the First Amendment did not compel states to adopt a national obscenity standard. Miller, 413 U.S. at 30-31. As acknowledged in a later case, the Court expressed no view on whether state legislatures could adopt a national standard, or whether federal legislation could refer to a national standard. Smith v. U.S., 431 U.S. 291, 304 n.11 (1977). Not only is Miller inapplicable to indecency, particularly broadcast indecency, it does not support the proposition Infinity advances, id., that the First Amendment requires the employment of a purely local standard.

18. Further, the Supreme Court in Pacifico, and two panels of the D.C. Circuit in the ACT I and ACT II cases, specifically upheld the Commission's generic indecency standard, which includes the phrase "contemporary community standards for the broadcast medium." Neither court questioned the validity of a standard that does not address a particular geographic area, but relies instead on the expertise of Commissioners drawing on their knowledge of the views of the average viewer or listener, as well as their general expertise in broadcast matters. See Infinity Reconsideration, SUPRA, at 933. The ACT I court, in reviewing the Commission's decision in the Infinity Reconsideration, did not take issue with that aspect of the definition that recognized the appropriate standard as "based on a broader standard for broadcasting generally." Id. Infinity's arguments fail to persuade us to proceed otherwise.

The Commission's Enforcement Jurisdiction Extends to Any Broadcast Station That Aids Indecent Programming.

19. Infinity challenges the Bureau's assessments against WYSP and WJFK, which both simulcast "The Howard Stern Show," on the basis that the original complaint that triggered the Bureau's investigation targeted only WXXK. Infinity argues that the Bureau's action represents a major departure in policy, which Infinity believes has been grounded in limiting indecency enforcement to only those stations about which we have received "properly documented" complaints. Infinity points out that the Stern show was simulcast on WYSP and WXXK in 1987 when the Commission decided to pursue only WYSP, on

⁷ For example, the indecency definition does not recognize the presence of serious literary, artistic, political, or scientific value as required by the Miller standard. Miller, 413 U.S. at 24. Rather, merit is only one variable in determining the patent offensiveness of a particular broadcast. Infinity Reconsideration, 3 FCC Red at 932.

the basis of a WYSP listener complaint. Infinity suggests that this approach will lead to an "unwieldy enforcement scheme" because, it surmises, an indecency finding on one affiliate's network or syndicated program would constitute an indecency finding for all other affiliates airing the same program.

20. The Commission enjoys broad enforcement discretion in the indecency area under 18 U.S.C. §1464, 47 U.S.C. §§ 312(a)(6) and 503(b)(1)(D), and 5 U.S.C. § 701(a)(2). See also Heckler v. Chaney, 470 U.S. 821 (1985) (agency discretion to refuse enforcement action is presumptively unreviewable under Administrative Procedure Act). Although the Commission acts primarily on a complaint-based system, (see "Commission Announces Action on 95 Indecency Complaints," Public Notice, Mimeo No. 448, released October 26, 1989), the Commission's statutory enforcement authority also extends to inquiries by the Commission on its own motion. See, e.g., 47 U.S.C. § 403. Certainly, when information comes to the attention of the Commission through means other than a complaint, the Commission may initiate an inquiry. See, e.g., Quiet Communications, Inc. (MYN(TV)), 5 FCC Red 2835 (1988) (initiation of Section 315 investigation based on station manager's remarks in trade journal). In any event, in this case the licensee has confirmed that material initially brought to our attention by a complainant, not by an independent Commission inquiry, was simulcast on two other Infinity-owned stations. In such circumstances, addressing our action to all three stations involved is entirely appropriate. See Letter to Carl J. Wagner (WFBO(FM) and WEDR(AH)), 6 FCC Red 3692 (1990). Thus, we need not address here Infinity's concern that this approach will have untoward consequences with respect to network and syndicated programming. For these reasons, the forfeitures against all three Infinity stations will be imposed.

21. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, IT IS ORDERED, that Sagittarius Broadcasting Corporation, licensee of Radio Station WERK(FM), New York, New York, Infinity Broadcasting Corporation of Pennsylvania, licensee of Radio Station WYSP(FM), Philadelphia, Pennsylvania, and Infinity Broadcasting Corporation of Washington, D.C., licensee of Radio Station WJFK(FM), Manassas, Virginia, FORFEIT to the United States the sum of two thousand dollars (\$2,000) each for their violations of Section 1464 of Title 18 of the United States Code. Payment of the forfeiture may be made by mailing to the Commission, at the address indicated in the attachment to this Memorandum Opinion & Order, a check or similar instrument payable to the Federal Communications Commission. In regard to this forfeiture proceeding, the licensee may take any of the actions set forth in Section 1.80 of the Commission's Rules, as summarized in the attachment to this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart, Chief
Mass Media Bureau