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Wendy P. Rouder

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IF YOU CAN'T SAY IT, WHY CAN YOU SHOW IT? AN OPEN LETTER TO THE FCC

By Wendy P. Rouder*

Federal Communications Commission
Broadcast Bureau
Washington, D.C.

To the Commissioners:¹

I am writing as a citizen viewer raising a strong objection to the advertising campaign pursued by the CBS network to publi-

* Third year student, Golden Gate University School of Law.

1. Originally this "open letter" was to be an inquiry into the limits of the Federal Communications Commission's censorship powers and the possible effect of these powers on controlling television portrayals of undesirable stereotypes. Legal discussion of this question has been limited. The few challenges to the broadcast media in this area have relied on the fairness doctrine. The fairness doctrine, first articulated by the FCC in *Editorializing by Broadcast Licensee*, 13 F.C.C. 1246 (1949), requires that the licensee provide the public with a "reasonably balanced presentation of all responsible viewpoints" in a "discussion of public issues of interest in the community." *Id.* at 1258. Two leading cases—*National Organization for Women v. F.C.C.*, 555 F.2d 1002 (D.C. Cir. 1977) and *Polish American Congress v. F.C.C.*, 520 F.2d 1248 (7th Cir. 1975), used the fairness doctrine to attack stereotyping. In *NOW* the complained-of images appeared integral to the programming of two ABC stations and in the case of *Polish* the stereotype was said to have been presented in a single NBC broadcast. In both cases the FCC refused to find a violation of the fairness doctrine. At the heart of the appellate affirmation of these FCC decisions was the conclusion that Poles are not controversial issues of public importance, 520 F.2d at 1255-56, and that the overall programming of ABC did not leave "the public uninformed on the present issue of women's role in society." 555 F.2d at 1015.

At the time these decisions were made, the Communications Act, 47 U.S.C. § 326 (1971), served as support for the decision of the Commission to take a "hands-off policy" in terms of regulating program content, except in a few select instances.

The surface failure of these special interest groups to progress in a fight against deleterious stereotyping has been, in part, factual. They had not found the right set of facts and the right legal theory to challenge adequately and demand meaningful appellate definition of § 326 of the Communications Act.

In *NOW*, the challenge was too broad: it went to the entire programming of two ABC stations. For *NOW* to have prevailed on a content theory would have meant that the FCC would have had to engage in broad censorship. In *Polish* the attacked station and the program producer were conciliatory, which weakened the complainant's argument.

cize its showing of a motion picture entitled "Lifeguard." The motion picture itself was broadcast locally (San Francisco), and I assume nationally, on Wednesday, October 11, 1978, at 9:00 p.m. local time. The advertising campaign for this show was done intensely in the week preceding the showing. The promotion consisted of repeated showings of a ten or fifteen second "clip," ostensibly from the film. The focus of this clip, the content of which is the basis of this complaint, was on several shots of two or three briefly clad young women with very large breasts. I personally endured three or four such showings of this same clip at various times throughout the week preceding the actual broadcast of the film.

In essence, I contend that this repeated showing of "tits"² was indecent under federal statute³ and within the meaning of the FCC decision in *Citizen's Complaint Against Pacifica Foundation Station WBAI (FM)*,⁴ (hereinafter referred to as *WBAI*). Fur-

2. The words "tits" and "breasts" are used throughout this letter. They are not meant synonymously. The writer is aware that the former conveys an offensiveness which strikes not only feminists. The term "tit" is meant herein to signify the female breast as it is sexually (or commercially) exploited.

Personal regard for the first amendment aside, and recognizing that *Pacifica* is now the law of the land, this writer would like to see it used to attack what many women and men find much more "offensive" and "undesirable" content than Carlin's "dirty" words.

3. 18 U.S.C. § 1464 (1971) provides: "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."

4. 56 F.C.C.2d 94 (1975). The "seven dirty words case" invited a test of the parameters of 47 U.S.C. § 326, the Communications Act prohibition of prior censorship. For the text of § 326, see note 7, *infra*. Specifically, the facts were narrow: the radio broadcast complained of by one listener, who heard it when his young son was present, was a monologue containing seven so-called "dirty words" repeated several times in several contexts which were usually sarcastic, ironic, and absurd. 56 F.C.C.2d at 100-01.

There was an element in the test of censorship under *WBAI*, that *NOW* and *Polish* lacked; namely, a statutory provision giving regulatory and punitive power to the FCC with regard to obscene, indecent, or profane language used on the air. 18 U.S.C. § 1464. Thus, armed with a narrow set of facts and a statutory axe, the FCC was prepared to flail away at *WBAI* in spite of the prohibitions in 47 U.S.C. § 326. The Commission's *WBAI* decision alluded to a subordination of the free speech interests found in 47 U.S.C. § 326 to the censorship authority of 18 U.S.C. § 1464:

At the outset we recognize that Congress in Section 326 of the Communications Act prohibited the Commission from engaging in censorship or interfering "with the right of free speech by means of radio communications." But the prohibition against the broadcast of "obscene, indecent, or profane language" was originally included in Section 326. Later it was transferred to the criminal code, 18 U.S.C. § 1464.

56 F.C.C.2d at 96. Construing § 326 as the residue of § 1464, the Commission then proceeded to censure *WBAI* for its broadcast of indecent language at hours when "children

ther, the promotion was indecent within the meaning of the United States Supreme Court's affirmation of your *WBAI* decision in *FCC v. Pacifica Foundation* (hereinafter referred to as *Pacifica*).⁵ I realize that the effect of your decision was an adjudication and should not be viewed as the promulgation of a rule.⁶ I am asking for a similar adjudication in the matter of the CBS promotion, recalling that in *Pacifica* the Supreme Court said that "the subsequent review of program content is not the sort of censorship at which the statute⁷ was directed."⁸

Specifically, I am suggesting that you determine that CBS' advertising for "Lifeguard" by use of the complained-of film clip was a violation of the federal statute prohibiting the broadcast of obscene, indecent or profane language.⁹ I am aware that this sec-

are undoubtedly in the audience."

The FCC strained in *WBAI* to define the language which it considered indecent: words which depict "sexual or excretory activities and organs" when children are in the audience, in a manner that is "patently offensive by contemporary community standards for the broadcast medium." 56 F.C.C.2d at 98. The Commission, in formulating its standard, borrowed from the obscenity criteria found in *Miller v. California*, 413 U.S. 15, 24 (1973), but admitted that the criterion of appeal of the material to a listener's prurient interests was absent from the *WBAI* broadcast. 56 F.C.C.2d at 98. The Commission made short shrift of the *Miller* consideration of whether "the work, taken as a whole, lacks serious literary, artistic, political or scientific value." 413 U.S. 15, 34. *Miller* requires the absence of this value before a work can be labeled obscene. *Id.* at 24. The Commission wrote that "when children may be in the audience, it cannot be redeemed by a claim that it has literary, artistic, political, or scientific value." 56 F.C.C.2d at 98.

The weight of the Commission's decision rested on the presence of children in the listening audience, although the Commission also proffered such other grounds for the prohibition as the privacy interest in the home, the prospect of unconsenting adult listeners, and the scarcity of spectrum space. 56 F.C.C.2d at 97. Conspicuously absent from the Commission's decision was any in-depth consideration of first amendment issues. Also missing was an objective basis for the Commission's conclusion that the language as broadcast was patently offensive by contemporary community standards.

5. 438 U.S. 726 (1978).

6. *Id.* at 734.

7. Section 326 of the Communications Act of 1934 provides:

Nothing in [the Act] shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

8. 438 U.S. at 737.

9. 18 U.S.C. § 1464. For text of § 1464, see note 3 *supra*. Section 1464 had its origin in the Communications Act of 1934. It was removed to Title 18 of the United States Code in 1948. The authority for the FCC to enforce § 1464 is found in 47 U.S.C. § 503(b)(1)(E) (1971).

Prior to *WBAI* there had been only four cases discussing § 1464 and those focused on the provision as it relates to criminal prosecution: *United States v. Smith*, 467 F.2d 1126

tion addresses itself to utterances of language on radio, but for several reasons I believe that visual imagery on television falls within the meaning of the statute.

First, television, by statute, comes within the meaning of "radio,"¹⁰ and "pictures" are a part of "radio communication."¹¹ Second, pictures or visual imagery in motion picture form are entitled to first amendment protection,¹² and first amendment protection applies to the broadcast media.¹³ Therefore, of necessity, such protection would extend to the visual images shown on television. Third, it is settled law that certain categories of speech generally are not protected by the first amendment, and the statute itself specifically permits some categories of speech to be treated differently from strictly protected speech.

It follows, then, that broadcast pictorial images falling into the same prohibited categories as certain verbal utterances under the statute would be treated with the same reduced degree of protection afforded such verbal speech. To treat such video images otherwise would lead to the anomalous result, for example, that a vernacular utterance describing fornication would be prohibited on the air but a graphic enactment of copulation could be televised.

There is a second reason for my urging that control of visual images falls under the authority of the indecency statute. One must recall that the statutory language was first enacted as part of the Radio Act of 1927.¹⁴ The wording of the 1927 Act spoke to "radio," "utters," and "language" and did not contain such parallel wording for television, probably because in 1927 public access to television was a dream and a will away.¹⁵ By 1948, television was treated as analogous to radio under the terms of the Communications Act of 1934.¹⁶ It would have been redundant, confusing and unnecessary for Congress to have added words such

(7th Cir. 1972); *Tallman v. United States*, 465 F.2d 282 (7th Cir. 1972); *Gagliardo v. United States*, 366 F.2d 720 (9th Cir. 1966), and *Duncan v. United States*, 48 F.2d 128 (9th Cir. 1931).

10. 47 U.S.C. § 153(b) (1971).

11. *Id.*

12. *Kingsley International Pictures Corp. v. Regents*, 360 U.S. 684 (1959).

13. *United States v. Paramount Pictures*, 334 U.S. 131, 166 (1948).

14. 44 Stat. 1172-73 (1927).

15. The first "talking" motion picture, "The Jazz Singer," opened in 1927.

16. 47 U.S.C. § 153(b) (1971).

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as “depicts,” “images” and “television” to the already existing “utters,” “language” and “radio.”

I appreciate that the Supreme Court’s affirmation of your *WBAI* decision was narrow¹⁷ and that the Court conditioned its approval of your order on the specific factual context.¹⁸ I think there is a sufficient similarity between the facts of the CBS advertising broadcast and the facts of the *WBAI* broadcast to conclude that CBS’ advertisements were indecent as broadcast.

My information and belief is that CBS showed its advertising clips both during daytime and early evening hours.¹⁹ If I recall correctly, one of the times the clip was shown was on a Sunday afternoon during a break in a sports broadcast. Since the shots were shown during hours when children were likely to be in the audience, a consideration of the advertisement’s literary or artistic content cannot serve to redeem it.²⁰ Although each showing of the advertisement was much briefer than the Carlin monologue which formed the basis of the complaint in *WBAI*—seconds compared to Carlin’s minutes—the cumulative effect of repeated showings of the ad was that it consumed airtime comparable to that consumed by the once-only broadcast of the Carlin monologue. This repetitious effect was even further intensified by the fact that each clip contained several large-breasted, scantily clad women. Seen in totality these advertisements were not the visual equivalent of an “occasional expletive in [an Elizabethan] setting,” such as the Supreme Court would find tolerable.²¹

Before I address the question of why I believe that these clips were the equivalent of repeated, aired usage of the words “tit” and “cunt,” I wish to acknowledge a distinction. Admittedly, Carlin’s monologue did not repeatedly use the words “tit” and “cunt,” but rather the words “shit” and “fuck,” although “tit” and “cunt” were included in his list of seven forbidden words.²² However, I rely on the absence in the Commission’s *WBAI* deci-

17. 438 U.S. at 750.

18. *Id.* at 744.

19. CBS (KPIX) has not responded to the writer’s request for the station log for Oct. 4-11, 1978.

20. 56 F.C.C.2d at 98.

21. 438 U.S. at 750.

22. *Id.* The Court appended the full text of Carlin’s monologue. *Id.* The original seven words forbidden on the air were said by Carlin to be shit, piss, fuck, cunt, cocksucker, motherfucker, and tits. *Id.*

sion of analysis of the context in which Carlin used any particular word.²³ Further, the value of his speech as a whole was not given any particular weight other than an acknowledgment of the fact that it did not appeal to prurient interests.²⁴ The emphasis in the Commission's decision was upon the effect on children hearing a "description of sexual or excretory activities and organs" having the effect of "debas[ing] and brutaliz[ing] human beings by reducing them to their mere bodily functions"²⁵ I hope the Commission will concede that Carlin's monologue would not have been redeemed had he substituted ten mentions of "tit" for ten mentions of "shit." In other words, it seems that it was the associative value of the words that Carlin used and not the fact that "fuck" is more debasing than "tit" that led the Commission to conclude that the monologue was indecent. The factual contexts of the two broadcasts have striking similarities, but the more difficult question, of course, is analyzing the factual distinctions under the law.

To measure the facts in the *WBAI* case, the Commission borrowed from and applied some of the tests in *Miller v. California*,²⁶ concluding that the *WBAI* broadcast was not *obscene* but *indecent*.²⁷ The content of the CBS ads in some ways more closely meets the obscenity tests of *Miller* than does that of the Carlin monologue: specifically, the CBS clips "taken as a whole, appeal to the prurient interest" and "lack serious literary,

23. As Judge Bazelon noted in his concurrence when the *WBAI* case reached the Court of Appeals:

The Commission never solicited a jury verdict or expert testimony. Nor did it rely on polls or letters of complaint [other than the letter which prompted the Commission's decision]. The Commission simply recorded its conclusion that the words were indecent, thereby creating the suspicion that its national standard is in fact either the composite of the individual Commissioner's standards or what they suppose are national standards.

556 F.2d at 23.

24. 56 F.C.C.2d at 98.

25. *Id.*

26. 413 U.S. 15 (1973).

27. At the appellate court level the indecency provision of 18 U.S.C. § 1464 seemed to have no independent vitality since Carlin's monologue was not obscene and the obscenity provision subsumed indecency. The Court of Appeals skirted addressing one of the key issues in the FCC decision: what is indecent speech? The court wrote: "It is evident therefore that the term indecent has never been authoritatively construed by the courts in connection with Section 1464. Since we feel section 326 of the Communications Act is dispositive of this appeal we do not find it necessary to resolve this difficult question." 556 F.2d at 15.

artistic, political or scientific value," two of the criteria set forth in *Miller*.²⁸

The obvious intent of the CBS advertisement was to appeal to prurient interests. The copy of the advertisement stressed the idea that the "Lifeguard" movie would show the viewer the inside story of the private life of a lifeguard. Superimposed upon this copy were visual images of large-breasted, bikini-clad females. The advertisement promised the viewer that the movie would focus on the spectacle of such women and how the leading male character sexually conquered them.²⁹

Providing viewers with "T and A" (industry slang for "tits and ass") is an acknowledged and publicized purpose of some network programming for the 1978-1979 season. In order to forestall any conclusion by the Commission that hyperbole, fantasy or hysteria underlies my claim that the networks have undertaken a conscious design to appeal to prurient interests, I quote at some length excerpts from the *60 Minute* broadcast of September 17, 1978, called "The Rating Game":³⁰

Mike Wallace: Of all the games played in television, the one that's played for the highest stakes is the rating game. Tonight, the story of how that game is played. We won't be talking about news or specials. We won't be talking about "Roots" or "Holocaust." We're dealing only with prime-time entertainment series.

[ABC's promotion: "We're Number One"]

And if there's any single phenomenon that has tilted the rating books in ABC's direction, as here on the set of "Love Boat," it's "T and A." "T and A" is show biz talk for bosoms and buttocks—attractive young women in various stages of undress. Freddie Silverman helped build his ABC empire on the shoulders of these young women.

Herb Jacobs is a veteran handicapper of new seasons and new shows. At the CBS affiliates' meet-

28. *Id.* at 24.

29. The advertisement promised, in this writer's opinion, other than what the movie delivered.

30. Copyright CBS Inc. 1978, all rights reserved. Originally broadcast Sept. 17, 1978 over the CBS Television Network as part of the "60 Minutes" program series.

ing, he explained to us how these "T and A" shows are concocted.

Herb Jacobs: And they take their clothes off three times, they get ideas. Let's put them in a big, you know, sunbathing or—or surf bathing, and then they want them to run two or three times so they jiggle. And all are well-endowed, of course. And then they say, now, let's get three undressed scenes and three jiggles and write a script around it.

Wallace: Bud Grant is CBS Vice President for Programs.

Bud Grant: We think we have a Nielsen winner in "The American Girls."

[Excerpt from "The American Girls" promotion]

Wallace: They work for a TV magazine, in bathing suits at least part of the time. The pilot for "American Girls" involved the investigation of a white slave ring in which the sexual favors of teenagers were auctioned off to a group of rich and dirty old men. The producers of "American Girls" tell us that this pilot is not necessarily typical of what you'll be seeing on the series.

[Excerpt from "American Girls" promotional spot, asking viewers to "turn us on"]

Grant: Don't be surprised if Rebecca and Amy sink "The Love Boat."

Wallace: "The Love Boat" will be on ABC again this fall opposite "American Girls." Now there are some who will tell you that "T and A" has peaked and is on its way out. But ABC has a new one to go along with shows like "Three's Company."

[Excerpt from "Three's Company"]

And CBS has added two such entries to its schedule:

[Excerpt from "Flying High"]

Who watches "T and A"? Apparently everybody. Of course, it's no surprise that men admire it. And when public pressure deprived them of some of the violent shows they used to watch, "T and A" was brought in by the networks to keep men in front of the tube. But the demographic statistics that the network researchers like to boast of show

that the most desirable audience of all is female, between the ages of 18 and 49. Why? Because they're the ones who control the pocketbook, who buy the products these shows advertise. And research apparently proves that women, not just leering men, like "T and A". But not this woman. Lila Garrett is a television writer, producer and director. She turned down \$120,000 to write for that CBS show called "American Girls."

Lila Garrett: Well, I had an attack of the most dangerous disease on television: I had a moment of good taste. [Laughs] Television has turned into a locker room joke and sex has turned into graffiti. It's kind of a dirty thing that you write on walls. When I say women have become pin-ups in these shows, I'm really putting it rather mildly.

Wallace: It's not just "T and A". It's comic book.

Such "T and A," as was evident in the "Lifeguard" ads, is designed to appeal to the prurient interests of male viewers. One need only review any copy of a so-called "girlie" magazine to know that focusing on the exposure of large female breasts and rounded buttocks is one of the key appeals to such prurient interests. This focus falls into the Supreme Court's definition of prurient, as the Court explained it in reliance upon Webster's dictionary: "material having a tendency to excite lustful thoughts."³¹ In "girlie" magazines the appeal is made not necessarily through total nudity, but rather through the size of the breast, the sexualized setting of the photo, and the emphasis on the breast through photographic composition. Whereas total nudity of the breasts may be a common element in appealing to prurient interests, it is not an indispensable one. I suggest that if it were thought of as indispensable, the broadcast industry would not find it profitable to attempt to program "T and A."

A definitive answer to the question of whether the average person applying contemporary community standards would find that an on-the-air display of "tits" appeals to prurient interests is most difficult. I posit that the average person has a very ambivalent attitude toward a display of the female breast because that which he or she knows should be seen as natural, functional and desexualized—the breast—has been insidiously twisted by a male

31. Roth v. United States, 354 U.S. 476, 487 n.20 (1957).

society to become a symbol of lust. Probably the most objective of social analysts would express this ambivalence when asked to comment on the positive or negative effect of "mammary worship." Because of what amounts to almost a social mystique surrounding the female breast—it has become the symbol of natural woman and fantasy sex—probably most people would be reluctant to say that the CBS depiction either appeals to prurient interests or is patently offensive.

I think the existence of "girlie" magazines coupled with the broadcast industry's avowed purpose of presenting "T and A" to increase ratings serves as proof positive that the focus on breasts on television is designed to appeal to the prurient interests of a significant segment of the adult viewing public.

As to a second *Miller* criterion, it is obvious that CBS' ad taken as a whole lacked "serious literary, artistic, political or scientific value."³² CBS in this ad was engaging in commercial speech, designed to attract an audience for a specific program. The advertisements in no way suggested independent artistic or literary values.

Thus, whereas the CBS clip appealed to prurient interests and the WBAI broadcast did not, and whereas the CBS advertisement was shown for commercial purposes only and lacked any of the literary and artistic values present in the linguistic ironies of the Carlin monologue,³³ the CBS showing can be said to have been closer to obscenity than was the WBAI broadcast.

The remaining (and in many ways most challenging) issue then becomes: can it be said of the CBS broadcast what the Supreme Court said of the WBAI broadcast, that it was "vulgar,' 'offensive,' and 'shocking'?"³⁴ One may ask in more constitutional

32. 413 U.S. at 24.

33. The WBAI decision alluded to such an artistic or literary value when it suggested that "during the late evening hours such words conceivably might be broadcast, with sufficient warning to unconsenting adults provided the programs in which they are used have serious literary . . . value." 56 F.C.C.2d at 100. Because the Commission precluded any in-depth consideration of such merits by stating that such values cannot redeem a patently offensive work if children are listening, authority for my statement that there is literary value in Carlin's "linguistic ironies" must be supplied by the reader's judgment.

34. 438 U.S. at 747. In many ways the Supreme Court's closely divided opinion raises more questions than it answers. But on one issue five justices are clear: the Communication Act's § 326 prohibitions operate only after Title 18 § 1464's powers

terms whether the work depicts or describes, in a patently offensive way, sexual conduct.³⁵ Even if the answer to this were a proven and emphatic “it does not,” I suggest that this answer would not preclude your making a determination as to whether the broadcast was *indecent*.

As the Supreme Court has indicated by its affirmation of the Commission’s *WBAI* decision, not all *Miller* elements have to be proven before the Commission may apply statutory³⁶ sanctions for indecent language. Second, what is patently offensive must be measured by the key considerations spelled out in *WBAI*: does the depiction reduce human beings to their sexual or excretory functions and are children being exposed to this imagery?³⁷

What the Commission found as patently offensive in Carlin’s monologue was not necessarily a description of sexual conduct,³⁸ but rather that the language had the “effect of debasing and brutalizing human beings by reducing them”³⁹ In this instance the reduction was of woman to a depersonalized sexual organ—the big “tit.” Any counterargument that a breast is not

have been accounted for. Further, the Supreme Court expressly ruled on a question shunned by the Court of Appeals: there is a distinction between obscene and indecent speech. 438 U.S. at 740-41.

Using a definition of indecent that invites government hatchwork, the Supreme Court wrote: “Prurient appeal is an element of the obscene, but the normal definition of ‘indecent’ merely refers to nonconformance with accepted standards of morality.” *Id.* at 740. The Court then plugged the Commission’s illustration of indecent into the Court’s own banal description: indecent is “patently offensive references to excretory and sexual organs and activities.” 438 U.S. at 743.

The Court, instead of dealing with Judge Bazelon’s contention that the Commission had no objective basis for concluding that Carlin’s monologue was patently offensive, summarily authorized the Commission’s conclusion. “In this case it is undisputed that the content of the Pacifica broadcast was ‘vulgar,’ ‘offensive,’ and ‘shocking.’” *Id.* at 747.

35. *Miller v. California*, 413 U.S. 15, 24 (1973). Technically, *Miller* speaks to words which depict sexual conduct. Depiction of the female breast may or may not be sexual conduct, depending upon the manner and context of depiction. Certainly, a large-breasted female bent at the waist to accentuate the breasts and winking straight on into a camera is a picture depicting sexual conduct.

36. 18 U.S.C. § 1464.

37. 56 F.C.C.2d at 97.

38. *Miller*, in guiding a jury’s obscenity determination, advises the juror to look to state law for specific definition of sexual conduct. This *Miller* element was never discussed in the Commission’s decision. It seems to have fallen by the wayside in the decision’s summary dismissal of its need to show “appeal to prurient interests.” The Commission’s repeated reference to “sexual organ” became a substitution for “sexual conduct.” To the extent that CBS sexualized the breast, the depiction was of a “sexual organ.”

39. 56 F.C.C.2d at 97.

patently offensive because it is a natural and beautiful bodily attribute has no more meaning than if it had been argued that Carlin merely spoke of "copulation," which is a natural and beautiful act.

The Commission's *WBAI* decision was based, in large measure, upon the fact that the broadcast was made at a time when children were likely to be in the audience.⁴⁰ I ask that this condition prevail as you review my claim against CBS. I also ask that you consider the additional seriousness of the effect on children when the indecency is in the form of a picture rather than a word. Given the concreteness of a picture compared to the abstractness of a spoken word, it becomes obvious that an indecent picture has the greater potential for an adverse effect upon a child.

Multiple studies have explored the influence of language and visual imagery in the formation of values and attitudes in children.⁴¹ It must follow that seeing women depicted as "tits" will play an important part in a child's formation of role models. "The ease with which children may obtain access to broadcast material, coupled with concerns recognized in *Ginsberg [v. New York]*, amply justify special treatment of indecent broadcasting."⁴²

I raise one further point for your consideration in urging you not to reject this claim as contrary to the mandate of the statute addressing a broadcaster's right of uninterrupted free speech.⁴³ Obviously, by the terms of the Supreme Court's decision in *Pacifica*, inter alia, this right is not unlimited and certainly cannot be said to be any greater than free speech rights under the first amendment. Thus, whatever considerations apply to so-called "commercial speech" under the first amendment, should also apply to the broadcast of commercials on television.

40. *Id.* at 99.

41. See 4 REPORT TO THE SURGEON GENERAL, TELEVISION AND GROWING UP: THE IMPACT OF TELEVISED VIOLENCE (1970); Clinton, *TV as a Behavior Model: Results of Research*, 11 AM. EDUC. 40 (1975); Goffman, *Genderism: Reinforcement of Sex Role Stereotypes by Advertising*, 11 PSYCH. TODAY 6 (1977); Schneider & Hacker, *Sex Role Imagery and Use of the Generic 'Man' in Introductory Texts*, 8 AM. SOC. 12 (1973).

42. 438 U.S. at 750. In the Commission's words: "It seems to us that the use of television to further the educational and cultural development of children bears a direct relationship to the licensee's obligation . . . to operate in the public interest." Petition of Action for Children's Television, 50 F.C.C.2d 1 (1974).

43. 47 U.S.C. § 326. For text of § 326, see note 7 *supra*.

Although the Supreme Court has indicated that commercial speech is not exempted from first amendment protection, “[a] different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired.”⁴⁴ The informational value of the CBS ads was virtually nil; the potential spectacle promised by the advertisement never materialized. I cannot recall seeing those same large-breasted females in the motion picture who appeared in the ads, and even if they were fleetingly present in the motion picture, the redistribution of emphasis between ad and movie made the advertisement misleading.

However, even absent the element of “misleading,” the CBS advertisements should not enjoy full protection under the Communications Act of 1934,⁴⁵ because they did not “serve the public interest, convenience and necessity.”⁴⁶ To the extent that CBS sold a program of voluptuous female semi-nudity it simply pandered to eroticism. The ad was the equivalent of a “girlie” magazine cover. The Supreme Court placed the worth of Carlin’s monologue at “the periphery” of first amendment concerns.⁴⁷ Given the scarcity of “spectrum space,” CBS’ advertisement should be at the periphery of Communications Act concerns.

To inform the Commission of the reduced degree of protection that should be afforded commercials on television, I direct it to an excellent article, one of whose key tenets I heartily endorse: “in the context of television product advertising [the “Lifeguard” program being the product], the interest which broadcasters, consumers, and advertisers might have in the free flow of demeaning images of women is not sufficient to outweigh the government’s interest in regulating those images.”⁴⁸

I lack knowledge or foresight to suggest the appropriate sanctions to be leveled against CBS,⁴⁹ although it is obvious that I

44. *Virginia Pharmacy Board v. Consumer Council*, 425 U.S. 748, 771-72 n.6 (1976). See Note, *Ring Around the Collar—Chain Around Her Neck: A Proposal to Monitor Sex Role Stereotyping in Television Advertising*, 28 *HASTINGS L.J.* 149 (1976), where the author does an able job of demonstrating that “the special nature of the forum in which television product advertising occurs makes it particularly susceptible to regulation despite the protection of the first amendment.” *Id.* at 163.

45. 47 U.S.C. § 326. For text of § 326, see note 7 *supra*.

46. 47 U.S.C. § 302; 438 U.S. at 748.

47. *Id.* at 743.

48. Note, *supra* note 43, at 164.

49. One possible sanction that could result from this letter is simply a warning from

believe its advertisement for "Lifeguard" should be sanctioned. Nonetheless, one of my overriding interests in this complaint is eliciting from the Commission an answer to this question: "Tits! If you can't *say* it on the air, why can you *show* it?"⁵⁰

Sincerely,
Wendy P. Rouder

the FCC that unless television advertisement shuns such over-emphasis of anatomy the stations displaying it will face license renewal jeopardy. Such an FCC result may be accomplished without rule-making as was the case in *Petition of Action for Children's Television*, 50 F.C.C.2d 1 (1974). The FCC (pursuant to the authority conferred on it by 47 U.S.C. § 312(a)) could take the drastic step of revoking a license for an 18 U.S.C. § 1464 violation. Less radical sanctions might be the issuance of a cease and desist order under 47 U.S.C. § 312(b) or assessment of a fine under 47 U.S.C. § 503(b)(1)(E). In *WBAI*, the censure came in the form of a declaratory order that Carlin's monologue as broadcast constituted a violation of § 1464. The Commission alluded to more stringent sanctions if there were future complaints regarding comparable broadcasts. The Commission wrote:

No sanctions will be imposed in connection with this controversy, which has been utilized to clarify the applicable standards. However, this order will be associated with the station's license file, and in the event that subsequent complaints are received, the Commission will then decide whether it should utilize any of the available sanctions it has been granted by Congress.

Id. At least one commentator has noted that any challenge to a station's license renewal creates a costly burden for the station. Such a challenge, in turn, tends to encourage self-regulation by broadcasters. Note, *The Limits of Broadcast Self-Regulation Under the First Amendment*, 27 *STAN. L. REV.* 1527 (1975).

50. On Dec. 20, 1978, the FCC responded as follows:

Dear Ms. Rouder:

Because we receive so many questions and comments about broadcasting, we reduce expenses by using prepared responses. We believe that taxpayers will appreciate the economy. If the enclosed material does not adequately set out FCC policies of interest to you, and if you will specify the additional information you need, we will try to provide a fuller explanation.

(Signature)

A postscript stated: "It does not appear that the material referred to in your Dec. 4, 1978 letter is violative of the standards set forth in the enclosed publication . . ." Enclosed was an analysis of *Pacifica*, as well as Pub. 8310-50, which is a form explanation of FCC criteria for indecency and obscenity. Nothing in Pub. 8310-50 contradicts the reasoning in the writer's letter.