

# MUSIC LESSONS: WHAT ADAM LAMBERT CAN TEACH US ABOUT MEDIA SELF-REGULATION ♦

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## INTRODUCTION

Adam Lambert was the runner-up in the 2009 season of the popular television singing talent competition *American Idol*.<sup>1</sup> Since the program's conclusion, Lambert, a strong vocalist and a theatrical and flamboyant performer,<sup>2</sup> has been working on moving out from under the talent contest's shadow to establish himself as a compelling professional entertainer.<sup>3</sup> He has also openly acknowledged his homosexuality, which he had neither

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<sup>1</sup> Alessandra Stanley, 'American Idol,' *A Well-Oiled Money-Making Machine, Cranks Out a New Star*, N.Y. TIMES, May 21, 2009, at A24.

<sup>2</sup> *Id.*, describing Lambert as a "sassy, androgynous individualist."

<sup>3</sup> Appearing on the television show *The View* on December 10, 2009, almost three weeks after his controversial performance at the American Music Awards, Lambert explained that his fans should expect his performances to be different from what they saw on the singing competition: "It's not 'American Idol' anymore . . . This is exciting, this is my career, this is music that's original now. It's not a TV reality contest singing competition." Dave Itzkoff, *Adam Lambert on "The View:" 'It's Not 'American Idol' Anymore*, N.Y. TIMES ARTS BEAT BLOG, Dec. 10, 2009, <http://artsbeat.blogs.nytimes.com/2009/12/10/adam-lambert-tells-the-view-its-not-american-idol-anymore/?scp=2&sq=adam%20lambert%20american%20idol&st=cse>.

confirmed nor denied during *American Idol*.<sup>4</sup> And yet some were surprised when, near the end of a live, three-hour-plus evening broadcast of the 2009 American Music Awards (“AMA”) on ABC, Lambert turned his first television performance since the *American Idol* finale<sup>5</sup> into what some would describe as risqué homosexual behavior.<sup>6</sup> The act had a sado-masochism theme, and Lambert pranced around the stage alternately kissing a male band member, leading a dancer along on a leash, fondling another dancer, and shoving one male dancer’s head into his crotch. Lambert finished his performance with a smoldering glare into the camera and a defiant raising of his middle finger.<sup>7</sup>

What happened over the next several days, as the aftermath of Mr. Lambert’s performance played out in the national media and the trade press, was of questionable value to his efforts to promote his career.<sup>8</sup> But this was more than a textbook example of a ham-fisted effort by a fledgling pop singer to create a new and more provocative public persona. This event also affirmed that the networks are capable of effectively regulating content and should therefore not be subject to any additional governmental broadcast-centric regulation from the Federal Communications Commission (“FCC” or “the Commission”).

The likelihood of greater regulatory oversight has been speculated upon since *FCC v. Fox Television Stations* was decided by the Supreme Court in 2009.<sup>9</sup> *FCC v. Fox* was the first time in thirty years that the Court considered the validity of the Commission’s policies regarding broadcast indecencies.<sup>10</sup> It was, however, a very narrow decision, concerning whether or not the FCC acted arbitrarily and capriciously under the Administrative Procedure Act (“APA”) when it abandoned its longstanding policy regarding tolerating fleeting expletives.<sup>11</sup> The case was remanded to the

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<sup>4</sup> See Vanessa Grigoriadis, *Wild Idol: The Psychedelic Transformation and Sexual Liberation of Adam Lambert*, ROLLING STONE, June 25, 2009, at 51.

<sup>5</sup> Daniel Kreps, *Adam Lambert Shocks American Music Awards with Racy ‘For Your Entertainment,’* ROLLING STONE ROCK AND ROLL DAILY BLOG, Nov. 22, 2009, <http://www.rollingstone.com/rockdaily/index.php/2009/11/22/adam-lambert-shocks-american-music-awards-with-racy-for-your-entertainment/>.

<sup>6</sup> *Id.* Lambert performed the song *For Your Entertainment*, from his album of the same name. Lyrics include “Do you like what you see? Let me entertain you until you scream” and “Can you handle what I’m about to do?”

<sup>7</sup> *Adam Lambert to Perform on ‘Early Show,’* CBS NEWS, Nov. 24, 2009, <http://www.cbsnews.com/stories/2009/11/24/earlyshow/leisure/celebspot/main5762324.shtml?tag=contentMain;contentBody>.

<sup>8</sup> For a summary of differences of opinion among critics regarding the artistic merits of the performance, see Gil Kaufman, *Adam Lambert’s AMA Performance Divides Critics: From ‘Ultra-Lewd’ to ‘A Delight,’* MTV, Nov. 23, 2009, [http://www.mtv.com/news/articles/1626886/20091123/lambert\\_adam\\_american\\_idol\\_j.html](http://www.mtv.com/news/articles/1626886/20091123/lambert_adam_american_idol_j.html).

<sup>9</sup> *F.C.C. v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009).

<sup>10</sup> The decision thirty years ago was *F.C.C. v. Pacifica Found.*, 438 U.S. 726 (1978).

<sup>11</sup> See *Fox Television*, 129 S. Ct. 1800; see also *Robert Corn-Revere, F.C.C. v. Fox Television*

Second Circuit, and it is anticipated that the issue the courts will address next is whether or not the FCC's new policy violates the First Amendment.<sup>12</sup> In addition, there are two other cases being litigated also concerning the FCC's authority to impose fines for other instances of broadcast indecencies.<sup>13</sup> It is therefore anticipated that "more momentous judicial review of the FCC's ban on broadcast indecency is yet to come."<sup>14</sup>

This Note will focus exclusively on FCC content-regulation<sup>15</sup> and will argue in favor of network self-regulation of program content and against more intrusive content control by the government. Part I will begin with a brief overview of the history of governmental and self-regulatory efforts to control broadcast content via Standards and Practices ("S&P"). This contextual material will be followed by Part II, summarizing the networks' reactions to Mr. Lambert's performance. ABC televised the initial performance, and CBS hosted Mr. Lambert in the days following the American Music Awards show. Both networks revealed the three primary internal and external pressures that dictate how the networks self-regulate: 1) the need to protect advertising revenue by not challenging community standards and meeting audience expectations; 2) the desire to satisfy the personal preferences of networks executives; and 3) the need to protect against FCC fines and to placate public interest groups in protecting against financial retaliation. Part III will argue that the Adam Lambert case study demonstrates that the networks can be trusted to self-regulate effectively because the failure to do so exposes them to financial harm. In addition, it underscores the primary benefits of self-regulation: efficiency, flexibility, incentives for compliance and avoidance of constitutional issues. In light of how successfully the networks are able to police themselves, the government should avoid imposing any additional broadcast-centric regulations.

### I. A BRIEF OVERVIEW OF THE NETWORKS AND REGULATION

That networks regulate their content through the application of S&P is not a secret. As one industry S&P executive who spoke on condition of anonymity noted, "the fact of regulation,

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Stations, Inc.: *Awaiting the Next Act*, 2008-09 CATO SUP. CT. REV. 295, 296-97 (2009). See generally, Administrative Procedure Act, 5 U.S.C. §§ 500-596 (2000).

<sup>12</sup> Corn-Revere, *supra* note 11, at 297.

<sup>13</sup> See *F.C.C. v. CBS Corp.*, 129 S. Ct. 2176 (2009) (regarding the FCC's imposition of a \$550,000 fine for the 2004 CBS Super Bowl broadcast involving Janet Jackson's wardrobe malfunction.) The case was remanded to the Third Circuit. See also *ABC Inc. v. F.C.C.*, No. 08-0841 (2d Cir. Jan. 4, 2011), for a challenge to an FCC fine for an episode of the police drama *NYPD Blue*.

<sup>14</sup> Corn-Revere, *supra* note 11, at 297.

<sup>15</sup> The complete overview of the FCC's varied regulatory functions can be found in Title 47 of the Code of Federal Regulations, 47 C.F.R. §§ 0-199 (2004).

standards and practices, is perfectly public.”<sup>16</sup> In actuality, broadcast regulation dictated both by the government and by the industry itself has been an issue since radio first became readily available to the public. Once television emerged, it “inherited most of the regulation that was created for the older medium.”<sup>17</sup> Additionally, since that time, there have been repeated efforts to link industry regulation with industry support for the “public interest.” The Radio Act of 1927 was the first codification of the vaguely defined public interest standard,<sup>18</sup> and it later became “the cornerstone of broadcast regulation” for both radio and television.<sup>19</sup>

By the 1930s, Congress determined that broadcast regulation should be coordinated by a single agency,<sup>20</sup> and it passed the Communications Act of 1934 to create the Federal Communications Commission.<sup>21</sup> The 1934 Act dictated that the FCC was in charge of licensing and regulation of communications,<sup>22</sup> and that it was to regulate on behalf of “public convenience, interest or necessity.”<sup>23</sup> Therefore, unless the statutory obligation to ensure compliance with the public interest is satisfied, a license can be revoked or denied.<sup>24</sup>

The FCC’s concern for the public interest was initially reflected in the *Blue Book*,<sup>25</sup> the Commission’s “definitive policy statement regarding factors relevant to the public interest.”<sup>26</sup> These requirements were eventually repealed for noncommercial programming, but were augmented by the stipulation that licensees determine the needs of their communities and provide

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<sup>16</sup> Interview with Confidential Source (Mar. 26, 2009). This source is an attorney who has worked as a high-level S&P executive in broadcast and cable networks for over a decade. It was requested that attribution not be given to protect the proprietary nature of the information being shared.

<sup>17</sup> Les Brown, *Self-Regulation in American Television in Areas Aside From Program Content*, 13 CARDOZO ARTS & ENT. L.J. 705, 709 (1995).

<sup>18</sup> The Act gave the Commission power to grant licenses for three-year terms in the “public convenience, interest or necessity.” See Ch. 169, 44 Stat. 1162, 1166, *repealed by*, Communications Act of 1934, ch. 652, § 602, 48 Stat. 1064, 1102. The term “public interest” has come to mean regulation in the name of consumers to ensure that broadcasting content is satisfying their particular needs and interests. But as various critics, including Nobel Prize winner Ronald Coase, have noted, “public interest” has no definite meaning. It has therefore proven frustratingly vague and consequently incapable of establishing a useful regulatory standard. See Ronald H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1, 8-9 (1959).

<sup>19</sup> Dean K. Cherchiglia, *Changing Channels in Broadcast Regulation: Leaving Television Advertising to Containment by Market Forces*, 34 CASE W. RES. L. REV. 465, 472 (1984).

<sup>20</sup> *Id.*

<sup>21</sup> See Ch. 652, 48 Stat. 1064 (codified as amended at 47 U.S.C. §§ 151-609 (2006)).

<sup>22</sup> 47 U.S.C. § 152 (2006).

<sup>23</sup> 47 U.S.C. §§ 302(a), 303, 307, 309, 310(d) (2006).

<sup>24</sup> Cherchiglia, *supra* note 19.

<sup>25</sup> The full title of the BLUE BOOK was the FED. COMM’NS COMM’N, PUBLIC SERVICE RESPONSIBILITY OF BROADCAST LICENSEES. The BLUE BOOK interpreted the public interest standard while also encouraging industry self-regulation. *Id.* at 473, n.58.

<sup>26</sup> *Id.* at 473.

diverse programming to help satisfy those needs.<sup>27</sup> For example, the Commission made the licensee responsible

for all material . . . broadcast through [its] facilities . . . . In the fulfillment of his obligation the broadcaster should consider the tastes, needs and desires of the public he is licensed to serve in developing his programming . . . [and] carry them out as well as he reasonably can.<sup>28</sup>

Placing the programming responsibility directly on the licensee affirmed the FCC's mission of encouraging industry self-regulation via the trustee model.<sup>29</sup>

The broadcast industry has also been governed by numerous self-imposed standards and regulations created by its industry representative, the National Association of Broadcasters ("NAB"). A trade association of both radio and television broadcasters, the NAB was established in 1923.<sup>30</sup> The organization "sought to establish codes of ethics within the broadcast industry by creating guidelines for self-regulation."<sup>31</sup> As NAB President, Neville Miller, explained in 1939, the broadcasters were motivated by the statutory guideline to serve the public interest<sup>32</sup> by "meet[ing] the demands of the public, . . . treat[ing] fairly the various interests which one finds in every community, and . . . render[ing] to [the] community a real service," as well as by the belief that more "than any other group . . . they possessed the ability to govern themselves."<sup>33</sup>

Of particular relevance is the Association's Television Code ("the Code"),<sup>34</sup> adopted in 1952<sup>35</sup> and amended at various points thereafter.<sup>36</sup> At the time, Congress had indicated that it was "concerned about crime shows on television and their possible contribution to juvenile delinquency,"<sup>37</sup> going so far as to hold

<sup>27</sup> En Banc Programming Inquiry, 44 F.C.C. 2303, 2313-14 (1960).

<sup>28</sup> *Id.*

<sup>29</sup> Cherchiglia, *supra* note 19, at 473-474.

<sup>30</sup> David R. Mackey, *The Development of the National Association of Broadcasters*, 1 J. BROADCASTING 305, 309 (1957).

<sup>31</sup> Brown, *supra* note 17, at 706 n.7.

<sup>32</sup> 47 U.S.C. §§ 302(a), 303, 307, 309, 310(d) (2006).

<sup>33</sup> Neville Miller, *Radio's Code of Self-Regulation*, 3 PUB. OPINION Q., 683, 685 (Oct., 1939). In addition, the Radio Act "specifically precluded government censorship of radio communication." Laurence H. Winer, *The Signal Cable Sends, Part II-Interference from the Indecency Cases?*, 55 FORDHAM L. REV. 459, 465 (1987).

<sup>34</sup> NAT'L ASS'N OF BROADCASTERS, TELEVISION CODE (22nd ed. 1981) (pertinent provisions reprinted in *United States v. Nat'l Ass'n of Broad.*, 553 F. Supp. 621, Appendix A (D.D.C. 1982) [hereinafter TELEVISION CODE]).

<sup>35</sup> *United States v. Nat'l Ass'n of Broad.*, 536 F. Supp. 149, 152 (1982).

<sup>36</sup> Angela Campbell, *Self-Regulation and the Media*, 51 FED. COMM. L.J. 711, 722 (1999).

<sup>37</sup> Brown, *supra* note 17, at 707; see also E.C. Gathings, *Air Waves and Newsstands*, CONG. REC. 82ND CONG., 1ST SESS., 1951, A3742; see generally Keisha L. Hoerrner, *The Forgotten Battles: Congressional Hearings on Television Violence in the 1950s*, 2 WJMCR (June 1999), <http://www.scripps.ohiou.edu/wjmcr/vol02/2-3a-B.htm>.

hearings on the issue and related subject-matter throughout the early 1950s.<sup>38</sup> The Code was “drafted to head off proposed legislation that would have created a citizens advisory board for radio and television.”<sup>39</sup> Facing this threat of external regulation, the industry was determined to prove that its own efforts at self-regulation would make any additional governmental regulatory oversight unnecessary.<sup>40</sup> It is therefore not surprising that the Code resembles a “self-regulatory version of the *Blue Book*,”<sup>41</sup> dictating a “set of standards, created as a mechanism for industry self-regulation and general community responsibility.”<sup>42</sup>

Ultimately, “[most] of the daily work of the Code staff concerned commercials,” detailing time limits for commercials and advertising guidelines and restrictions.<sup>43</sup> But the concerns that led to the Code’s implementation were not forgotten, and the Code also dictated various content-centric decisions. These programming standards were “both general and specific prescriptions and proscriptions.” For instance, broadcasters were encouraged to reach out to their communities to determine their community’s needs, interests, and issues.<sup>44</sup> Other aspects of the Code dealt specifically with what sort of materials would or would not be allowed on the air, especially in children’s programming and when the subject matter was a controversial public issue.<sup>45</sup> Among its restrictions, it “forbade smut and vulgarity, gratuitous violence, [and] self-destructive behavior.”<sup>46</sup>

After only thirty years, the Code was abolished. In 1982, a federal court decision declared three of the Code’s advertising standards to “restrain trade in violation of the Sherman Act by agreeing to restrict the supply of advertising and by standardizing the format for the presentation of television commercials.”<sup>47</sup>

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<sup>38</sup> Hoerner, *supra* note 37, citing STAFF OF H. COMM. ON INTERSTATE AND FOREIGN COMMERCE, SUBCOMMITTEE ON THE FED. COMM’NS COMM’N., 82ND CONG., 2ND SESS., INVESTIGATION OF RADIO AND TELEVISION PROGRAMS. (1952); STAFF OF S. COMM. ON THE JUDICIARY, SUBCOMMITTEE TO INVESTIGATE JUVENILE DELINQUENCY, 83RD CONG., 2ND SESS., REPORT ON JUVENILE DELINQUENCY (1954).

<sup>39</sup> Some scholars allege that the Code was developed in part in response to congressional dissatisfaction with hard liquor advertisements on television. See David Brenner, Note, *The Limits of Broadcast Self-Regulation Under the First Amendment*, 27 STAN. L. REV. 1527, 1529 (1975).

<sup>40</sup> Campbell, *supra* note 36, at 722.

<sup>41</sup> Cherchiglia, *supra* note 19, at 478.

<sup>42</sup> Brown, *supra* note 17, at 706.

<sup>43</sup> Campbell, *supra* note 36, at 722.

<sup>44</sup> *Id.* at 731.

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

<sup>46</sup> Brown, *supra* note 17, at 707, citing the TELEVISION CODE.

<sup>47</sup> *United States v. Nat’l Ass’n of Broad.*, 536 F. Supp. at 153, n.11. See also Campbell, *supra* note 36, at 724 (“The DOJ argued that provisions limiting the number of minutes per hour of commercials, the number of commercials per hour, and the number of products advertised in a commercial, had the actual purpose and effect of manipulating the supply of commercial television time, with the result that the price of the time was raised to advertisers in violation of section 1 of the Sherman Act.”).

Despite the fact that only a small number of the advertising dictates had been challenged by the Department of Justice, “the NAB abandoned the Code in its entirety” shortly thereafter.<sup>48</sup>

That same year, the FCC under the Reagan Administration moved towards deregulation, “abandoning the public trustee concept and dismantling the system of broadcast regulation that had grown up around it.” The result was an overall reduction of FCC oversight of broadcasting activities eventually leading to the deregulation of television by the FCC.<sup>49</sup> Since the Code had been adopted initially to fend off any additional governmental regulation, once that threat was removed, “the industry saw no reason to retain the Code.”<sup>50</sup>

Current opponents of deregulation warn that a lack of oversight decreases the likelihood that networks will uphold their statutory requirement to support the public interest.<sup>51</sup> In contrast, advocates continue to argue that market forces will effectively rein in the networks.<sup>52</sup> As the Adam Lambert case study detailed below will prove, the market forces exerting external pressures on the networks, as well as their various self-imposed limitations, ensure that the networks are capable of effectively self-regulating. And as will be elaborated in Parts II and III, self-regulation also has crucial advantages over governmental dictates. There is no need, therefore, for the government to impose additional content regulation.

## II. A CASE STUDY OF STANDARDS AND PRACTICES IN ACTION

After instances like Adam Lambert’s controversial performance at the American Music Awards, networks often find themselves having to explain how they could allow such programming on the airwaves. This often means that a network’s S&P department becomes the subject of public scrutiny. As one overview of S&P explains, “[s]tandards, and the broadcasters’ efforts to implement them, come to the fore whenever an apparent breach of the implicit obligation to respect the public trust occurs.”<sup>53</sup> Yet as an industry practitioner notes, S&P is

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<sup>48</sup> Campbell, *supra* note 36, at 724.

<sup>49</sup> C. H. Sterling, *Deregulation*, MUSEUM OF BROADCAST COMMUNICATIONS, <http://www.museum.tv/eotvsection.php?entrycode=deregulation> (last visited Apr. 5, 2010). See also Campbell, *supra* note 36, at 724, citing *In re The Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, 98 F.C.C.2d 1076 (1984), *recons.*, Memorandum Opinion and Order, 104 F.C.C.2d 358 (1986), *aff’d in part and remanded in part*, *Action for Children’s Television v. F.C.C.*, 821 F.2d 741 (D.C. Cir. 1987).

<sup>50</sup> Campbell, *supra* note 36, at 725.

<sup>51</sup> Cherchiglia, *supra* note 19, at 468.

<sup>52</sup> See *Nat’l Ass’n of Broad.*, 536 F. Supp. at 166-68.

<sup>53</sup> George Dessart, *Standards and Practices*, MUSEUM OF BROADCAST COMMUNICATIONS, <http://www.museum.tv/archives/etv/S/htmlS/standardsand/standardsand.htm> (last

“probably the least known department at each of the networks.”<sup>54</sup>

At this junction it is important to explain how S&P departments function. Initially the departments existed in tandem with the Code, but upon the Code’s demise the networks “took over the entire burden,”<sup>55</sup> implementing parts of the now-defunct Code via their S&P departments.<sup>56</sup> Therefore, similarities can be found between the impetus motivating the Code and the networks’ S&P departments, namely that “lest an offended audience demand government intervention, Standards and Practice’s charge has been to review all . . . broadcast matter, including entertainment, sports and commercials, for compliance with legal, policy, factual, and community standards.”<sup>57</sup>

As such, like the Code departments before them, the objective of S&P departments is to “determine the acceptability” of what makes it to air<sup>58</sup> via “program-by-program judgments as to what constitutes material suitable for broadcast.”<sup>59</sup> The networks do this for commercial advertising, news, and most relevant for this assessment, entertainment.

#### A. Advertising

Commercial clearance involves the screening of over 50,000 announcements annually, with roughly seventy different product types.<sup>60</sup> Editors with particular expertise in the different product categories oversee the process, reviewing commercials in all stages of production.<sup>61</sup> They are legally required<sup>62</sup> to scrutinize the substantiation provided for comparative claims,<sup>63</sup> but they also retain the right to determine whether or not a commercial is suitable for its intended audience.<sup>64</sup>

For instance, in 2010, CBS eased restrictions on advocacy advertisements during the Super Bowl broadcast.<sup>65</sup> Explaining its

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visited Apr. 5, 2010).

<sup>54</sup> Alice M. Henderson & Helaine Doktori, *How the Networks Monitor Content*, in TELEVISION AS A SOCIAL ISSUE, APPLIED SOCIAL PSYCHOLOGY ANNUAL EIGHT 130 (Stuart Oskamp ed., 1988).

<sup>55</sup> Dessart, *supra* note 53.

<sup>56</sup> Bruce A. Linton, *Self-Regulation in Broadcasting Revisited*, 64 JOURNALISM Q. 483 (1987).

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

<sup>58</sup> Henderson & Doktori, *supra* note 54, at 130.

<sup>59</sup> CBS/Broadcast Group, *Program Standards for the CBS Television Network*, in TELEVISION AS A SOCIAL ISSUE, APPLIED SOCIAL PSYCHOLOGY ANNUAL EIGHT 132 (Stuart Oskamp ed., 1988).

<sup>60</sup> Dessart, *supra* note 53.

<sup>61</sup> Henderson & Doktori, *supra* note 54, at 130.

<sup>62</sup> See FTC, POLICY STATEMENT REGARDING ADVERTISING SUBSTANTIATION (1984), available at <http://www.ftc.gov/bcp/guides/ad3subst.htm>.

<sup>63</sup> Dessart, *supra* note 53; CBS/Broadcast Group, *supra* note 59, at 131.

<sup>64</sup> Dessart, *supra* note 53.

<sup>65</sup> CBS agreed to air an issue advertisement funded by the conservative Christian group Focus on the Family conveying an anti-abortion message. Stuart Elliott, *An Advocacy Ad Stirs a National Debate*, N.Y. TIMES, Feb. 2, 2010, at B4.



change in policy, CBS noted that their restrictions against advocacy advertisements needed to be loosened because such restrictions no longer “reflect[ed] public sentiment or industry norms.” Some limitations would still be enforced, however, and only commercials that were “responsibly produced” would be considered.<sup>66</sup> Advertisements that were extremely one-sided or officious would therefore most likely not meet the network’s standards and would not be aired.

If a commercial is not cleared to air on suitability grounds, the commercial S&P departments often provide a brief and vague explanation that their decision was dictated by the network’s S&P.<sup>67</sup> For example, CBS recently claimed that it was unwilling to air an advertisement from a gay dating site during the 2010 Super Bowl broadcast because it had concerns about the advertisement’s failure to satisfy “the Network’s Broadcast Standards for Super Bowl Sunday.” Further explanations were not provided.<sup>68</sup> Similarly, NBC and various affiliates have repeatedly rejected advertisements from the animal rights group, People for the Ethical Treatment of Animals (“PETA”), claiming the ads had either fallen short of the network’s standards,<sup>69</sup> or were “not appropriate” for the audience for which they were intended.<sup>70</sup>

### B. Network News

Generally, networks have separate standards for news broadcasts and entertainment programming.<sup>71</sup> News S&P is

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<sup>66</sup> *CBS on Tim Tebow Super Bowl Ad: OK if ‘Responsibly Produced,’* USA TODAY, Jan. 27, 2010, [http://www.usatoday.com/sports/football/nfl/2010-01-26-tim-tebow-cbs-ad\\_N.htm](http://www.usatoday.com/sports/football/nfl/2010-01-26-tim-tebow-cbs-ad_N.htm).

<sup>67</sup> Henderson & Doktori, *supra* note 54, at 130-31.

<sup>68</sup> The network also alleged that the rejection was motivated by continued doubts about the organization’s credit status but the validity of this claim was questioned by the advertiser. Hollie McKay, *CBS Rejects Gay Dating Site’s Proposed Super Bowl Ad*, FOX NEWS, Jan. 29, 2010, <http://www.foxnews.com/entertainment/2010/01/29/cbs-rejects-gay-dating-sites-proposed-super-bowl-ad/> (quoting the official CBS rejection letter).

<sup>69</sup> PETA produced an ad detailing how turkeys are slaughtered to be aired during the broadcast of the Macy’s Thanksgiving Day Parade, which the advocacy group claimed NBC rejected with only the vague assessment that “this commercial does not meet NBC Universal Standards.” Sarah Gilbert, *NBC Nixes PETA Ad on Macy’s Thanksgiving Day Parade Broadcast*, WALLETPOP BLOG, Nov. 25, 2009, <http://www.walletpop.com/blog/2009/11/25/nbc-nixes-peta-ad-on-macys-thanksgiving-day-parade-broadcast/>. A similar assessment was given by NBC when it rejected an earlier ad by PETA promoting vegetarianism that the rights group had planned to air during the Super Bowl. The advertisement, entitled “‘Studies Show Vegetarians Have Better Sex,’ features a series of sexy models playing provocatively with a variety of vegetables . . . . Victoria Morgan, NBC advertising standards chief, said the advert[isement] ‘depicts a level of sexuality exceeding our standards.’” Paul Thompson, *Veggies Might Have Better Sex, But Not on TV*, DAILY MAIL, Jan. 29, 2009, at 22.

<sup>70</sup> Several affiliates nationwide banned the Thanksgiving ad because, as one station’s general manager explained, the subject matter seemed to “not [be] appropriate for the spirit of the [Macy’s Thanksgiving Day] parade.” *4 NBC Affiliates Ban PETA’s Thanksgiving Day Ad*, THE STREET, Nov. 24, 2009, <http://www.thestreet.com/story/10632699/4-nbc-affiliates-ban-petas-thanksgiving-day-ad.html>.

<sup>71</sup> See generally CBS/Broadcast Group, *supra* note 59; Dessart, *supra* note 53; Henderson &

perhaps the best known of the network S&P departments, in part because they have faced the most public scrutiny. Generally, this scrutiny has been reserved for instances of failing to prevent the broadcast of egregious factual inaccuracies<sup>72</sup> or investigative journalism pieces that violated journalistic ethics.<sup>73</sup> In these cases, the networks go to great lengths to restore the public's confidence in their reporting by investigating the allegations and making employees publically accountable for their errors in professional judgment.<sup>74</sup>

The most recent high-profile example of news S&P under fire concerned the program *60 Minutes Wednesday*, part of the premier investigative news brand on television.<sup>75</sup> On September 8, 2004, *60 Minutes Wednesday* aired a segment claiming the existence of documentary evidence proving that President George W. Bush had received "preferential treatment to obtain a position the Texas Air National Guard," thereby allowing him to avoid active combat in the Vietnam War.<sup>76</sup> The segment, entitled *For the Record*, was anchored by Dan Rather, the face of CBS News, and produced by an award-winning, highly respected veteran of the network,

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Doktori, *supra* note 54.

<sup>72</sup> For an overview of the censure network and cable news divisions faced for failing to properly call the 2000 Presidential election, see Josh Getlin & Jeffrey Gettleman, *TV News Badly Embarrassed by Bad Calls*, L.A. TIMES, Nov. 9, 2000, at A1; Steven Luxenberg, *Is TV to Blame? Well, Let's Go to the Videotape*, WASH. POST, Nov. 12, 2000, at B5; Katharine Q. Seelye, *Network Chiefs Get Flogging at Capitol for Election Fiasco*, N.Y. TIMES, Feb. 14, 2001, at A28.

<sup>73</sup> In 1993 NBC was sued by General Motors for broadcasting a report on the news magazine *Dateline NBC* that claimed to show a General Motors truck bursting into flames upon impact when it was revealed that journalists had used small rockets strapped to the car to make it ignite if the gas tank leaked. Two days after the lawsuit was announced, the case was settled and NBC issued an on-air apology described as "practically unprecedented in broadcast journalism." Elizabeth Kolbert, *NBC Settles Truck Crash Lawsuit, Saying Test Was 'Inappropriate'*, N.Y. TIMES, Feb. 10, 1993, at A1. ABC was sued by the supermarket chain Food Lion on grounds of fraud, trespassing and breach of loyalty after it was revealed that in 1992 ABC reporters for the news magazine *Primetime Live* had lied to get jobs in order to film Food Lion employees repackaging and selling spoiled meat and fish. Eventually the U.S. Court of Appeals for the Fourth Circuit overturned a verdict against the network. *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999). For reporting on the case, see Felicity Barringer, *Appeals Court Rejects Damages Against ABC in Food Lion Case*, N.Y. TIMES, Oct. 21, 1999, at A1.

<sup>74</sup> NBC News commissioned an investigation of its *Dateline NBC* segment on General Motors, and subsequently fired three top producers involved with the segment. Elizabeth Kolbert, *NBC Admits Bad Judgment in Truck Report*, N.Y. TIMES, Mar. 23, 1993, at D23. In addition, shortly after the 2000 Presidential election, various broadcast news divisions announced changes to their internal policies and efforts at internal review. See Peter Marks, *ABC Tightens its Rules on Declaring Winners*, N.Y. TIMES, Nov. 23, 2000, at A34.

<sup>75</sup> *60 Minutes* "has won more Emmy Awards than any other primetime broadcast, including a special Lifetime Achievement Emmy. It has also won virtually every other broadcast journalism award, including back-to-back Peabody awards for excellence in television broadcasting in 2008 and 2009 to bring its total to 16." About Us, 60 MINUTES, <http://www.cbsnews.com/stories/1998/07/08/60minutes/main13503.shtml#a> (last visited Apr. 5, 2010).

<sup>76</sup> Dick Thornburgh & Louis D. Boccardi, REPORT OF THE INDEPENDENT REVIEW PANEL ON THE SEPTEMBER 8, 2004 *60 MINUTES WEDNESDAY* SEGMENT "FOR THE RECORD" CONCERNING PRESIDENT BUSH'S TEXAS AIR NATIONAL GUARD SERVICE 1 (2005), [http://www.variety.com/graphics/photos/storypics/cbs\\_report.pdf](http://www.variety.com/graphics/photos/storypics/cbs_report.pdf).

Mary Mapes.<sup>77</sup> Almost immediately the veracity of the documents was doubted and the motivations behind the segment as a whole were questioned.<sup>78</sup> Eventually, CBS News President, Andrew Heyward, issued a remorseful statement admitting “CBS News cannot prove that the documents are authentic, which is the only acceptable journalistic standard to justify using them in the report. We should not have used them.”<sup>79</sup> In the aftermath, Mapes was fired, and Rather was forced out of his position as the anchor of CBS Evening News.<sup>80</sup>

Eager to eliminate doubts concerning its credibility, CBS appointed an Independent Review Panel, helmed by Dick Thornburgh, the former Attorney General of the United States and Louis D. Boccardi, the former Chief Executive Officer and President of The Associated Press<sup>81</sup> to examine both the process by which the original segment was prepared, vetted and broadcast and the circumstances surrounding the repeated efforts to defend the segment after it aired.<sup>82</sup> The result, known as the *Thornburgh/Boccardi Report* [hereinafter *CBS Report*], is a highly detailed, public explanation of how network news companies’ S&P divisions verify the accuracy of their programming. It affirms that, despite some shortcomings, network news Standards and S&P can be trusted to ensure that network news content is accurate.

The *CBS Report* explains that the network ensures that news segments abide by its S&P via a multi-layered process of review involving various junior and senior staff members and network news executives.<sup>83</sup> Quite often, however, the time constraints of broadcast news do not realistically permit all the safeguards in place to fully function as intended, including legal review. For example, as the *CBS Report* implies, when a segment is produced

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<sup>77</sup> Mapes “is widely considered one of the best newsmagazine producers at CBS News and who recently oversaw the *60 Minutes* report about abuses at the Abu Ghraib prison near Baghdad, Iraq.” Bill Carter & Jacques Steinberg, *CBS Quiet About Fallout, but Precedent is Ominous*, N. Y. TIMES, Sept. 21, 2004, at A24.

<sup>78</sup> Thornburgh & Boccardi, *supra* note 76, at 19-26, 153.

<sup>79</sup> *Id.* at 2.

<sup>80</sup> David Carr, ‘*60 Minutes*’ II Wins a Peabody Award, *Raising Eyebrows*, N. Y. TIMES, Apr. 8, 2005, at C6. Ultimately Dan Rather sued CBS, alleging that his reputation was tarnished by the manner in which the network handled their investigation into the *60 Minutes Wednesday* segment. The lawsuit, however, was dismissed. Bill Carter, *Rather’s CBS Suit Dismissed*, N. Y. TIMES, Sept. 30, 2009, at B1. *60 Minutes Wednesday* was canceled in 2005, but the network alleged that the Bush Texas Air National Guard story did not influence the decision to eliminate the program, explaining “[t]his was a ratings call, not a content call.” Tricia McDermott, ‘*60 Minutes*’ *Wednesday Canceled*, CBS NEWS, May 18, 2005, <http://www.cbsnews.com/stories/2005/05/18/60II/main696185.shtml?tag=mncol;lst;2>.

<sup>81</sup> Boccardi was the sole non-television executive to testify before Congress in the aftermath of the 2000 Presidential Election when the networks were pilloried for failing to accurately call the election for President Bush over the Democratic candidate, Vice President Al Gore. See Seelye, *supra* note 72.

<sup>82</sup> Thornburgh & Boccardi, *supra* note 76, at 3.

<sup>83</sup> *Id.* at 36-41.

under tight time constraints, generally over the course of one day or only a few days (a process known within the industry as a “crash”),<sup>84</sup> it is unrealistic to expect the vetting process to function at full capacity. During a “crash,” a thorough verification of the producer’s reporting would likely prevent the piece from being completed in time for broadcast.<sup>85</sup> As such, it is the exception, limited to instances involving “an extraordinarily sensitive and significant story,” and not the norm that network executives retain the autonomy to probe and verify the accuracy of a “crash” segment’s reporting.<sup>86</sup> In addition, if lawyers are involved, they are typically limited to a review of the pertinent legal issues raised by a segment, if any exist.<sup>87</sup> More experienced lawyers are occasionally asked to comment on editorial content and take the liberty of questioning accuracy, but usually only in cases where the material is particularly sensitive.<sup>88</sup>

Therefore, in most instances, it is the producers<sup>89</sup> and the Executive Producers, their immediate superiors, who are tasked with ensuring compliance with the network’s news S&P.<sup>90</sup> Although they are not officially members of the S&P staff, both levels of producers are well equipped for this responsibility as the first tier of S&P review.<sup>91</sup> These positions are staffed by experienced journalists who have worked their way to senior posts by virtue of their trustworthiness and professionalism and their years of experience verifying sources.<sup>92</sup> In an industry where truth and accuracy are highly valued,<sup>93</sup> a producer’s professional reputation is determined in part by the thoroughness and accuracy of their reporting.<sup>94</sup> They are driven to scrutinize all materials and statements for accuracy before broadcast. As the story of Mary Mapes proves, failure to do so is to risk professional opprobrium, termination, and perhaps even litigation.<sup>95</sup> Therefore, although the news S&P system is challenged by the

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<sup>84</sup> *Id.* at 38.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 123.

<sup>87</sup> *Id.* at 38.

<sup>88</sup> *Id.* at 39.

<sup>89</sup> *Id.* at 37.

<sup>90</sup> *Id.* at 38. The Executive Producer is “ultimately responsible for everything that goes on the air.”

<sup>91</sup> *Id.* at 36-37.

<sup>92</sup> *Id.* at 37.

<sup>93</sup> As the Introduction to the CBS News Standards and Practices Manual explains, “most of the Standards ‘come down to two essential principles: accuracy and fairness.’” *Id.* at 41.

<sup>94</sup> The greater a producer’s reputation for trustworthiness, the greater the confidence in the producer’s ability to ensure compliance with S&P. For instance, Mary Mapes’s “reputation grew dramatically in 2003 and 2004 as she produced a number of noteworthy stories” for CBS. *Id.* at 7. Consequently, CBS lawyers admitted that they were not compelled to ask for additional information while vetting the segment “For the Record” based on their trust in her and her “stellar reputation.” *Id.* at 124.

<sup>95</sup> Carr, *supra* note 80.

time constraints of the medium, the risk of professionally-damaging consequences are so great that network news staff and executives are incentivized to control content for accuracy.

### C. Entertainment

The third S&P division, entertainment, is the one of greatest import to this analysis. The legal dictates that require commercial advertising to be reviewed<sup>96</sup> and the unequivocal need for network news programs to be accurately researched and reported<sup>97</sup> foster respect and acceptance of S&P for advertising and news. In contrast, the creative community that works on entertainment programming for the networks often interacts antagonistically with entertainment S&P departments. As one overview of the field notes, entertainment S&P is generally considered “anachronistic paternalism at best, and most often as a form of censorship,” resented for its conservative tastes that are assumed to hamper efforts to “advance” the medium.<sup>98</sup>

Presumably, part of that resentment stems from the fact that even within the networks themselves, entertainment S&P divisions are secretive, and therefore not very well known or understood.<sup>99</sup> The process is not a secret. Like S&P in commercials and news divisions, entertainment S&P executives work with “writers, producers, and directors”<sup>100</sup> during all stages of the production process, including “script review, issuances of notes, research where appropriate, meetings, review of roughcuts/dailies, and attendance at shootings when necessary.”<sup>101</sup> The result is oftentimes a collaborative effort<sup>102</sup> to ensure that the material being produced is suitable for broadcast.<sup>103</sup>

What is a secret, however, is how final determinations are actually made. The air of mystery surrounding this issue has been deliberately cultivated, even within the industry itself. One leading entertainment S&P executive, speaking on condition of anonymity, shared an anecdote emblematic of how seriously secrecy is taken among entertainment S&P practitioners. Upon first being promoted, the executive reached out to fellow executives and requested copies of their S&P handbooks. Every

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<sup>96</sup> See *supra* note 62.

<sup>97</sup> Thornburgh & Boccardi, *supra* note 76, at 4.

<sup>98</sup> Dessart, *supra* note 53.

<sup>99</sup> Interview with Confidential Source, *supra* note 16.

<sup>100</sup> Henderson & Doktori, *supra* note 54, at 130.

<sup>101</sup> *Id.* at 130-31.

<sup>102</sup> CBS/Broadcast Group, *supra* note 59, at 132.

<sup>103</sup> It is worth noting that although S&P departments are still very active within broadcasting, with “the emergence of the cable networks, and the deregulatory climate, there has been considerable relaxation of the process—not every episode is reviewed once a series is established.” Dessart, *supra* note 53.

executive contacted rebuffed the efforts, explaining that these materials were proprietary.<sup>104</sup> Even one of the few publicly available guidelines, the *CBS Program Standards*, published in the 1980s, lacks specificity and is introduced with the caveat that ultimately the process of evaluating programming for the purposes of applying S&P is subjective and fluid.<sup>105</sup>

Consequently, those interested in knowing where the line is actually drawn by practitioners making entertainment S&P decisions are often unable to confirm the specific standards used to make final assessments.<sup>106</sup> However, practitioners and academics in broadcast communications often name three primary S&P considerations, which are good starting points for S&P analyses: 1) audience expectations; 2) personal preferences; and 3) risk aversion in light of an anticipated response by the FCC or advocacy groups. The Adam Lambert incident during the ABC broadcast of the 2009 American Music Awards and the aftermath of that risqué performance on ABC and other networks reporting on the story provides a case study of how these three factors influence broadcasting choices. More importantly, it proves that the networks can be trusted to self-regulate and that intrusive governmental efforts to regulate content are unnecessary.

### 1. Audience Expectations

A network exists to serve its advertisers, which it accomplishes by serving its audience.<sup>107</sup> As CBS noted in the introduction to its *Program Standards*, networks “exist for, and ultimately succeed or fail by, how well [they] serve the needs and interests of [their] viewing public.”<sup>108</sup> This is because financially, the networks rely almost exclusively on advertisers to generate revenue.<sup>109</sup> The amount that advertisers are willing to pay for the opportunity to advertise during particular programs on particular networks is calculated based on the audience share that the program is able to generate: the larger the audience, the higher the amount the networks can charge.<sup>110</sup> This is especially true if the audience consists primarily of the eighteen through forty-nine demographic that advertisers covet because of their spending power and the

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<sup>104</sup> Interview with Confidential Source, *supra* note 16.

<sup>105</sup> CBS/Broadcast Group, *supra* note 59, at 132-33.

<sup>106</sup> Interview with Confidential Source, *supra* note 16.

<sup>107</sup> *Id.*

<sup>108</sup> CBS/Broadcast Group, *supra* note 59, at 132.

<sup>109</sup> Tim Arango, *Broadcast TV Faces Struggle to Stay Viable*, N.Y. TIMES, Feb. 28, 2009, at A1. See also *Business Model Unraveling for TV Networks*, HOLLYWOOD REPORTER, Dec. 29, 2009, [http://www.hollywoodreporter.com/hr/content\\_display/television/news/e3i55cc6046dcbcc64544336db3970a235d?pn=1](http://www.hollywoodreporter.com/hr/content_display/television/news/e3i55cc6046dcbcc64544336db3970a235d?pn=1).

<sup>110</sup> Lynn Schafer Gross, *Ratings*, MUSEUM OF BROADCAST COMMUNICATIONS, <http://www.museum.tv/eotvsection.php?entrycode=ratings> (last visited Apr. 5, 2010).

assumption that they are more susceptible to advertising than older demographics.<sup>111</sup> S&P can therefore be seen as “brand protection,” primarily motivated by a desire to maintain “the networks’ most precious asset, its audience”<sup>112</sup> by satisfying the needs and expectations of the networks’ clients.<sup>113</sup> This, in turn, ensures that advertisers will buy airtime on the networks to gain access to that audience in order to sell their products.<sup>114</sup>

As a result, among “the most important factors used in S&P review are the audience’s expectations.”<sup>115</sup> S&P executives are charged with assessing viewers’ community standards, what they will and will not tolerate, to ensure that no audience share is lost on account of program content.<sup>116</sup> This, in turn, preserves advertising revenue. Given the negative financial impact that a loss of audience can mean for a network, success or failure of a network’s S&P decision is measured by whether or not the viewer “change[s] channels or turn[s] . . . off” the television.<sup>117</sup>

What those expectations are, however, is variable, and changes depending on the audience and the advertisers for a particular program.<sup>118</sup> For example, networks are aware that a significant portion of their audience at eight o’clock is families.<sup>119</sup> As Martin D. Franks, the Executive Vice President for Planning, Policy and Government Relations at CBS Corporations explained, “[w]e are . . . in the line-drawing business . . . . We may not have a formal family hour at 8 o’clock, but we are trying to be respectful of our audience and who makes up our audience at a particular time of day.”<sup>120</sup> And yet, the number of profanities and the amount of violence and sex that air during this time have been on the rise.<sup>121</sup> This increase, however, is not considered by the networks to be in conflict with their anticipated audience.

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111 See *CBS Sunday Morning: Is 18-49 Passe as Top Demographic?* (CBS television broadcast Nov. 6, 2005).

112 Dessart, *supra* note 53.

113 Interview with Confidential Source, *supra* note 16.

114 See Gross, *supra* note 110.

115 Henderson & Doktor, *supra* note 54, at 131.

116 *Id.*; see also Dessart, *supra* note 53.

117 CBS/Broadcast Group, *supra* note 59, at 132.

118 Interview with Confidential Source, *supra* note 16.

119 For an overview of attempts by the NAB to regulate content during this time period, and the decision by the Federal District court that such efforts were coerced by the F.C.C. and therefore a violation of the broadcasters’ First Amendment rights, see *Writers Guild of Am., W., Inc. v. F.C.C.*, 423 F. Supp. 1064 (C.D. Cal. 1976) and Campbell, *supra* note 36, at 773-74. Ultimately, the decision was overturned on jurisdictional grounds (*Writers Guild of Am., W., Inc. v. Am. Broad. Co.*, 609 F.2d 355 (9th Cir. 1979)), but the attempts to dictate content via the NAB’s Family Viewing policy were not restored. Campbell, *supra* note 36, at 774.

120 Edward Wyatt, *More than Ever, You Can Say That on Television*, N.Y. TIMES, Nov. 14, 2009, at A1.

121 See Barbara K. Kaye & Barry S. Sapolsky, *Taboo or Not Taboo? That is the Question: Offensive Language on Prime Time Broadcast and Cable Programming*, 53 J. OF BROADCASTING & ELECTRONIC MEDIA 22 (2009).

Instead, it reflects two important changes in audience expectations dictated by adjustments in community standards. First, the notion of family dynamics has changed over time, and currently, “[t]hat dynamic includes the frequent use of profanities.”<sup>122</sup> Family audiences are therefore presumably more tolerant of hearing profane language when viewing programming together during that time frame. The networks are consequently able to reflect that change in standard by permitting coarser language in their earlier programs. Second, broadcast television is aware that cable television remains unregulated, and is making programming changes to compete with audiences who have grown accustomed to less restricted content on cable during that time period.<sup>123</sup>

Adam Lambert’s American Music Awards performance and its aftermath serve as useful examples of how audience expectations vary depending on the program in question, and how the networks alter content to meet those expectations. Throughout the live performance, ABC kept its cameras on Mr. Lambert, suggesting that it was not concerned that its audience would find the content troubling or offensive. This changed when Mr. Lambert unexpectedly simulated oral sex with a male dancer. Then ABC made the in-the-moment decision to cut away to an aerial shot of the audience.<sup>124</sup> Its efficient use of the technology at its disposal to prevent certain aspects of the performance from being seen by viewers suggests that ABC was attempting to satisfy its audience’s expectations by controlling their exposure to broadcast content.

The network’s concerns over audience reaction to this moment in the performance were corroborated by their decision to edit the simulated oral sex out of the West Coast re-broadcast. The other sexually charged aspects of the performance, however, were preserved.<sup>125</sup> Although it is unclear how the network came to the conclusion that this minimal editing was preferable to having the performance air undisturbed or be cut in its entirety, perceived audience expectations likely had an impact on the decision. The program itself was geared towards older children and adults,<sup>126</sup> it was expected to air as the final act in the three-

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<sup>122</sup> Wyatt, *supra* note 120.

<sup>123</sup> *Id.*

<sup>124</sup> Emily Christianson & Patrick Kevin Day, *Best and Worst: American Music Awards 2009—Adam Lambert Shocks ‘em*, L.A. TIMES, <http://theenvelope.latimes.com/env-ama-best-worst-2009-pictures,0,3601105.photogallery> (last visited Apr. 6, 2010).

<sup>125</sup> *Adam Lambert to Perform on ‘Early Show,’ supra* note 7; see also Jill Serjeant, *Adam Lambert’s Sexually-Charged Act Draws Complaints*, REUTERS, Nov. 23, 2009, <http://www.reuters.com/article/idUSTRE5AK0C720091123>.

<sup>126</sup> The program was able to generate a very respectable rating of 5.5 among the eighteen through forty-nine demographic that is sought after by advertisers, marking an eight



hour show,<sup>127</sup> and it is part of a genre known for generating controversy for adult-subject matter.<sup>128</sup> Some level of sexual content would therefore be permissible. But as this case study proves, there is a fine line between suitable and unsuitable content, and the networks will not hesitate to bar content they fear may cross that line lest their audience members find it intolerable.

ABC declared that its concern over audience expectations was the primary motivator behind its handling of the American Music Awards aftermath. The day following the awards show, the network announced that it had canceled Lambert's upcoming performance<sup>129</sup> on the popular morning news program, *Good Morning America*.<sup>130</sup> The network cited objections from viewers as the reason for its cancellation, revealing that there had been a total of 1500 complaints lodged about the performance, and that it had qualms that a performance by Mr. Lambert would disregard that program's audience expectations as well.<sup>131</sup>

The decision was not surprising given the conservative programming on morning news programs and their financial importance to network news divisions. Morning news show audiences are multi-generational,<sup>132</sup> and their "somewhat chattier" format<sup>133</sup> reflects the fact that "many children watch the morning news shows."<sup>134</sup> So, while there is some hard news early in the program,<sup>135</sup> the rest of the airtime is usually devoted to

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percent increase over the previous year's ratings and its best results in five years. Toni Fitzgerald, *Big Ratings for American Music Awards*, MEDIA LIFE, Nov. 23, 2009, [www.medialifemagazine.com/artman2/publish/Overnights\\_50/Big\\_ratings\\_for\\_American\\_Music\\_Awards.asp](http://www.medialifemagazine.com/artman2/publish/Overnights_50/Big_ratings_for_American_Music_Awards.asp).

<sup>127</sup> Kaufman, *supra* note 8.

<sup>128</sup> See *F.C.C. v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009).

<sup>129</sup> The performance was scheduled to air three days after the AMA broadcast. *Adam Lambert to Perform on 'Early Show,' supra* note 7.

<sup>130</sup> Of the three network morning news programs, ABC's *Good Morning America* consistently comes in second in the ratings to NBC's program, *The Today Show*. *Network TV: Audience*, in THE STATE OF THE NEWS MEDIA 2009: AN ANNUAL REPORT ON AMERICAN JOURNALISM (2009) [Hereinafter *Network TV: Audience*], available at [http://www.stateofthemediamedia.org/2009/narrative\\_networktv\\_audience.php?cat=2&media=6#NetAudMornMonth](http://www.stateofthemediamedia.org/2009/narrative_networktv_audience.php?cat=2&media=6#NetAudMornMonth).

<sup>131</sup> *Adam Lambert to Perform on 'Early Show,' supra* note 7. The network described this number of complaints as "moderate." Chris Ariens, 'Good Morning America' Cancels Adam Lambert Concert, TV NEWSER, Nov. 24, 2009, [http://www.mediabistro.com/tvnewser/abc/good\\_morning\\_america\\_cancels\\_adam\\_lambert\\_concert\\_144103.asp](http://www.mediabistro.com/tvnewser/abc/good_morning_america_cancels_adam_lambert_concert_144103.asp). An estimated 14.2 million viewers watched the AMA telecast, the largest audience since 2002, ABC said, based on preliminary viewing figures. Serjeant, *supra* note 125.

<sup>132</sup> Alex Dobuzinskis, *Disney Reviewing Live Shows After Lambert*, REUTERS, Nov. 30, 2009, <http://www.reuters.com/article/idUSTRE5AT3NF20091130>. It is worth noting that of all the networks, ABC's morning show audience is the oldest demographically, CBS's *Early Show* is the youngest, and NBC's *The Today Show* is in the middle. *Network TV: Audience, supra* note 130.

<sup>133</sup> *Network TV: Audience, supra* note 130.

<sup>134</sup> Dobuzinskis, *supra* note 132.

<sup>135</sup> *Network TV: Content*, in THE STATE OF THE NEWS MEDIA 2009: AN ANNUAL REPORT ON AMERICAN JOURNALISM (2009),

lighthearted lifestyle, cooking, and entertainment segments.<sup>136</sup> A controversial, adult-themed, sexually charged performance with homoerotic pantomimes like the one Mr. Lambert gave at the American Music Awards would defy the expectations of an audience used to the more benign programming content of morning news shows. As an ABC spokesperson explained, the network canceled Adam Lambert's booking because they were "concerned about airing a similar concert [to the one on the AMA show] so early in the morning."<sup>137</sup>

Satisfying the expectations of the *Good Morning America* audience has important financial repercussions for ABC. By preserving and protecting the audience that its advertisers seek to promote their products to, ABC assures advertisers a return on their investment in that program. This increases the likelihood that the advertiser will buy airtime during that program in the future.<sup>138</sup> In addition, if ABC is able to deliver a larger audience share than its competitors for a particular time slot, the network can charge advertisers a higher rate than its less popular rivals, ensuring higher revenue than its competitors.<sup>139</sup>

The preservation of advertising revenue is particularly important among morning news programs, which are generally considered the rainmakers for the network news divisions: *Good Morning America*, for example, generates over half of the advertising revenue earned by ABC News programs.<sup>140</sup> And yet the program's ability to continue to generate similar sums has been in doubt given the continued decline of its audience share as audiences rely on other outlets for news.<sup>141</sup> The network's cancelation of Mr. Lambert's performance can therefore be seen as an attempt to meet audience expectations by not airing a performance that could contribute to the ongoing decline in audience share, and over the long run have a negative financial

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[http://www.stateofthedia.org/2009/narrative\\_networktv\\_contentanalysis.php?media=6&cat=1#topstorymorning](http://www.stateofthedia.org/2009/narrative_networktv_contentanalysis.php?media=6&cat=1#topstorymorning).

<sup>136</sup> The menu tabs on the *Good Morning America* website are good examples of the content that airs on the show itself: "Your Money," "Healthy Living," "Entertainment," "Recipes," "Parenting," "Pets," and "Books." <http://abcnews.go.com/GMA/> (last visited Jan. 29, 2009).

<sup>137</sup> Ariens, *supra* note 131.

<sup>138</sup> See generally Gross, *supra* note 110.

<sup>139</sup> *Network TV: Economics*, in THE STATE OF THE NEWS MEDIA 2009: AN ANNUAL REPORT ON AMERICAN JOURNALISM (2009),

[http://www.stateofthedia.org/2009/narrative\\_networktv\\_economics.php?cat=3&media=6](http://www.stateofthedia.org/2009/narrative_networktv_economics.php?cat=3&media=6). For instance, *The Early Show* on CBS is in last place in the ratings and it subsequently generates significantly less revenue than its competitors at ABC and NBC. In contrast, NBC's top rated *The Today Show* is able to translate its status as the ratings leader in its time slot "into a premium for advertising revenue of roughly 10%." *Id.*

<sup>140</sup> *Id.* Other programs include the evening news program *World News*, the late night news program *Nightline*, the Sunday morning news program *This Week* and the news magazine *20/20*, <http://abcnews.go.com> (last visited Apr. 5, 2010).

<sup>141</sup> *Network TV: Audience*, *supra* note 130.

impact on the network.

## 2. Personal Preferences

Ultimately, practitioners acknowledge that determining what is allowed on the air is “a subjective and personal process.”<sup>142</sup> For example, S&P executives admit that programming decisions are motivated in part by a desire to reflect the staff’s collective taste, which usually aims to mirror the targeted audience’s taste.<sup>143</sup> Although it is difficult to quantify how much of the aftermath of the Adam Lambert situation was motivated by the personal tastes of the networks’ executives, there is some evidence that subjectivity played a significant role in the decisions taken.

As mentioned above, for both the East and the West coast broadcast the producers chose to selectively edit some of Mr. Lambert’s performance.<sup>144</sup> Editing decisions are generally left to the discretion of producers and program executives and can therefore be attributed in part to their personal opinions about what would and would not be acceptable for air.<sup>145</sup> Furthermore, while ABC executives explained that their decision to cancel Mr. Lambert’s performance on *Good Morning America* was dictated by the desire to protect that program’s young audience members, they provided no insight into what drove them to also cancel Mr. Lambert’s appearance on the late-night interview program, *Jimmy Kimmel Live*.<sup>146</sup> Given its post-midnight broadcast, there is a limited risk of young viewers watching the program.<sup>147</sup> The perfunctory explanation that ABC provided, “[w]e decided not to move forward with the booking at this time,” suggests that perhaps the network’s decision was rooted in its continued annoyance with Mr. Lambert for his behavior during the American Music Awards.<sup>148</sup>

Furthermore, there is the question of the kiss. When reporting on the controversy surrounding Mr. Lambert’s performance, CBS showed a series of still photographs of the act, but blurred out the photograph of Mr. Lambert kissing a male

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<sup>142</sup> CBS/Broadcast Group, *supra* note 59, at 133.

<sup>143</sup> Interview with Confidential Source, *supra* note 16.

<sup>144</sup> Serjeant, *supra* note 125.

<sup>145</sup> Interview with Confidential Source, *supra* note 16.

<sup>146</sup> David Itzkoff, *For ABC, Adam Lambert Still an Unwelcome Idol*, N.Y. TIMES, Dec. 4, 2009, at C5.

<sup>147</sup> *Jimmy Kimmel Live*, ABC, <http://abc.go.com/shows/jimmy-kimmel-live/index> (last visited Apr. 5, 2010). Interestingly, *Jimmy Kimmel Live* has a regular segment entitled “Unnecessary Censorship,” whereby benign content is unnecessarily bleeped or blurred to create the impression that obscenities or indecencies were uttered or enacted. *Jimmy Kimmel Live*, Watch Full Episodes and Shorts, ABC, <http://abc.go.com/watch/clip/jimmy-kimmel-live/SH005455790000/20957/250460> (last visited Apr. 5, 2010). Kimmel has also been the subject of ABC’s efforts to regulate content, being forced to pre-tape his show so that the network can check for offending content before broadcast. Don Kaplan, *ABC Yanks ‘Kimmel’ Over Detroit Joke*, N.Y. POST, June 11, 2004, at 129.

<sup>148</sup> Itzkoff, *supra* note 146.

band member. In contrast, the network has shown unedited photographs of the female singers Madonna and Britney Spears kissing during a live performance of the 2003 Video Music Awards on MTV.<sup>149</sup> A CBS network representative explained the different treatment of the images by noting that “[t]he Madonna image is very familiar and has appeared countless times including many times on morning television. The Adam Lambert image is a subject of great current controversy, [and] has not been nearly as widely disseminated . . . .”<sup>150</sup> In brief, CBS was aware that the familiarity of the Madonna image would neither threaten audience expectations, nor would it expose the network to regulatory scrutiny from the government.

CBS explained that it chose to show the female/female kiss but blur the male/male kiss out of concern for their audience’s familiarity with the photograph and its assessment of the different risk of liability between the images.<sup>151</sup> Others, however, including Mr. Lambert himself, alleged that the decision was motivated by network executives’ discomfort with displays of sexuality between two men.<sup>152</sup> The *New York Times* speculated that the issue was less a question of endorsing a community standard and more a case of a double standard dictated by subjective preferences:

[W]hile gay sexuality is discussed and joked about plenty, rarely are . . . gay characters shown having sex or kissing passionately . . . . Women kissing women is far more common, probably because it doesn’t offend: for many viewers, two women romping together in bed registers less as lesbianism than as an extracurricular turn-on for men.<sup>153</sup>

The difference in treatment between displays of lesbian and gay sexuality in the aftermath of the performance “was a reminder of television’s policy regarding gay men: Do tell, just don’t show.”<sup>154</sup> Such assessments are, however, speculative, and defining how large a role subjectivity plays in S&P is hard to determine definitively.

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149 Maria Elena Fernandez, *A Milder, Not Wilder Lambert*, L.A. TIMES, Nov. 26, 2009, at D11; see also Corey Moss, *Madonna Smooches with Britney and Christina; Justin, Coldplay Win Big at VMAs*, MTV, Aug. 28, 2003, [http://www.mtv.com/news/articles/1477729/20030828/spears\\_britney.jhtml](http://www.mtv.com/news/articles/1477729/20030828/spears_britney.jhtml).

150 Fernandez, *supra* note 149.

151 *Id.*

152 Lambert, *Offering No Apologies*, CBS NEWS, Nov. 25, 2009, <http://www.cbsnews.com/stories/2009/11/25/earlyshow/leisure/celebspot/main5772303.shtml>.

153 Alessandra Stanley, *Community Standard or Double Standard?*, N.Y. TIMES, Nov. 26, 2009, at C1.

154 *Id.*

### 3. Risk Aversion: Fear of the FCC and Advocacy Groups

The demand to satisfy audience expectations and executives' personal preferences can be categorized as inside pressures, motivated by the network's internal need to protect its advertising revenue by preserving its audience share and satisfying its major institutional players. The networks also face external pressures, imposed by forces that attempt to influence programming content independently of the network's interest or desire to do so. The two main sources of outside programming pressure are the federal government, via the FCC, and advocacy groups. The networks' responses during the aftermath to Mr. Lambert's performance serve as useful models of the different, and at times overlapping, mechanisms broadcasters employ to address both of these outside sources.

Any broadcaster airing an awards show or a live broadcast has been put on notice by the FCC that the Commission no longer tolerates instances of isolated indecencies during these programs, even if they are passing or fleeting in nature.<sup>155</sup> Perhaps the most infamous instance was Janet Jackson's 2004 Super Bowl performance: "The FCC fined CBS \$550,000 for broadcasting a fleeting glimpse of Janet Jackson's breast to roughly 90 million TV viewers of the . . . half-time show, which Jackson famously blamed on a wardrobe malfunction."<sup>156</sup> In addition, during the live broadcast on NBC of the 2003 Golden Globe Awards, Bono, the lead singer of the rock band U2, expressed his delight at winning an award by declaring his victory "fucking brilliant." Although the FCC was initially unclear on how it would respond to this situation,<sup>157</sup> it ultimately declared "the mere fact that specific words or phrases was [sic] not sustained or repeated does not mandate a finding that material that is otherwise patently offensive to the broadcast medium is not indecent."<sup>158</sup> Similarly, after reviewing two other instances of fleeting expletives during live broadcasts of awards shows,<sup>159</sup> the FCC declared that both

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<sup>155</sup> See *in re Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 F.C.C.R. 13299 (2006) (remand order) (concerning the 2002 and 2003 Billboard Music Awards) and *F.C.C. v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1812-14. (2009) (declaring that the FCC's change in policy is neither arbitrary nor capricious and within its authority under the Administrative Procedure Act).

<sup>156</sup> Serjeant, *supra* note 125.

<sup>157</sup> "Complaints about the broadcast initially were dismissed by the F.C.C.'s Enforcement Bureau. Applying existing precedent, the Commission staff explained that 'fleeting and isolated remarks of this nature' do not violate the Commission's regulations. However, '[a]fter being subjected to significant pressure from Congress . . . the F.C.C. reversed' its order. Corn-Revere, *supra* note 11, at 308.

<sup>158</sup> *In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 F.C.C.R. 4975, 4979, n.4 (2004) [hereinafter *Golden Globes Order*].

<sup>159</sup> The singer/actress Cher used the phrase "F— 'em" during the 2002 Billboard Music

instances were actionably indecent.<sup>160</sup> The Commission has acknowledged that its willingness to fine broadcasters for these isolated instances of indecent programming is a change in policy, but the Supreme Court has affirmed that the change is neither arbitrary nor capricious and can therefore be implemented within the Commission's authority under the Administrative Procedure Act.<sup>161</sup>

Although the Supreme Court agreed that the FCC has the power to change its regulatory policy concerning fleeting expletives, both *FCC v. Fox Television Stations*<sup>162</sup> and *FCC v. CBS Broadcasting*,<sup>163</sup> regarding fines assessed against CBS for airing Janet Jackson's "wardrobe malfunction" during the 2004 Super Bowl,<sup>164</sup> were remanded. Pending review by the Second and Third Circuits, respectively, as well as possible additional review of one or both decisions by the Supreme Court, "the FCC's broadcast indecency policy remains in limbo."<sup>165</sup> Broadcasters are therefore unable to predict with certainty what actions the Commission will take under similar circumstances.

What is clear, however, is the financial impact a misstep could have. In 2006, Congress passed the Broadcast Decency Enforcement Act, raising the maximum penalty for broadcast indecencies tenfold, from a conservative \$32,500 to \$325,000.<sup>166</sup> In addition, the Commission can choose to either "impose one fine per program that may include several indecent incidents or it may choose to fine each incident within a program, potentially raising total sanctions into the millions."<sup>167</sup>

For ABC, concern that the FCC would fine them for the sexual content of Mr. Lambert's initial performance is mitigated by the fact that it aired after ten PM. The Commission has promulgated its regulation on broadcast indecency to be limited to "any material which is indecent" only "between 6 AM and 10 PM."<sup>168</sup> The hours between ten PM to six AM are therefore considered a "safe harbor," since "children under the age of 17

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Awards and reality starlet Nicole Richie used the words "sh—" and "f—ing" when she appeared on the same awards show a year later. *In re Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 F.C.C.R. 13299, 13303, 13312 (2006).

<sup>160</sup> These actions were upheld by the Commission. *See id.*

<sup>161</sup> *F.C.C. v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009).

<sup>162</sup> *Id.*

<sup>163</sup> *F.C.C. v. CBS Corp.*, 129 S. Ct. 2176 (2009).

<sup>164</sup> Helgi C. Walker & Martha E. Heller, *Communications Law 2009*, in TELECOMMUNICATIONS POLICY AND REGULATION INSTITUTE (27TH ANNUAL) 229, 318 (2009).

<sup>165</sup> *Id.* at 315.

<sup>166</sup> 47 U.S.C. § 503(b)(2)(C)(ii) (2006).

<sup>167</sup> Walker, *supra* note 164, at 315.

<sup>168</sup> 47 C.F.R. § 73.3999(b) (1995), which is an enforcement of 18 U.S.C. § 1464 (2006).

are less likely to be in the audience.”<sup>169</sup>

Yet the fear of regulatory sanctions seemed to run through ABC’s and CBS’s responses to Mr. Lambert’s controversial performance. For example, after the broadcast, the show’s producers affirmed what Mr. Lambert had been suggesting since shortly after the performance: the more sexually-charged moments in the act, including the kiss and the grabbing and pushing of a male dancer’s head into Mr. Lambert’s crotch, were unplanned.<sup>170</sup> As a spokeswoman for Dick Clark Productions, the company that produced the AMA show, told Reuters, “[w]e did not expect the impromptu moments.”<sup>171</sup> The result is a parallel between Mr. Lambert’s performance and a fleeting expletive uttered in excitement during an awards ceremony: both were unplanned and not condoned by the network. Therefore although the FCC’s current regulatory measures regarding fleeting indecencies were specifically directed towards verbal utterances, by analogy they could apply to this instance of a performance as well, eliminating the need for any additional or perhaps more extensive regulatory attempts to control programming content during live performances.

After *Good Morning America* canceled Mr. Lambert’s performance, the CBS *Early Show* invited him to appear on their broadcast.<sup>172</sup> It was during this appearance that CBS chose to blur the photograph of Mr. Lambert kissing a male dancer during his AMA presentation.<sup>173</sup> While the network explained that a lack of audience familiarity with the image was a main consideration in banning the photo from broadcast, they also explained that they were unwilling to air it because “for all we know, [the image] may still lead to legal consequences.”<sup>174</sup> This explanation suggests that the network was concerned that the FCC could still take regulatory action and impose sanctions against broadcasters airing images of Adam Lambert’s performance. Whether or not there was a genuine risk of FCC sanction is difficult to predict, although it seems unlikely.<sup>175</sup> What is clear, however, is that the network was willing to self-regulate based upon the mere threat of government sanctions.

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<sup>169</sup> Walker, *supra* note 164, at 315.

<sup>170</sup> Lambert: *Offering No Apologies*, *supra* note 152. Dick Clark Productions also refused to allow Mr. Lambert’s performance to be downloaded on the World Wide Web, so previously active links to the performance have been replaced by the statement “This video is no longer available due to a copyright claim by Dick Clark Productions, Inc.”

<sup>171</sup> Serjeant, *supra* note 125.

<sup>172</sup> Dave Itzkoff, *ABC Drops Adam Lambert, and CBS Picks Him Up*, N.Y. TIMES, Nov. 25, 2009, at C2.

<sup>173</sup> Fernandez, *supra* note 149.

<sup>174</sup> *Id.*

<sup>175</sup> See *infra* p. 37 and note 216.

Furthermore, ABC suggested that they wanted to shield themselves from any future regulatory liability by announcing that, from now on, they would change the way they approved live performances before they aired.<sup>176</sup> The network would establish a system by which they would create negative financial repercussions for performers who engaged in unexpectedly indecent or obscene behavior during a live broadcast. The system would get “assurances from artists that their stage shows will resemble their rehearsals, and us[e] contractual obligations to hold them to that,”<sup>177</sup> with the implication that a breach of contract could result in financial penalties for performers. Disney/ABC Television Group President Anne Sweeney told Reuters that this change was driven by a desire to protect audience expectations, noting “[w]e certainly don’t want to suppress artistry at any level, but we also have to be very cognizant of who our audience is.”<sup>178</sup>

The immediate impact of that decision, however, would not be to uphold community standards and protect audience expectations. A policy of implementing a profanity delay for all live performances would do that more effectively.<sup>179</sup> Instead, the proposed policy would serve as evidence that the industry was willing to implement measures to control its content that were tailored to the particular problem of the unpredictability of live performances. From now on, the network would minimize the likelihood of surprise instances of indecent content during live performances by threatening legal action and financial repercussions against performers who failed to meet the network’s S&P standards.<sup>180</sup> For example, if implemented successfully, ABC’s new policy would probably result in fines for breach of contract against those directly responsible for the indecent behavior, the performers whose live acts unexpectedly violated the network’s S&P standards. Similar subsequent behavior would be deterred

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<sup>176</sup> Dobuzinskis, *supra* note 132.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> After Janet Jackson’s infamous wardrobe malfunction during the 2004 Super Bowl, *supra* note 156, CBS used a five-minute tape delay system during its 2004 broadcast of the Grammy Awards to avoid any additional liability for fleeting expletives or indecent behavior. Hal Boedeker, *Networks No Longer Want Risk of Live TV, Almost All Shows Will Have Tape Delays As Shields Against Vulgar Performers*, ORLANDO SENTINEL, Feb. 6, 2004, at A1. Although, it is important to point out that such a policy is not without its risk of error. As the FCC noted in its brief before the Appellate Court in *F.C.C. v. Fox Television Stations, Inc.*,

[t]he network used a five-second delay for this broadcast and had a single employee monitoring the show and operating a ‘delay button’ to edit out objectionable material. According to Fox, the employee failed to edit Cher’s comment, instead blocking dialogue that came afterwards. The Commission subsequently received complaints about the broadcast.”

Brief of Petitioner-Appellant at 12, *Fox Television Stations, Inc. v. F.C.C.*, 489 F.3d 444 (2d Cir. 2007) (No. 06-1760).

<sup>180</sup> Dobuzinskis, *supra* note 132.



without the need for additional governmental intervention.<sup>181</sup> The network would therefore act in a regulatory capacity, relying not on the FCC but on the judiciary via breach of contract suits, to protect against indecent content.<sup>182</sup> If successfully implemented, this new system would lend strong support to the assertion that the network's self-regulatory measures can more effectively deter offensive live performances.<sup>183</sup>

Not surprisingly, regardless of whether or not ABC's and CBS's efforts were necessary to protect themselves from regulations or sanctions, they may have helped to appease the various advocacy groups who voiced their disapproval of and concern about Mr. Lambert's performance on the American Music Awards. Advocacy groups concerned with broadcast content and its impact on viewers have expressed an interest in controlling media content because of the recognized ability of entertainment programs to "reflect and shape the dominant values and norms in society."<sup>184</sup> Groups typically express their disapproval of broadcast content by either contacting the networks directly or, more effectively, lodging complaints with the FCC via coordinated responses among group members.<sup>185</sup> Relying on the FCC as an intermediary to make the networks aware of their disapproval is remarkably effective and efficient: the "agency typically investigates potentially indecent programming only when it has received complaints from viewers"<sup>186</sup> and it can have an immediate impact on the networks via sanctions.<sup>187</sup>

Advocacy groups have been especially influential in orchestrating the recent public outcry over live broadcast programming. For example, a quarter of the complaints the FCC received about the 2004 Janet Jackson Super Bowl half-time show came from either the members of the advocacy group Parents Television Council ("PTC") or those informed of the wardrobe

<sup>181</sup> See *supra* PART I for an overview of how broadcasters have repeatedly undertaken efforts to affirm their capacity to self-regulate.

<sup>182</sup> It is unclear, however, what the policy would be were the incident of indecency an accident, as in the case of Janet Jackson's wardrobe malfunction in the 2004 Super Bowl.

<sup>183</sup> Although initially Lambert seemed proud of improvising during his performance, he quickly changed his tone and made an effort to appear more conciliatory, noting

I think in the future I will probably make a little bit more of an effort to stay consistent with what I do during rehearsal to what I do during the show. That's something I'm learning now, and that way if anyone has a problem with what I'm doing, it can be explored during rehearsal.

Maria Elena Fernandez, *Adam Lambert Asks and Answers 'Whataya Want From Me' on 'The Early Show'*, L.A. TIMES SHOW TRACKER BLOG, Nov. 25, 2009, <http://latimesblogs.latimes.com/showtracker/2009/11/adam-lambert-asks-and-answers-whataya-want-from-me-on-early-show.html>.

<sup>184</sup> Patrick Fahey, *Advocacy Group Boycotting of Network Television Advertisers and its Effect on Programming Content*, 140 U. PA. L. REV. 647, 648 (1991).

<sup>185</sup> *Mixed Messages: Faith in a Box*, HOUS. CHRON., Jan. 1, 2005, at 1.

<sup>186</sup> Walker, *supra* note 164, at 315.

<sup>187</sup> 47 U.S.C. § 503(b)(2)(C)(ii) (2006).

malfunction via the group's email alert system.<sup>188</sup> Unsurprisingly, after Mr. Lambert's performance, PTC and other citizen groups like the Liberty Council voiced their displeasure of the performance. Timothy Winters, president of PTC claimed that "upset members" were particularly angry about the "nature of the content, the explicit nature, and how much graphic content there was." Winters noted that it was troubling that awards shows have proven to be "unsuitable for children" given how significantly teenagers contribute economically to the entertainment industry.<sup>189</sup> As is typical of their standard complaint procedures, the groups made their dissatisfaction known by either contacting the network directly or, lodging their objections with the FCC. Ultimately, in addition to the 1500 complaints received by the network itself,<sup>190</sup> the FCC received a total of 5000 additional complaints about the content of the American Music Awards broadcast.<sup>191</sup>

In general, however, although advocacy groups can compel the FCC to investigate allegations of indecency, it is difficult to quantify the impact they have on dictating network behavior. These groups are generally excluded from the production and selection process, but they are not completely shut out from broadcast decisions.<sup>192</sup> As two CBS executives explain, they often "meet with representatives from various recognized special interest groups who frequently offer insights to their specific areas of concern. Input from these organizations . . . is given careful consideration in the formulation and application of the CBS broadcast acceptance policy."<sup>193</sup>

The networks are willing to attend to the needs and concerns of these groups because they are mindful of their ability to inflict a negative financial impact. The "weapon-of-choice in the advocacy group arsenal," is the consumer boycott.<sup>194</sup> In other words, these

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<sup>188</sup> *Mixed Messages: Faith in a Box*, *supra* note 185.

<sup>189</sup> *Lambert's AMA Act Has People Talking*, CBS NEWS, Nov. 24, 2009, <http://www.cbsnews.com/stories/2009/11/24/entertainment/main5760901.shtml>.

<sup>190</sup> Ariens, *supra* note 131.

<sup>191</sup> The total number of complaints and samplings of their content were made available by the website The Smoking Gun, after they successfully filed a Freedom of Information Act request with the FCC. The majority of the complaints were in opposition to Lambert, but there were also complaints about performances by other singers, and messages in support of Lambert sent in anticipation of negative commentary. The Smoking Gun, Lewd Lambert Lambasted, Jan. 7, 2010, <http://www.thesmokinggun.com/archive/years/2010/010710lambert1.html> (last visited Apr. 5, 2010). As the NEW YORK TIMES noted, there was no shortage of adult material during the awards show broadcast: "other risqué performances . . . include[ed] Lady Gaga smashing whiskey bottles, Janet Jackson grabbing a male dancer's crotch and Eminem talking about his character Slim Shady's rap sheet of rape, assault and murder." Stanley, *supra* note 153.

<sup>192</sup> Fahey, *supra* note 184, at 649.

<sup>193</sup> Henderson & Doktori, *supra* note 54, at 130.

<sup>194</sup> Fahey, *supra* note 184, at 649.

groups have the capability to express their dissatisfaction with or disapproval of programming content not just by lodging complaints with the FCC that may result in fines, but also by boycotting outright or threatening boycotts of advertisers or sponsors of programs that do not meet their moral standards. The networks have repeatedly been forced to alter their programming decisions in an effort to meet groups' demands and thereby protect their sponsors and advertisers and preserve their advertising revenue.<sup>195</sup>

Despite this underlying respect for advocacy groups' power, the networks still remain skeptical about their ability to address the groups' primary concerns regarding the promotion of conservative community standards. For instance, in an interview with an S&P executive, the executive explained that the impression among colleagues and peers is that advocacy interest groups are "not always reasonable" regarding what they believe the networks should or should not tolerate.<sup>196</sup> This is because, as illustrated by the comments from Mr. Winters above,<sup>197</sup> the groups' decisions on what shows to protest are often driven by a desire to protect children in the audience from being exposed to mature content or language.<sup>198</sup> The executive correctly points out that although this is a laudable goal, "most households don't have children"<sup>199</sup> and the networks generally resent allowing a "minority [to] regulat[e] [the] majority."<sup>200</sup>

Despite the sometimes adversarial relationship between networks and advocacy groups, the announcement by ABC of a new policy for the vetting of live performances<sup>201</sup> could be seen as an effort to appease one of the groups' primary grievances against the networks: their lack of transparency when making S&P decisions. Because S&P standards are "a flashpoint for advocacy interest groups," networks prefer to preserve a level of secrecy about their specific dictates so that they may "maintain maximum flexibility" in making programming choices.<sup>202</sup> This allows them to adapt to specific situations or test changes in audiences' tolerance

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<sup>195</sup> *Id.* at 654-65.

<sup>196</sup> Interview with Confidential Source, *supra* note 16.

<sup>197</sup> *Lambert's AMA Act Has People Talking*, *supra* note 189.

<sup>198</sup> This line of reasoning motivated the FCC to pursue the case against Pacifica Foundation for airing a broadcast of George Carlin's famously lewd monologue, "Filthy Words," better known as "Seven Dirty Words," and was affirmed as appropriate justification in *F.C.C. v. Pacifica Found.*, 438 U.S. 726 (1978).

<sup>199</sup> Interview with Confidential Source, *supra* note 16; U.S. CENSUS BUREAU, SURVEY OF INCOME AND PROGRAM PARTICIPATION, 2004 WAVE 2, TABLE 7, COMPOSITION OF HOUSEHOLDS (2004), <http://www.census.gov/population/www/socdemo/children.html> (last visited Apr. 6, 2010).

<sup>200</sup> Interview with Confidential Source, *supra* note 16.

<sup>201</sup> Dobuzinskis, *supra* note 132.

<sup>202</sup> Interview with Confidential Source, *supra* note 16.

levels<sup>203</sup> without being subject to unwanted scrutiny by advocacy groups alleging that the networks have deliberately or wrongfully strayed from their standards.<sup>204</sup>

Although the new policy by ABC did not specify what behavior would not be tolerated during live performances,<sup>205</sup> it did provide advocacy groups with what they want most from S&P divisions: assurance that the company takes these issues seriously and insight into the network's S&P practices. In this case, the network lifted the veil on two new procedural aspects of their live broadcast standards and practices: the network would carefully vet live performances during the rehearsal process and it would rely on contracts to protect viewers. Furthermore, the network would enforce accountability with the performers themselves if they breached their contracts and failed to satisfy the network's S&P standards.<sup>206</sup> By providing insight into its new S&P aimed at minimizing the likelihood of indecency during live broadcasts, ABC assured both advocacy groups and the federal government that it can be trusted to attend to their shared concerns.

### III. MAKING THE CASE FOR SELF-REGULATION

The Adam Lambert incident underscores the primary benefits of self-regulation: 1) efficiency; 2) flexibility; 3) incentives for compliance; and 4) avoidance of constitutional issues.<sup>207</sup> First, the networks are most familiar with the different audiences for their programs and the various technological options at their disposal to minimize the likelihood of breaching community standards. In this instance, ABC was able to quickly and effectively respond to the questionable content by editing the performance both during the East coast broadcast and the West coast re-broadcast. In contrast, government regulation requires adhering to the notice and comment procedures of the Administrative Procedure Act.<sup>208</sup> It therefore takes far longer than any change that the networks might be able to implement themselves. Consequently, it is more efficient to have the government rely on the networks to police themselves.

Second, self-regulation is more flexible than government regulation. Through self-regulation, the networks are better able to tailor their decrees to ensure that they will have the desired impact on the appropriate actors. For example, ABC's new policy

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<sup>203</sup> See Wyatt, *supra* note 120.

<sup>204</sup> Interview with Confidential Source, *supra* note 16.

<sup>205</sup> Dobuzinskis, *supra* note 132.

<sup>206</sup> *Id.*

<sup>207</sup> See Campbell, *supra* note 36, at 715-17.

<sup>208</sup> 5 U.S.C. § 500 *et seq.* (2006).

regarding regulating live performances via contractual clauses<sup>209</sup> provides them with the necessary flexibility to properly control content before a broadcast. This makes the likelihood of a fleeting expletive or a surprise instance of indecency less likely. Their ability to customize their response to the particular circumstances that created the problem in the first place—in this instance, a performer’s unwillingness to adhere to his rehearsed choreography—increases the likelihood that their regulatory efforts will be effective.

Third, the networks have strong incentives to comply with community standards. As explained above, market forces exert a very strong pressure on the networks’ content-centric policies. The networks know that audiences regulate the medium by changing the channel, and this dissuades them from significantly challenging the audience’s assumptions or expectations via programming that is so explicit or risqué that they are unwilling to keep watching.<sup>210</sup> This is because the loss of audience share may lead to a reduction of advertising revenue that would negatively impact the networks financially.<sup>211</sup> As such, the networks are induced to abide by more conservative community standards.

Fourth, whenever the FCC attempts to set parameters for permissible or impermissible content on television, they risk having their decisions scrutinized or invalidated as violations of the First Amendment. By leaving content regulation in the hands of the networks, the FCC avoids any potential constitutional issues raised by their efforts to do the same.

Of course, opponents of self-regulation are quick to point out the dangers of allowing the networks to conform their content to community standards with little or no government oversight. The primary danger is the network’s inclination to favor self-serving behavior.<sup>212</sup> Although the networks have a financial incentive to not challenge community standards if doing so risks alienating their audience, they are more inclined to challenge or abandon these standards if doing so allows them to better compete against other broadcasters.<sup>213</sup> Second, federal regulatory efforts also have the benefit of being openly democratic.<sup>214</sup> Through notes and comments procedures, the public has the opportunity for input before the Commission adopts a new policy.<sup>215</sup> The more democratic process has a greater likelihood of reflecting

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209 Dobuzinskis, *supra* note 132.

210 Brown, *supra* note 17, at 708.

211 Gross, *supra* note 110.

212 Campbell, *supra* note 36, at 717.

213 *See* Wyatt, *supra* note 120.

214 Campbell, *supra* note 36, at 717-18.

215 *See* 5 U.S.C. § 500 *et seq.* (2006).

community standards. In contrast, the secretive nature of self-regulation by broadcasters is under-inclusive, reflecting the standards of a select few and therefore having a greater probability of failing to meet the needs of the public at large.<sup>216</sup>

In the case of Adam Lambert's performance, however, both of these concerns were unfounded, proving that networks are not always selfish actors. The Adam Lambert performance aired during the FCC safe harbor for indecent behavior;<sup>217</sup> therefore, it is unlikely that ABC will face any fines or penalties for the performance. And yet despite the absence of a threat of federal sanctions, the network determined that the situation warranted a prompt response<sup>218</sup> and a change in policy to avoid any similar instances in the future.<sup>219</sup>

The charge that the networks are not democratic is also unwarranted. While the reasoning of the S&P executives dictating the self-regulation procedures remains unknown,<sup>220</sup> and their decisions can be highly subjective,<sup>221</sup> ultimately the primary force driving the network's decisions is the desire to maintain their audience share. Therefore, if a significant portion of the audience changes the channel in outrage or frustration at a broadcast's content,<sup>222</sup> they may influence the network's regulatory policy regarding continued broadcast of the same or similar content. Democratic involvement is therefore applicable every time a viewer changes the channel to avoid watching content they deem objectionable.

The Adam Lambert incident proves that the networks have the incentives and the means to ensure that they are adequately regulating their content to conform to community standards. The imposition of additional regulation by the FCC is therefore unnecessary and should be abandoned in favor of promoting self-regulation.

*Maria Matasar-Padilla*\*

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<sup>216</sup> Campbell, *supra* note 36, at 718.

<sup>217</sup> See 47 C.F.R. § 73.3999(b) (1995), which is an enforcement of 18 U.S.C. § 1464 (2006).

<sup>218</sup> Ariens, *supra* note 131.

<sup>219</sup> Dobuzinskis, *supra* note 132.

<sup>220</sup> Interview with Confidential Source, *supra* note 16.

<sup>221</sup> CBS/Broadcast Group, *supra* note 59, at 133.

<sup>222</sup> Brown, *supra* note 17, at 708.

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