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FCC Issues Indecency Fine

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From: Peter Gutmann

After a long period of inactivity, the Federal Communications Commission has issued an indecency fine to 52 ABC television stations that had aired an episode of “NYPD Blue” nearly five years ago. The broadcast had run at 9 PM in the Central and Mountain time zones and thus was outside the “safe harbor” that protected other affiliates in the Eastern and Pacific zones, where the episode had been seen at 10. (The Commission further noted that it was fining only stations against which complaints had been filed, although others had aired the program as well.)

As described in detail in the FCC’s Notice, the opening of the show depicted a young boy entering a bathroom where his mother had disrobed for a shower. According to ABC, the scene was intended to illustrate the “awkwardness involved when a single parent brings a new romantic partner into his or her life.” The Commission, though, focused only on repeated shots that included the woman’s bare back and buttocks, as well as a single flash of a small portion of the side of her breast.

The Commission applied its three-part test to determine if the material was patently offensive in the full context of the broadcast. First, the Commission appeared to expand the prior scope of its definition of sexual organs by including buttocks, even though it could cite as support only “common sense” and a single case that had approved a public nudity ordinance that had mentioned buttocks among other prohibited matter. Second, it found that the broadcast dwelled on the indecent depiction, due to repeated shots of nudity. Third, it found the depiction titillating and shocking due to the repeated and lingering images, as well as the boy’s shocked reaction.

ABC had argued that the number of complaints was modest when compared to the program’s high ratings. The Commission responded that neither factor is relevant. Instead, it noted that the show’s popularity served to increase the likelihood that children were among those who saw it, thus increasing the public harm from such misconduct.

The Commission proposed fining each of the 52 stations \$27,500, the statutory maximum at the time of the broadcast (since increased to \$325,000).

At this point, it is unclear whether the action heralds a renewed FCC effort to vigilantly enforce its existing indecency policies, or merely an occasional, isolated warning for broadcasters to proceed cautiously in a troublesome area. In that regard, Commissioner Tate issued a statement that the safe harbor law “is neither difficult to understand nor burdensome to implement,” although many broadcasters cannot say the same about the Commission’s indecency policies.

Communications Daily reported that the action had been delayed for two years by the Chairman, pending guidance from the courts, but that he finally was forced to issue the fines before expiration of the applicable five-year statute of limitations.

ABC has already announced that it plans to appeal the fines. In the meantime, attention turns to the Supreme Court, which has yet to decide whether to hear the appellate case that had overturned the FCC's prior sanction of fleeting expletives. That case could provide valuable guidance for the future of indecency regulation.

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