



WOMBLE
CARLYLE
SANDRIDGE
& RICE
PROFESSIONAL LIMITED
LIABILITY COMPANY

FCC Affirms and Elaborates Indecency Fine Against *NYPD Blue* Telecast

February, 2008

The Federal Communications Commission has issued a *Forfeiture Order* that further explains the bases for its recent decision to assess a record indecency fine against 52 ABC television affiliates for having aired an episode of “NYPD Blue” in February, 2003.

Last month, the Commission proposed fining each affiliate \$27,500 for having aired an opening scene which depicted a young boy entering a bathroom where his mother had disrobed for a shower. Several shots displayed the woman’s bare back and buttocks, as well as a flash of the side of her breast. Oppositions were filed both by the ABC network and by its affected affiliates. In rejecting their contentions, the FCC bolstered with further reasoning its prior decision that had applied its traditional indecency test to the episode in question.

Depiction of Sexual or Excretory Organs or Activities – The first stage in an indecency analysis is a determination that the material in question describes or depicts sexual or excretory organs or activities. ABC had argued that sexual organs are biologically defined as genitalia and that excretory organs include only those body parts that eliminate waste products of metabolism. The Commission rejected these assertions, affirming its authority to interpret and apply its own standards and terminology. In this context, it held that the proper definitions were not medical ones but rather “in the sense of organs that are closely associated with sexuality or excretion and that are typically kept covered because their public exposure is considered socially inappropriate and shocking.” (Indeed, it noted that the use of ABC’s narrow definition would prohibit all depictions of perspiring skin.) It further cited the policy purpose of its indecency regulatory regime as the protection of children from indecent depictions of organs associated with sex and excretion. The Commission expressed fear that if it were to interpret these terms in a narrow physiological sense, “the airwaves could be filled with naked buttocks and breasts during daytime and primetime hours because they would be outside the scope of indecency regulation.” Finally, the Commission rejected application of the “rule of lenity” (which requires that ambiguity in a criminal statute be resolved in favor of a defendant) on the ground that its indecency regulations are not criminal.

Patently Offensive – The second stage in the Commission’s indecency test is that, in context and on balance, the material is found to be patently offensive as measured by contemporary community standards for the broadcast media. The Commission considered ABC’s claims that the broadcast had been preceded with a parental advisory and rating and that *NYPD Blue* had been recognized for outstanding artistic and social merit. Yet the Commission felt that these points were outweighed by each of the three factors it considers in order to assess patent offensiveness.

Explicit and Graphic Nature – Although the Commission distinguished the partial side view of the actress’s naked breast as insufficiently graphic and explicit, it found that the several shots of her bare buttocks amply met that standard. The Commission suggested that the result might have been different had the actress been wearing some clothing or even a g-string, or had the shots of her buttocks been pixilated or obscured.

Focus and Repetition – Under this factor, the Commission noted that the scenes of the woman’s buttocks were lengthy and repeated, including one in which “the camera deliberately pans down her back to reveal another full view of her buttocks before panning up again.” The Commission concluded that the sequence contained more and lengthier depictions of nudity than in other cases where the nudity was found to be passing or fleeting, and thus not actionable.

Pandering, Titillating and Shocking Nature – Here, the Commission noted that “the viewer is placed in the voyeuristic position of viewing an attractive woman disrobing as she prepares to step into the shower.” Again, it cited the multiple shots as well as the panning shot which “highlights the salacious aspects of the scene, clearly suggesting that its interest lies at least partly in seeing the actress’s naked buttocks.” It also cited a subsequent shot of her boy’s shocked face, which it found to heighten the titillating and shocking nature of the scene. The Commission distinguished this situation from its precedent in having permitted full frontal nudity in a prime-time airing of *Schindler’s List* – the Commission found that depiction of events in a concentration camp bore no contextual resemblance to the material in *NYPD Blue*.

Sufficiency of Complaints – Turning to procedural issues, the Commission rejected contentions that the identical “form” complaints generated by a single advocacy group should have been insufficient to trigger the proposed fines. The affiliates also had argued that the complaints did not involve the broadcast itself but rather the exposure of a child actor to adult female nudity on the set during production of the episode. The Commission defended its investigation and eventual action on the ground that complaints do not have to be letter-perfect or provide an exact description, and that the complaints here had served to alert it to a possible programming violation, which it then discovered and pursued upon further inquiry. The Commission further rejected arguments that the complaints improperly failed to identify the stations involved, that they failed to include a statement that the complainant viewed the actual material alleged to be indecent, and that there had been too long a delay between the broadcast and the filing of the complaints. Even so, the Commission dismissed the fines against five stations, as it deemed the complaints directed against them to have been insufficient, although it did not state why.

Liability of Satellite Stations and Renewed Licenses – One affected station sought exemption on the ground that it was licensed as a satellite and thus merely relayed the programming of its parent station rather than making an independent programming judgment. The Commission rejected this argument on the ground that the station chose satellite status and that its viewers were entitled to expect the same content restrictions as for a full-service station. However, the Commission exempted two stations from the proposed fines, as they had received unconditional renewals in the interim, and thus were no longer liable for matters that had arisen during the prior license term.

Constitutional Issues – ABC and its affiliates raised general Constitutional arguments as to the validity of the Commission’s indecency test and the vagueness and over-breadth of its application. As it has consistently done in the past, the Commission rejected these assertions, including the contention that less intrusive means now exist to protect children. In that regard, the Commission previously had dismissed the efficacy of V-chip technology on the grounds that few parents know how to use it and that some categories of programming, including news and sports, are not rated and therefore not subject to blocking. Here, the Commission added that the *NYPD Blue* episode in question had not carried an “S” content scriptor (for “sexual situations”) and therefore in this instance would not have been blocked even by parents correctly using their V-chips.

The Commission issued its *Forfeiture Order* a mere 3½ weeks after first proposing these fines, apparently in a rush to beat the five-year statute of limitations which began with the February 25, 2003 airing of the episode in question. Presumably, ABC and the affected affiliates will pursue a court challenge. In the meantime, attention shifts to the United States Supreme Court, which is expected to decide by the end of this month whether to hear an appeal of the fine against Fox for Bono’s fleeting expletive during a music awards show. Although the Court’s decisions often are rendered on narrow substantive or procedural grounds, the artistic community, the broadcast industry and the Commission itself all will look to the Supreme Court in the hope for extensive guidance in this vexing area of concern.

For now, the FCC may be using this decision to send a signal to the broadcasting industry that it expects programmers to be vigilant against indecent content aired outside the safe harbor, and that it will not readily absolve licensees from responsibility following investigation of even a rudimentary complaint.

**The Communications Lawyers at
Womble Carlyle Sandridge & Rice, PLLC**

Peter Gutmann, (202) 857-4532, pgutmann@wcsr.com

Mark Palchick, (202) 857-4411, mpalchick@wcsr.com

Gregg P. Skall, (202) 857-4441, gskall@wcsr.com

John F. Garziglia, (202) 857-4455, jgarziglia@wcsr.com

Michael H. Shacter, (202) 857-4494, mshacter@wcsr.com

Michael B. Hazzard, (202) 857-4540, mhazzard@wcsr.com

Ross Buntrock, (202) 857-4479, rbuntrock@wcsr.com

Jennifer Kashatus, (202) 857-4506, jkastatus@wcsr.com

Danielle Benoit, (202) 857-4537, dbenoit@wcsr.com

Jonathan Canis, (202) 857-4454, jcanis@wcsr.com