



The Federal Communications Commission has issued \$7,000 fines against thirteen Fox affiliates who had aired a *Married by America* program in April 2003. The Commission originally had proposed fining all 169 Fox affiliates that had carried the show, but it is proceeding only against the few stations against which complaints had been filed. As with its *NYPD Blue* decision last week, the Commission’s rationale for issuing its fines provides a certain degree of guidance to broadcasters – at least for the time being, as judicial challenges of these decisions may significantly rewrite the underlying policies.

The broadcast occurred on April 7, 2003. The Commission sent letters of inquiry that July and a notice of apparent liability in October 2004, in which it found the material at issue to have been indecent. The Commission’s *Forfeiture Order* describes the ostensibly offensive material in great detail. Despite the affected stations’ objections, the Commission found the program’s depiction of lewd activities at bachelor and bachelorette parties to have violated all the elements of its broadcast indecency standards. The Commission’s analysis suggests a number of areas in which it extended or refined its prior analyses.

Depictions of Sexual or Excretory Organs or Activities – Here, the Commission described “a myriad of activities designed to stimulate sexual arousal.” Some, such as “the massaging and caressing of naked chests and stomachs” of otherwise clothed males, licking whipped cream from a male’s nipple, and “the thrusting of a male stripper’s [clothed] crotch into a woman’s face” in the past would not have been sufficient in and of themselves to meet the definition. The Commission further noted that the nude female breasts and buttocks shown were pixilated. Yet, it stated that it “has never held that the full exposure of sexual or excretory organs is required to satisfy the first prong of the broadcast indecency standard.” The Commission seems to be judging these incidents not in isolation, but rather as part of a highly suggestive sequence.

Explicitness and Graphicness – Here, the Commission stated that “the party scenes were graphic in their depictions of strippers luring partygoers into engaging in sexual behavior.” The Commission further explained that “the fact that isolated body parts were ‘pixilated’ did not obscure the overall graphic character of the depiction.” It concluded: “Despite a few missing pieces of the visual jigsaw puzzle, a child watching this program easily could discern that partially nude adults are attending a party and participating in sexual activities.”

Fleeting – Fox had asserted that the ostensibly offensive images had appeared on screen for barely 10 seconds and therefore should be deemed “fleeting.” The Commission disagreed, stating that the scenes were part of a six-minute sequence that contained persistent sexual

activities and were imbued with highly-charged sexual content. The Commission further seized upon the episode's theme of enticing participants into sexual conduct.

Pandering and Titillating Presentation – Here again, the Commission focused less upon the individual depictions than upon their overall purpose, which it construed as titillating the brides- and grooms-to-be and, by extension, the viewing audience. All of this serves to raise a question as to whether verbal *double entendre* (and its visual equivalent of suggestive depiction) has now become actionable.

In rejecting the affiliates' defenses, the Commission addressed a number of related considerations that may prove significant in future indecency cases.

Community Standards – The last three factors noted above are all designed to determine whether the complained-of material is “patently offensive as measured by contemporary community standards for the broadcast medium.” The Commission has consistently rejected claims that such a standard cannot be ascertained or that it should consider expert testimony in individual cases. Rather, it stated that, as an expert agency, “we rely on our collective experience and knowledge, developed through constant interaction with lawmakers, courts, broadcasters, public interest groups and ordinary citizens, to keep abreast [sic] of contemporary community standards for the broadcast media.” The Commission further noted that a program's high ratings or the number of complaints do not affect its decision to investigate – rather, a single complaint that raises legitimate concerns over licensee misconduct will be sufficient to trigger an investigation. (Although the Commission made this statement with respect to “even one *properly filed* complaint,” it should be noted that the *NYPD Blue* case was triggered by complaints which required supplementation upon the Commission's initiative before they could be deemed sufficient.)

Pre-Broadcast Preview – The affiliates noted that the *Married By America* episode was in the nature of a reality program and had not been transmitted to affiliates prior to actual broadcast. The affiliates reasoned that the episode was tantamount to the 2004 *Super Bowl* halftime incident, in which affiliates had been taken by surprise. The Commission rejected this analogy, noting that a preview at the end of the prior weekly episode of *Married By America* had provided highlights that included many of the scenes that were the subject of its *Forfeiture Order*. Since the Fox affiliates had been provided with advance notice and thus alerted to the nature of the material, the Commission felt that they should have been prepared to screen the program before airing it. The Commission went on to note that there seemed to be no reason why Fox could not have provided affiliates with a tape of the episode in question prior to broadcast. More generally, the Commission restated its “bedrock policy” that broadcast licensees are ultimately responsible for all material they air, regardless of the source.

Network Affiliation Agreement – In a related claim, two affiliates asserted that their affiliation agreements with Fox placed limits on the number of permitted preemptions and provided that an excessive number of unauthorized preemptions could result in a financially devastating severance of the affiliation relationship. Here, too, the Commission reiterated the fundamental obligation of a licensee to ensure compliance with Commission rules and policies and to take responsibility for all programs that are aired. The Commission further noted that its

network affiliation rules specifically provide that agreements cannot hinder licensees from rejecting programs which a station reasonably believes to be unsatisfactory, unsuitable, or contrary to the public interest. That, in turn, raises an interesting point. Presumably, while the Commission's rules enable a station to preempt programming in excess of any limits imposed by its affiliation agreement, the licensee still could be liable under the agreement for any financial penalties or other consequences that might result from such a breach of the agreement's terms. Affiliation agreements should be checked to be sure that they are not inconsistent with assertion by a licensee of its FCC-guaranteed rights to (1) reject or refuse a program which the station reasonably believes to be unsatisfactory or unsuitable or contrary to the public interest or (2) substitute a program which, in the station's opinion, is of greater local or national importance. If the agreement discourages such actions, or exposes the affiliate to liability for asserting its rights, it may need to be revised.

Future Prospects – The Commission noted that it was adhering to the \$7,000 fine it had proposed in 2004. Nonetheless, it noted that: “On reflection ... the forfeiture penalty ... seems unduly low in light of the nature and gravity of the violation and the ability of the licensees to pay. If we were proposing a forfeiture for the first time here, we would be inclined to propose a significantly higher forfeiture per station.” Thus, it would appear that, armed with the new maximum fines authorized by Congress, the Commission may be on the verge of assessing substantially larger indecency penalties than it has sought in the past.

The Commission characterized the Fox forfeiture order as “consistent with our policy of restrained enforcement in indecency proceedings.” It is true that few recent sanctions have been proposed in this area and that the recent *NYPD Blue* and *Married By America* forfeitures seemed prompted by a need to prevent a lapse of the five-year statute of limitations rather than a desire to pursue new cases or press pending matters to a conclusion. Nonetheless, broadcasters remain at risk for even inadvertent violations of the Commission's indecency policies, which may be an unavoidable consequence of airing virtually any programming that is either live or from any but the most carefully-vetted recorded sources. Guidance from the courts or Congress is desperately needed in this difficult and troubling area.

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