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Higher Broadcast Indecency Fines

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From: Peter Gutmann

Congress has passed the “Broadcast Decency Enforcement Act of 2005,” which raises by a factor of ten the maximum fines which the FCC can impose for broadcast indecency or obscenity. The House vote was by an overwhelming margin of 379-35; the Senate vote had been unanimous. The bill will become effective upon presidential signature, which is widely assumed.

The new law increases the maximum penalty from \$32,500 to \$325,000 for each violation (which the FCC had previously interpreted as each separate instance of indecency or profanity within a single broadcast on a single station), subject to a maximum of \$3,000,000 for any single act or continuing violation.

The Act only applies to broadcasters and does not extend to competing, and often edgier, media such as cable, satellite and the Internet. It also falls short of another proposed bill that would have raised the basic fine to \$500,000, extended FCC authority to sanction performers, and imposed a “three strikes and you’re out” provision to revoke licenses for repeated offenses.

Rep. Upton of Michigan introduced the measure by citing instances of programming he found offensive, belittling the current fines as “peanuts” and “the cost of doing business,” and emphasizing that broadcasters “have a special place in our society, given that they are stewards of the public airwaves.” During the House debate, most other speakers echoed these sentiments. In the face of vast bipartisan support for the measure, which many see as risk-free to support in an election year, only a few cautionary statements were made.

Rep. Walden of Oregon, who noted that he is the only member of the House who is a broadcast licensee, mentioned the prevalence of other unregulated media and warned: “If you think that the TV in your family room is suddenly going to have every program cleaned up, you are mistaken.” Fearing that the new fines could bankrupt many small, independent broadcasters, he noted that “the decisions of the Commission leave me and many of my colleagues in the broadcast world a bit confused about where the boundaries are.” Rep. Upton then pledged to work with him to clarify the rules, saying: “It is very important that broadcasters know precisely what the rules are.”

While endorsing the need to reduce indecency, Rep. Watson of California blamed the problem on media consolidation and a lack of competition, which the current legislation would only worsen through discouraging creativity, while encouraging “shocking entertainment for the sake of increasing viewership and making a spectacle of itself.” She urged restoration of the Fairness Doctrine and greater scrutiny of public interest obligations as an element of renewal.

Reps. Gonzales and Green urged the Commission to apply its expanded fines in a way that penalizes the party who really is at fault, rather than a local affiliate with no time to preview a program before it airs.

The only strong dissent was by Rep. Ackerman of New York, who stated: “I am continually amazed that defending our Constitutionally guaranteed freedom of speech is such a lonely job in the House of Representatives,” and called the vote “a frontal assault on our Constitution and the protections that it gives to the American people.” He noted that nearly all the indecency complaints originated with a single organization and that the vast majority of the American people should not have their free speech impaired by a few, but rather should have the right to choose what to view and hear. “We are going down a slippery slope and no one can honestly say where it will stop. ... The true test of freedom of speech is if we tolerate ... speech that we disagree with.”

It is true that the Act only adjusts the amount of potential fines and does not expand FCC authority or the interpretation of existing law. Yet, Rep. Ackerman warned of the chilling effect of the legislation on future creativity and free expression and cited several programs that had been rejected recently for fear of controversy. That may well prove to be its most lasting impact.

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