

[US] FCC Expands Broadcast Indecency Liability

IRIS 2004-10:1/35

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On 22 September 2004, the Federal Communications Commission ("FCC" or "Commission") issued a USD 550,000 Notice of Apparent Liability against Viacom, Inc. owner of the CBS and MTV networks for airing a program with a half-second picture of a woman's breast (see IRIS 2004-4: 15). The Commission's action expanded its campaign against indecency, by imposing liability for negligent rather than wilful broadcasting of sexual material. Procedurally, Viacom must pay or challenge the proposed fine within 30 days of the FCC's decision.

The material in question came during the "halftime show" at the 38 annual Super Bowl, the high point of the US football season. Airing in the middle of the game, the program features performances by well-known celebrities this year including Ms. Janet Jackson and Mr. Justin Timberlake. During a dance routine at the show's climax, Mr. Timberlake removed "a portion of Ms. Jackson's bustier, exposing her breast to the camera" for 19/32 of a second.

The FCC found the incident to be indecent under its revised two-part test. First, it held Ms. Jackson's breast to be a "sexual organ" under agency precedent. Second, the Commission found that the half-second exposure "pandered" to viewers. The Commission fleetingly noted that many children probably were in the audience.

Both of the FCC's conclusions were consistent with its current crackdown on indecency, as set forth most recently in its Golden Globes (NBC) decision (see IRIS 2004-4: 15). There the singer Bono had shouted that winning an award was "fucking unbelievable," and the Commission had held that any sexual display or language was actionable indecency, no matter how "fleeting."

The agency had somewhat more difficulty in establishing Viacom's responsibility for the material. Both Ms. Jackson and Mr. Timberlake stated that they had informed neither CBS nor MTV (the show's producer) of the planned "costume reveal". The Commission found only that CBS and MTV "were well aware of the overall sexual nature of the Jackson/Timberlake segment and took no action to prevent possible indecency."

If a broadcaster had any reason to suspect that a performer might behave indecently, it presumably would have to take prophylactic measures. Based upon the Golden Globes (NBC) decision, notice might be nothing more than an actor's previous conduct.

The Commission thus based indecency liability on negligent rather than intentional conduct. Aside from introducing a new and unfamiliar basis for liability, the FCC did not define due diligence as to potential indecency. For example, it did not specify whether a broadcaster was on notice if a program involved romantic relationships or other thematic elements.

The only safe course for a broadcaster seems to be implementing a video as well as audio delay system such as the five-minute video delay which CBS installed after the Super Bowl. But this equipment is fairly expensive more than USD 250,000 and unaffordable for many small stations, particularly public ones.

The Commission obviously was concerned about the financial effect of its decision, since it imposed the fine only on 20 Viacom-owned stations; for the moment, it absolved roughly 200 separately owned CBS affiliates many serving small markets from Altoona, Pennsylvania or Minot, North Dakota.

Indeed, had the FCC proposed fining all CBS affiliates, the total amount would have been USD 5,500,000. And since Congress recently raised the maximum FCC fine from USD 27,500 to USD 32,500, under the new statute the fine for the Viacom stations alone could total USD 650,000 and for all affiliates USD 6,500,000.

In re Complaints Against Various Television Licensees Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show, FCC 04-209, 22 September 2004

http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-209A1.pdf

