

## [US] FCC Further Broadens Basis for Indecency Liability

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On 12 October 2004, the US Federal Communications Commission (FCC" or "Commission") again broadened the basis for liability under its broadcast indecency doctrine and for the first time imposed liability on network affiliates as well as owned stations. In issuing a Notice of Apparent Liability against the Fox Broadcasting Network, it required Fox either to pay a forfeiture within 30 days or appeal its decision. This was the Commission's third action against a US broadcast network only ABC has escaped attention coming shortly after sanctions on the National Broadcasting Company (NBC) (see IRIS 2004-4: 15) and Viacom (see IRIS 2004-10: 15). The objectionable content in the FOX programme, "Married By America," was less than clear. The FOX reality show apparently involved a number of single people, who had agreed to date and perhaps marry other single men and women whom they had never met before. The particular programme one of a series involved bachelor and bachelorette parties for two couples in Las Vegas, Nevada. Although the FCC did not specify the content of the programme, it mentioned that it involved roughly six minutes of scenes in which the participants: licked "whipped cream from strippers' bodies;" "a topless woman with her breasts [blacked out] straddled a man in a sexually suggestive manner;" "two partially clothed female strippers kissed each other above a male;" and "a male stripper was about to put a woman's hand down the front of his pants." The Commission acknowledged, however, that no breasts or sexual acts were shown. part indecency test, namely that a programme: (1) "describe or depict sexual or excretory organs [including breasts] or activities;" and (2) be "patently offensive as measured by contemporary [national] community standards for the broadcast medium." The agency then went off in new directions, however, as to both parts of the test. As to the definition of indecency, the Commission stated that about six minutes of the program were "sexually suggestive" even without any nudity and "conclude[d] that the broadcast satisfies the first prong of our indecency analysis." The result here thus was quite different from both the NBC case, in which a participant used the word "fucking," and the Viacom decision, in which part of a dancer's bare breast appeared for a little more than half a second. As to the "patently offensive" issue, the Commission gave little guidance. It stated that "although the nudity was [blacked out], even a child would have known that the strippers were topless and that sexual activity was being shown." This analysis creates two problems. First, it involves basing one inference upon another e.g., what children infer from televised content, in the absence of any empirical evidence. Second, it creates severe operational difficulties for advertisers and

producers. For example, when an attractive young couple embraces after using a perfume in an advert, it may not be unreasonable to assume that romantic or sexual activity is likely to follow. But that is not stated, leaving no factual basis upon which to predict how an agency or court is likely to act in reviewing the material. Finally, the FCC imposed the forfeiture not just on the Fox Network and its stations, but also upon 150 affiliated stations a step which it had not taken in NBC or Viacom. The Commission reasoned that all stations were on notice, since the programs were available on tape in advance.

***Notice of Apparent Liability for Forfeiture, in the Matter of Complaints Against Various Licensees Regarding their Broadcast of the Fox Television Network Program "Married By America" on 7 April 2003, NAL/Acct. No. 200532080003 File No. EB-03IH-0162, Adopted on 5 October 2004, Released on 12 October 2004***

[http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-04-242A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-242A1.pdf)

