

Legislative Frenzy Over Indecency Threatens All Broadcasters

House Committee Bill Raises Indecency Fine to \$500,000 and Requires License Revocation Proceedings for Repeat Offenders; Talk of Adding TV Violence to Indecency Definition Also Gaining Traction; Legislation Headed to House Floor for Debate with 145 Co-sponsors

The March 3d approval of the Broadcast Decency Enforcement Act of 2004 by the House Energy and Commerce Committee on a 49 to 1 vote sent the bill on a fast track to the House floor for debate. The bill, H.R. 3717, emerged from the Commerce Committee with 145 co-sponsors and a number of amendments that are of great concern to broadcasters.

The legislation originally proposed by Rep. Fred Upton (R-MI) changes the maximum dollar amount for single violations of the indecency law from the current \$27,500 to \$500,000. Removed from the bill by amendment was a \$3 million ceiling on the maximum fine for a continuing violation, thus leaving broadcasters open to almost unlimited fines.

The legislation also now features a “three strikes and you’re out” plan: Rep. Heather Wilson (R-NM) and Rep. Albert Wynn (D-MD) added an amendment that provides for automatic license revocation proceedings at the FCC if you are found to have violated the indecency rule three times in a license term.

The legislation also requires that the FCC consider even a single indecency violation in the context of all licensing decisions, including license renewal. We are greatly concerned that the extensive harm that can be caused to a broadcaster under this legislation will encourage disgruntled employees, competitors, or those with merely a grudge against a station to commence filing repetitive indecency complaints. As there is no penalty for filing a frivolous indecency complaint, such parties can just keep filing until the FCC agrees one to three times

that the material aired was indecent. Even if a broadcaster never aired indecent programming, the cost of defending against such repetitive complaints would be substantial, particularly since the stakes are so high that the broadcaster could not take any complaint lightly.

One small bit of good news is that language was added that gives the Commission discretion to tailor the amount of fines so that smaller stations are not economically destroyed by fines. This provision was included by Rep. Greg Walden (R-OR), who is a broadcaster himself.

Newly appointed Vice Chairman of the Committee, Rep. Charles Pickering (R-MS), added language that requires the FCC to complete review of an indecency complaint within 180 days. Rep. Edward Markey (D-MA) added a provision empowering the FCC to make stations found to be in violation of the indecency rules to provide free airtime for public service announcements. Rep. Cliff Stearns (R-FL) included language that will increase fines on indecent performers. Rep. Michael Bilirakis (R-FL) and Rep. Gene Green (D-TX) added language that will insulate network affiliates from fines where network programs were not available for preview and include indecency; in those cases, only the network would be held liable. Rep. John Dingell (D-MI) added language that will require the Commission to submit an annual report to Congress on its indecency enforcement record for the preceding year.

While some press reports have indicated that the legislation has been endorsed by the Bush

administration, it is important to note that the endorsement, which came from Commerce Secretary Don Evans, was based on the bill as introduced by Rep. Upton, not the legislation as it currently stands.

There has also been talk of expanding the definition of indecency to include violence, although it is unclear how this would be accomplished. Trade press reports say that Committee Chair Joe Barton, Reps. Upton, Dingell and Markey are drafting a letter to the Commission directing the agency to open an inquiry into "the issue of excessively violent broadcast programming and its impact on children," and to begin that inquiry within 60 days.

Much can happen in the course of floor debate in the House, and the legislation is by no means a done deal at this point. However, we believe that it is on a fast track, and broadcasters who wish to communicate their concerns to their Representatives and Senators should do so immediately.

For the latest information on the status of the legislation, please contact any of the lawyers in the Communications Practice Group.

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