

APPEALS COURT UPHOLDS INDECENCY SAFE HARBOR RULES

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Body

FCC can limit broadcast indecency to 10 p.m.-6 a.m. time period, but not to midnight-to-6 a.m. as it most recently decided, U.S. Appeals Court, D.C., said in 7-4 decision released June 30. Court majority said govt. interest in "the well-being of minors provides an independent justification for the regulation of broadcast indecency" and uniqueness of broadcast means it may be subject to more restrictive regulation. In 2 minority opinions, 4 judges questioned both whether bcst. should be regulated differently from cable and whether safe harbor meets govt. goals and provides adequate safeguards for rights of adults. Peggy Charren, founder of Action for Children's TV (ACT), which appealed FCC decision, said court ruling will be appealed to U.S. Supreme Court.

Decision in ACT vs. FCC "sweeps away everything that previous courts have decided," one broadcast official said. Among other things, it overturns 3-0 decision by same court rejecting FCC rules limiting indecency to safe harbor between midnight and 6 a.m. (TVD Nov 29/93 p3). Court then said safe harbor rules were too broad to be constitutional. Court may have signaled broadcast decision month ago, however, upholding FCC rules limiting indecency on leased access channels (TVD June 12 p4).

"It's striking how sweepingly wrong this decision is," broadcast official said. "It's a very 1960s decision." NAB said final decision on appeal hasn't been made, despite Charren's claim, but appeal is likely. NAB Pres. Edward Fritts said he's "deeply disappointed" with decision, which he said doesn't properly reflect First Amendment precedents. However, FCC Chmn. Hundt said "parents and the public are the winners" because safe harbor "serves the goal of confining this material to hours when minors are less likely to be exposed to it."

Majority rejected argument that parents can safeguard children from indecency with less restrictive rules. It noted that most children have access to radios and TVs when parents aren't present: "It is fanciful to believe that the vast majority of parents who wish to shield their children from indecent material can effectively do so without meaningful restrictions on . . . broadcast indecency." It also said parents who want to expose children to indecency can do so through cable, VCRs and other means, so speech isn't limited.

Court did reject different treatment accorded to public stations. Under FCC rules, public stations that go off air at midnight can air indecency beginning at 10 p.m. Decision said govt. hasn't

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explained disparate treatment: "Congress has made no suggestion that minors are less likely to be corrupted by sexually explicit material that is broadcast by a public as opposed to a commercial station." Court remanded case to FCC with instructions to modify rules to allow same 10 p.m.-6 a.m. safe harbor for all broadcast stations.

Channeling indecent programming to safe harbor period "would not unduly burden the First Amendment," majority said. Court also rejected claims that govt. hadn't proved that indecency hurt children: "The Supreme Court has never suggested that a scientific demonstration of psychological harm is required." In his dissent, Judge Harry Edwards said there's "significant evidence" of causal relationship between violent programming and behavior, but "the FCC has pointed to no such evidence addressing the effects of indecent programming."

Treating broadcasting differently from other media is justified because it's so pervasive, majority said in opinion written by Judge James Buckley: "Broadcast audiences have no choice but to subscribe to the entire output of traditional broadcasters. Thus they are confronted without warning with offensive material." However, Edwards said "it is no longer responsible for courts to provide lesser First Amendment protection to broadcasting based on its alleged unique attributes." He said it's "incomprehensible" that majority would reject public station exemption "yet be blind to the utterly irrational distinction . . . between broadcast and cable operators . . . One wonders how to explain . . . iron-clad bans on indecency on broadcasters, while simultaneously allowing a virtual free hand for the real culprits -- cable operators."

Edwards said decision "effectively bans all indecent programming." Citing govt. argument that ban on indecency outside safe harbor makes it easier for parents to supervise children's viewing, he said what amounts to outright ban means that "my right as a parent has been preempted, not facilitated."

Imminence of "V-chip" technology that would give parents ability to control viewing of violence and indecency "suggests that a draconian ban from 6 a.m. to midnight is decidedly premature," Judge Patricia Wald said in her dissent. Wald also said any time-based ban "intrudes substantially into the rights of adult viewers" and "places the government in the extraordinarily sensitive role of censor." At very least, she said, govt. should have to prove that ban extends only to hours when many children are in audience and "parents are otherwise absorbed."

Main effect of decision will be to "do away with speech that we need to hear in a democracy" and limit rights of adults, ACT's Charren said: "The Constitution knows better what we have a right to hear than Congress does." ACT, which has campaigned primarily for better children's programming, doesn't endorse indecency itself, Charren said, just free speech rights. She remains critical of broadcast industry, saying it "stands up very fast for free speech, but makes a hash of its public interest responsibilities."

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