



TELEVISION

The 'Steven Spielberg Exception' to TV's Indecency Rules?

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How does the FCC define indecent material on television? If you're Fox, you'd likely answer that the FCC doesn't really know – or has several different definitions depending on who's asking.

That's at least the impression the network gives in the case of Federal Communications Commission v. Fox Television Stations, Inc., which was recently argued before the U.S. Supreme Court.

The case primarily addresses the question of whether the FCC's decisions as to what constitutes "indecent" on public broadcast television between the hours of 6 a.m. and 10 p.m. are unconstitutionally arbitrary under the First Amendment. Fox alleges that whereas the FCC has permitted primetime television broadcasts of Steven Spielberg's "Saving Private Ryan" and "Schindler's List," complete with full nudity and swearing, the FCC has sanctioned other television broadcasts, such as an episode of "NYPD Blue," due to brief displays of nudity or swearing.

Also read: [Fox 'Pleased' by Indecency Ruling: 'Must Allow for Isolated Instances'](#) [1]

Our reading of the oral argument transcript, however, is that the Supreme Court seems more sympathetic to the position of the FCC. Focusing largely on the interests of children and the rights of parents, a number of Justices seemed to embrace the notion that within a sea of profane cable and Internet options, there should be "a safe haven" where parents know their kids won't be "bombarded with curse words or nudity."

The spectrum of public television broadcasting, which is owned and licensed by the government to TV networks such as Fox, provides that safe haven. As Chief Justice John Roberts (the only Justice with relatively young children) stated: "All we are asking for, what the government is asking for, is a few channels where you can say I'm not going to – they are not going to hear the S word, the F word. They are not going to see nudity."

A number of practical arguments made against the FCC didn't appear to gain much traction with the Court. For instance, the government pointed out that V-Chip technology has proved to be unreliable and deficient in ensuring that all "offensive" language gets blocked. And although there are cable networks devoted to children's programming, private companies decide whether or not such programming will exist.

In addition, the argument that TV programming will be regulated by advertisers who don't want to alienate viewers with offensive shows, seems to have it backward: It seems more likely that advertisers would embrace the opportunity to attract more viewers with titillating and "shocking" broadcasts.

So how does the FCC decide that "Schindler's List" is acceptable to broadcast before 10 p.m., but "NYPD Blue" is not? The FCC's decisions are basically "context-based" judgment calls.

Justice Elena Kagan seemed troubled that "it's like nobody can use dirty words or nudity except for Steven Spielberg." Justice Antonin Scalia, however, likened the federal government's discretion in this area to the Supreme Court's own requirement of "a certain modicum of dress for people that attend this Court and the people that attend other Federal courts.... [T]hese are public airwaves, the government is entitled to insist upon a certain modicum of decency."

In other words, as was famously stated by the Supreme Court decades ago in addressing the question of what constitutes pornography, the Court seems OK with the notion of the federal government 'knowing indecency when it sees it.' It appears that major motion pictures by Steven Spielberg about World War II are not "indecent."

In the end, Justice Samuel Alito may have best summarized the practical significance of this case – or lack thereof – when he commented that "broadcast TV is living on borrowed time. It is not going to be long before it goes the way of vinyl records and 8-track tapes." Perhaps. If that observation is correct, then the First Amendment should not take a serious hit by a ruling in favor of the FCC's ability to continue to regulate the public airways.

For now, though, networks still consider the public airways to be valuable property worthy of their investments and programming. That fact may be seen as further justifying the FCC's entitlement to regulate what the government licenses out, albeit on an imperfect basis.

Whatever lifespan public television broadcasting may still have, the Supreme Court seems unlikely to deregulate it as Fox hopes in the name of the First Amendment. The Court should issue its ruling before its term ends in June of this year.

Description

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