

# Could broadcast indecency regulation spread to cable TV?

WASHINGTON - Earlier this summer, a federal court told the Federal Communications Commission that it was wrong to fine CBS over the 2004 Super Bowl "wardrobe malfunction" in which singer Janet Jackson's breast was exposed. Last year, another federal court struck down the FCC's "fleeting indecency" standard when the FCC levied fines against networks for obscene language on live programs.

Remember that the FCC has jurisdiction only over the broadcast airwaves. Broadcasters have long groused that they've lost ground to cable TV because cable can offer more "adult" programming without any fear of sanction.

But the fear factor may be creeping in.

Time Warner, still the owner of the nation's largest cable system until it gets spun off into a separate company - but still the owner of such high-profile cable channels as HBO, Cinemax, CNN, TBS and TNT - filed a brief Aug. 8 at the Supreme Court, fearing that broadcast indecency regulations (no matter how difficult they are to enforce) could spread to cable. The brief was filed because the Supreme Court is reviewing the fleeting indecency case.

"This court should never lose its vigilance to prevent restrictions on broadcast speech from spawning copycat restrictions on nonbroadcast speech," Time Warner said.

"In light of the tools available to allow viewers to choose what cable speech to hear and not hear, the government cannot possibly establish that content-based restrictions on such speech pass First Amendment muster," it added.

"Members of the FCC at various times have expressed an interest in obtaining the authority to regulate the content of cable television speech as well as broadcast television speech," the company told the high court.

While Time Warner fears the hand of the FCC meddling in its programming decisions, the media giant may do better to take action to prevent costly indecency lawsuits – the corporate version of death by a thousand cuts.

In the dawn of cable TV, localities granted franchises to cable firms, in effect giving them a monopoly over all the cable TV in their burg. This led to complications once constituents complained about MTV and the Playboy Channel snaking their way through the cable lines into their homes.

Cities either professed ignorance over contract stipulations or put up a good bully-pulpit show. But the cities depended on the revenue they got from the cable franchise, while the cable franchise depended on revenue from subscribers, including the loyal minority who would click their way through everything else on the dial to get to their favorite channel, even if their fellow citizens regarded it as trashy. In some cases, cable channels have paid cable franchises for carriage; in others, the cable company enjoys a revenue-sharing agreement with a cable channel for product sales or advertising.

But cable companies, which over time bought and got bought out by ever-expanding cable firms, decided that dealing with every city and town was taking too much of their time and money. So they plowed their dough into lobbying state legislatures to grant statewide video franchises that abrogated local cable agreements.

This is where the tricky part comes in, and where Time Warner starts quaking in its corporate boots. The FCC always has asserted jurisdiction over the airwaves because radio and TV broadcasters used public airspace to transmit their signals.

But with cable, there are lots of different owners of the property through which the cable wire runs. Public utilities' poles carry cable wiring. That pole may well sit on a public right of way controlled by a municipal government. Eventually, the wire runs into your residence – which you may own, or which a landlord or a bank may own.

And let's not forget satellite television, which can't avoid passing through public air space to reach your TV.

Some person, group or city with deep enough pockets and a wide enough streak of

righteous dudgeon could sue, claiming that the wire itself is OK, but what's coming through the wire is not.

Or, cable franchises could offer a la carte programming, letting customers choose what channels they want coming through the wire. It's that simple.