Appeals court agrees Utah law violates First Amendment

It overturns state's prohibition on 'indecent material' on cable

Utah's effort to prohibit cable television systems from transmitting "indecent material" met with failure again last week. A three-judge panel of the U.S. Court of Appeals for the 11th Circuit affirmed a district court's decision that the law—fashioned with an eye to avoiding the constitutional flaws of an earlier one—still violated the First Amendment (BROADCASTING, April 15). The panel rejected the state's appeal with a seven-page unsigned opinion that relied almost entirely on the reasoning of the lower court.

But one member of the panel, Judge Bobby R. Baldock, did not regard the matter as that simple. He wrote a 37-page concurring opinion expressing the view that cable television is sufficiently similar to broadcasting to be subject to the same kind of "indecency" regulation that the FCC applied to broadcasting in the *Pacifica* case. However, even applying that approach, Baldock said the Utah law was unconstitutional.

The Utah Cable Television Programing Decency Act includes under the heading of indecent material the visual or verbal depiction or description of human sexual or excretory organs or functions, including the exposure of genitals, pubic area, buttocks or the showing of any portion of the female breast below the top of the nipple. The depiction is banned if the "average person applying contemporary community standards for cable television . . . would find [it] is presented in a patently offensive way for the time, place, manner and context. . . ." The constitutionality of the law was challenged by several cable television systems, followed by HBO and a number of cable subscribers.

The district court held that federal law—the Cable Communications Policy Act of 1984—preempts state regulation of the content of cable television programing, except that held to be obscene. And Utah's Decency Act, the court noted, is not limited to banning obscenity, as defined by the Supreme Court in its landmark *Miller v. California* decision in 1973. It would, for instance, ban programing regardless of whether it depicts sexual conduct, one of the standards of the *Miller* test. Accordingly, the statute was held to go too far. The district court also said the act is "unconstitutionally overbroad and vague, and void on its face."

The majority on the appeals court panel—composed of Judge James K. Logan and Judge Dale E. Saffels, of the U.S. district court for Kansas, sitting by designation—said they agreed with the district court's opinion and could "add little of value" to it. "We affirm its judgment on the basis of the reasons stated in it." That sentiment cheered cable interests concerned with attempts by states and communities to regulate cable programing. Those attempts could be given new impetus by the Attorney General's Pornography Commission that called for regulation of cable programing. George Shapiro, counsel for HBO, noted that the 11th circuit was the second U.S. appeals court to affirm a lower court decision rejecting efforts to ban allegedly indecent programing from cable television service. The other was the 10th circuit, in Atlanta, which held a Miami ordinance to be unconstitutional (BROADCASTING, April 1, 1985).

The 10th circuit's decision, Shapiro said, "is an affirmation that . . . courts are not prepared to make broad judgments in the area of content. There is now a lot of case law that says 'hands off [of content] if it doesn't meet the obscenity standard.' "

However, the concurring opinion was less cheering to cable interests. Judge Baldock agreed that the state law is unconstitutional, contending it provides for a complete ban on a type of programing rather than regulation of it. Indecency, he said, can be regulated as to time, place and manner. He also said the statute is void for vagueness. But he disagreed with the district court's view that the differences between broadcasting and cable television "require that *Pacifica* not be extended to cable television."

That case grew out of a complaint filed with the FCC regarding programing heard in the afternoon on an FM station in New York. The Supreme Court ultimately held that the commission is empowered to impose sanctions on stations broadcasting "offensive" and "shocking" language at times of the day when children could be exposed to it. And the high court had described its ruling as a narrow one, based on the unique pervasiveness of broadcasting and on its unique accessibility to children.

Baldock said those "same two characteristics are inherent in cablecasting." He acknowledged the differences in transmission of radio and television on the one hand and cable on the other. But, he said, to permit the regulation of indecency on an over-the-air medium but not on one distributed over cable, based only on those differences, "is to deemphasize that the programing transmitted [in both cases] emanates from outside the home and is received identically." He also said the fact that cable "is a subscriber medium does not mean that it is so unlike traditional broadcasting that indecency cannot be regulated."

Shapiro offered an observation as to the "main point" to remember regarding Baldock's opinion: "Don't lose sight of the fact it's only a concurring opinion—and that two of the three judges agree with the lower court."

However, the court fight over the Utah law may not be over. Utah officials have said in the past they would carry the case all the way to the Supreme Court. The state's associate deputy attorney general, Paul Warner, said last week that remains the state's "tentative decision"—but that it would have to be reviewed in light of the appeals court's opinion. Warner noted that the unsigned opinion offered little insight into the panel's thinking. But, he said, "we want to look at the 37-page concurring opinion. It raises some interesting questions." □

Harassment charged. Seven women filed a sexual harassment suit against CBS Inc. in D.C. Superior Court. The plaintiffs, six former and one current employe of CBS's *Nightwatch* news program, are seeking $1 million in compensatory and $1 million in punitive damages for violation of the District of Columbia Human Rights Act, intentional infliction of emotional distress and sexual assault. The Washington law firm, Stein, Mitchell & Mezines, is handling the case for the plaintiffs.

Circuit court upholds FCC's TV-cable crossownership rule

Holds right of first refusal does not qualify Marsh Media for grandfather protection from divestiture requirement

Marsh Media Ltd. has lost a court challenge to the FCC's TV-cable TV crossownership rule. The commission had invoked it in ordering Marsh to divest the 25% interest in Total Television of Amarillo (Tex.), acquired when one of Marsh's three original partners decided to sell out in 1977. The U.S. Court of Appeals for the Fifth Circuit, in New Orleans, said a right of first refusal that Marsh acquired along with its 25% interest when the partners received the franchise, in 1968, did not afford grandfather protection against application of the crossownership rule that was adopted in 1975. The First Amendment was no protection, either, the court said.

The 1975 rule barring crossownership of television and cable television interests in the same community exempts systems owned on July 1, 1970. And Marsh, which owns KVII-TV Amarillo, contended that its right of first refusal constituted an owner-