

Collision Course on the Airwaves

Critics caution rush to regulation could infringe on freedom of speech

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The producers of the ABC cop show "NYPD Blue" take a rebel's pride in the firsts they have scored: first network series to routinely use profanity, first to feature seminude love scenes and first to show a middle-age man's ample bare bottom.

Now "NYPD Blue" is scoring a new kind of first. For the first time in the show's 11 years, creator Steven Bochco said, the network's censors have breached an agreement that allows him to air the racy material that gives the TV drama its gritty appeal.

Bochco's troubles began soon after Janet Jackson's "wardrobe malfunction" during the Super Bowl halftime show. Three times since then, Bochco says, ABC has expunged racy scenes from "NYPD Blue," including one that he describes as "a relatively brief, very tasteful sex scene."

An ABC spokeswoman confirmed the changes but said they resulted from a "standard review" by the network's censors. Bochco said he refused to make the changes voluntarily.

"It doesn't mean that I can stop them from doing it," he said. "But it does signal my unwillingness to be a co-conspirator. It's very chilling. It's a little intimidating, and it's frustrating."

It's also a sign of the times in the not-quite-so-brave new world of broadcasting. When the House of Representatives last week passed an 18-fold increase in the fines for indecency--to a maximum \$500,000 per incident--it marked the first major push in 25 years to toughen broadcast decency standards.

Bills in the House and Senate are the leading edge of a political backlash against what critics say has been an increase in indecent material on the nation's television and radio airwaves.

Even before the Jackson incident, the Federal Communications Commission was preparing enforcement actions in more than two dozen indecency cases, which is nearly five times the

average pace of enforcement activity in each of the last five years.

The fear of new fines, and the far more serious threat that the government might yank station broadcasting licenses, are prompting broadcasters to tighten standards. Clear Channel Communications Inc. has turned off the microphones of radio "shock jocks" Howard Stern and "Bubba the Love Sponge," while television executives are reviewing their programs with a keen eye for questionable content.

A new era of careful speaking, primmer pictures and tougher government oversight could have far-reaching effects. It could change what kinds of programs air on broadcast TV, and it could bring unregulated cable and satellite programming under government oversight for the first time.

Democrats are using the public outrage over Jackson's Super Bowl exhibition as a chance to override, for a second time, the FCC's vote last year to allow greater concentration of media ownership.

The FCC voted last June to cap the reach of any single owner of broadcast TV stations at 45 percent of the nation's households, up from 35 percent. A later compromise with Congress to limit the increase to 39 percent remains on hold pending a court challenge.

Meanwhile, on the radio dial, the move toward new caution could push some of the morning drive's most popular personalities into a new form of distribution. Stern and others are expected to entertain lucrative new contracts from satellite radio, which so far remains beyond the reach of regulators.

That's a lot of change stemming from less than two seconds of bared breast. But in the blush of outrage after the Super Bowl, few seem inclined to stand in the way of that change.

Liberals and conservatives are cheering the process, each for their own reasons. Liberals laud the renewed zest for oversight of a Bush administration FCC that has pushed for media deregulation. Conservatives favor the return to decency standards, even if it comes at the cost of more government intervention.

"I am loath to get the government involved," said William Bennett, the conservative leader and co-director of the Empower America think tank. "I think the reason the government is involved is because people are screaming for the government to do something."

They're getting what they're screaming for.

The \$500,000 limit on fines, up from the \$27,500 maximum for broadcasters, was only one provision of the bill the House passed last week. The House also voted, 391-22, to raise the fine on performers who violate decency standards to \$500,000 from \$11,000.

And perhaps most significant, the bill includes a so-called "three strikes and out" provision that automatically starts license revocation proceedings for any station fined three times for violating

decency standards.

The Senate, meanwhile, is considering proposals that reach even further. Among them: new standards to protect children from violent programming and a moratorium for more study before the FCC could implement its new media concentration limits.

Businesses rarely welcome increased regulation, even when it comes with such widespread and bipartisan applause. The broadcast industry is no exception.

Tie cable to regulations, too

Television broadcasters, in particular, are formulating a plan to seek to slow the legislation in the Senate by offering amendments that might make the measure more complicated and difficult to pass.

The industry argues that cable television should, for the first time, be brought under regulatory scrutiny. This would make the competitive dynamic more fair, broadcasters say.

"Broadcast management is paralyzed right now. Cable, being in a more nimble environment, is more creative," said Kathryn Thomas, an expert on programming trends at media-buying giant Starcom in Chicago. Regulators "can't speak out of both sides of the mouth and, in the end, hope they haven't done monumental damage to the business."

Broadcasters also may push to entitle cable customers to pick and choose which stations they want. That move would replace the package deals cable companies now sell, forcing customers to bring programming into their homes that might offend them.

Another effort to broaden the legislation in the Senate would seek to include violence in broadcast decency standards. But opponents say any such effort would be misguided.

"That's the slippery slope of over-regulation," warned Dan Polsby, an expert on media law at George Mason University Law School who helped write the decency standards the FCC has used for a quarter century.

"Violence doesn't offend people in the same way at all. It tends to be about the affirmation of conventional morality: good against evil," Polsby said. "Sex tends to undermine the conventional morality."

Whatever the details of any final bill, approval would likely represent the biggest change to broadcasting decency standards since 1978. That's when the U.S. Supreme Court established the constitutionality of such standards by upholding the FCC's ban on comedian George Carlin's "seven dirty words" monologue.

Carlin's comedic bit attacked the FCC's limits on outrageous speech, an argument that critics of the proposed laws are echoing, with politer language, today.

Those who dissent against the rush toward increased regulation fear a negative impact on free speech. In the face of a get-tough FCC, big broadcasters with billions of dollars at stake might sacrifice free expression to save their bottom lines, critics say.

"The notion of both a consolidated media in the hands of just a few owners and this federal government setting standards for decency is a dangerous combination," said U.S. Rep. Jan Schakowsky (D-Ill.). "It's a dangerous combination for free speech."

Increasingly radio, because of its spontaneity, its propensity to push the envelope and its many hours of live programming, has drawn more criticism and fines from the FCC than television.

Stern action toward Stern

Clear Channel is the nation's largest radio owner with 1,200 stations in 50 states. Amid the fallout from the Jackson incident, the firm fired Tampa-based shock jock "Bubba the Love Sponge" and paid, without protest, a \$750,000 fine for his antics.

The San Antonio-based broadcasting giant also suspended Stern from its six stations that carried him and introduced a "zero tolerance" decency requirement for its on-air personalities. Clear Channel also spent \$500,000 for the equipment needed to impose a 20-second delay on all of its live broadcasts.

The move on Stern came the day before Clear Channel radio executive John Hogan testified before Congress. But the Stern antics that prompted his removal were no more outrageous than much of his sexually provocative banter over the years.

The timing gave rise to charges that the jock's suspension was motivated by politics. And with quick resolution of the "Love Sponge" case, Clear Channel avoided having that transgression count against any future "three strikes" penalty, said Merrill Lynch analyst Marc E. Nabi.

Broadcasters who like to perform on the edge of decency find the new standards unnerving. Chicago-based shock jock Erich "Mancow" Muller contends that the \$42,000 he was fined for decency offenses since 1999 would cost \$62 million under the proposals in Congress--the result of the higher fines and the way they may be applied on individual stations.

"Anyone with an opinion is in danger if you're not with the current political climate," Muller said. "I'm trying to do my show and figure out what the rules are. So far, it's been, 'If you can't say it around a 7-year-old, then don't say it.' Now I have to do a show for a 7-year-old?"

He added: "One mistake and you're finished? Zero tolerance? That's fascism."

FCC enforcement chief David Solomon doubts the sincerity of complaints about vagueness.

"It's an excuse by broadcasters every time they get in trouble that if only the FCC can make its rules clearer," he said. "I think it's pretty hard for anybody to argue with a straight face they think all this is fine."

Bennett, who next month will launch his own conservative radio program, has little sympathy for Muller or Stern, or the advertisers and stations that back them.

"If you're sponsoring Howard Stern, you ought to be nervous," Bennett said. "You don't own these airwaves, and there are rules and regulations.

"Will the nation suffer without Howard Stern on all the stations he's been on? I don't think so. Somebody else will come along."

Either that, or Stern and others like him will go elsewhere, to satellite radio perhaps.

Last week, Stern threatened to take his mostly raunchy, highly rated gig to unregulated satellite distribution, which is not subject to federally mandated decency standards. But the threat seemed hollow because the fledgling satellite industry could not afford Stern.

That is changing.

Satellite on ascent

Satellite radio operators have raised money in the stock market and are building their lists of subscribers, who pay monthly fees for broadcasts. XM Radio expects to double its audience this year to 3 million subscribers. Rival Sirius Satellite Radio has built a 265,000-customer base after a much later start.

Recently, Sirius agreed to pay \$31 million a year to broadcast National Football League games.

Merrill Lynch's Nabi figures Sirius might pay Stern a similar amount--enough to match what Stern earns from Infinity Broadcasting and other sources--in a bid by the radio network to attract new customers.

No wonder radio industry experts paid particular attention last week when Stern warned his listeners that his days on the free radio dial might be ending.

"I'm saying goodbye to you now, because this is it," he told listeners last week. "These are the last days of Pompeii, baby."

Stern's detractors see an altogether different cataclysm at hand: The end of Sodom and Gomorrah. And partly, they blame regulators for letting broadcasting standards fall so low.

Critics of FCC Chairman Michael Powell say broadcasters felt they would have free reign under him, particularly after Powell in his first news conference as chairman declared, "I don't think that my government is my nanny."

Powell offered a simple solution to offensive material: "Turning it off and controlling your children's television access."

Three years later, Powell and others are looking at the issue differently.

Commissioner Michael Copps, one of two Democrats on the five-member FCC, said the agency shares blame for any perceived indecency outbreak because of its mixed signals and inaction.

"I think we're culprit No. 1 that this has gotten as far as it has," Copps said. "Hopefully, now we'll be the vindicator No. 1 and try to see if we can't arrest this race to the bottom."