

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Various Complaints Against the Cable/Satellite Television Program "Nip/Tuck")	File Nos. EB-03-IH-0468; EB-03-IH-0563 through 0567; EB-03-IH-0732; EB-05-IH- 0040
)	

MEMORANDUM OPINION AND ORDER

Adopted: March 3, 2005

Released: March 4, 2005

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this *Memorandum Opinion and Order*, we deny complaints received from individuals who have alleged that the television program "Nip/Tuck," shown on the FX Network, or various episodes of the program, violate federal restrictions regarding indecent and obscene material. As set forth below, the Commission has indicated that it does not regulate cable indecency or indecency on satellite subscription services, so we deny that aspect of the complaints. Moreover, nothing in the record indicates that "Nip/Tuck" meets the legal test for obscenity, so we deny that aspect of the complaints as well.

II. BACKGROUND

2. The television program "Nip/Tuck," a drama involving plastic surgeons, is shown on the FX Network, which is available through cable or satellite service.¹ Some complaints allege that the program generally is indecent and/or obscene, and other complaints allege that various, specific episodes are indecent and/or obscene. Although the complaints vary in the degree of detail provided, they generally allege that the program depicts actors engaged in an array of simulated sexual acts, including oral, anal, and genital intercourse, as well as nudity. Some complaints also focus on the program's graphic portrayal of medical procedures such as liposuction and rhinoplasty.

III. DISCUSSION

3. The Commission does not regulate cable indecency. In this regard, the Commission recently stated: "Indecency regulation is only applied to broadcast services," not cable.² In declining to review complaints regarding cable indecency, the Commission has said that cable services "are not broadcast

¹See www.fxnetworks.com. "Unlike broadcast television, which sends over-the-air signals, cable television operates by transmitting programs to subscribers through coaxial cables or wires." *Cruz v. Ferre*, 755 F.2d 1415, 1419 n.4 (11th Cir. 1985) (citations omitted). Satellite television is transmitted via "over-the-air signals" but, like cable, is available only to subscribers. See *Subscription Video*, Report and Order, 2 FCC Rcd 1001, 1005, ¶ 32 (1987) (subscription-based satellite services are not "broadcasting" as defined by the Communications Act), *aff'd sub nom. National Association for Better Broadcasting v. FCC*, 849 F.2d 665 (D.C. Cir. 1988).

² See *Violent Television Programming and Its Impact on Children*, Notice of Inquiry, 19 FCC Rcd 14394, 14403, ¶ 21 (2004) ("*Violence NOP*").

services, but subscription-based services, which do not call into play the issue of indecency.”³ Under 18 U.S.C. § 1464, the Commission has express statutory authority to impose sanctions for the broadcast of “any obscene, indecent, or profane language by means of radio communication.”⁴ As the Commission recently stated: “. . . the criminal code restriction on indecency applies only to ‘means of radio communication’ and therefore not cable communications.”⁵ Thus, the Commission does not regulate cable indecency. More generally, the Commission also has made clear that indecency restrictions do not apply to other subscription services: “[T]his case, which involves subscription as opposed to conventional broadcast service – does not call into play the issue of indecency.”⁶

4. We also deny the complaints to the extent that they allege that “Nip/Tuck” is obscene. The three-part obscenity test set forth in *Miller v. California* requires that (1) an average person, applying contemporary community standards, would find that the material, as a whole, appeals to the prurient interest; (2) the material depicts or describes, in a patently offensive way, sexual conduct specifically defined by applicable law; and (3) the material, taken as a whole, lacks serious literary, artistic, political, or scientific value.⁷ This test is designed “to isolate ‘hard core’ pornography from expression protected by the First Amendment.”⁸ The complaints, even those that cite to and describe specific episodes, do not allege that the program actually depicts the kind of “hard core” pornography covered by *Miller*. Further, nothing in the record indicates that “Nip/Tuck” *as a whole* appeals to the prurient interest or lacks serious literary, artistic, political, or scientific value.

5. Finally, although the Commission does not regulate cable indecency, we note that the Act provides a number of tools, available through current technology, for those who wish to selectively block unwanted television programming. As the Commission has noted, “[f]irst, as section 640 requires, a cable operator must block programming, using any means, if such a request is made by a particular

³*Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee*, Memorandum Opinion and Order, 17 FCC Rcd 23246, 23328, ¶ 213 (2002) (subsequent history omitted).

⁴18 U.S.C. § 1464 (“Whoever utters any obscene, indecent, or profane language by means of radio communications shall be fined under this title or imprisoned not more than two years, or both.”); *compare id. with* 18 U.S.C. § 1468(a) (“Whoever knowingly utters any obscene language or distributes any obscene matter by means of cable television or subscription services on television, shall be punished by imprisonment for not more than 2 years or by a fine in accordance with this title, or both.”). *See also* Telecommunications Act of 1992, Pub. L. No. 102-356, § 16a, 106 Stat. 949, 954 (1992) (requiring Commission to implement indecency time of day restrictions on “radio or television *broadcast* station[s]”) (emphasis added); 47 C.F.R. § 73.3999 (applying indecency restrictions to broadcast but not to cable).

⁵ *Violence NOI*, 19 FCC Rcd at 14403, n.45 (quoting 18 U.S.C. § 1464). The Commission also noted there that its rules regarding section 1464 do not apply to cable.

⁶ *See Harriscope of Chicago, Inc.*, Memorandum Opinion and Order, 3 FCC Rcd 757, 760 n.2 (1988) (subsequent history omitted) (indecency restrictions not applied to subscription service provided by television licensee; “Consistent with existing case law, the Commission does not impose regulations regarding indecency on services lacking the indiscriminate access to children that characterizes broadcasting.”); *see also Litigation Recovery Trust*, Memorandum Opinion and Order, 17 FCC Rcd 21852, 21856, ¶ 8 (2002) (indecency restrictions not applicable to satellite programming provided to hotels; “[s]uch subscription-based services do not call into play the issue of indecency.”).

⁷*Miller v. California*, 413 U.S. 15, 24 (1973).

⁸*Id.* at 29.

subscriber. Second, a cable subscriber may obtain a lock-box from the local cable operator if he or she wants to selectively block unwanted material.”⁹ Satellite subscription services have similar tools.¹⁰

IV. ORDERING CLAUSES

6. Accordingly, IT IS ORDERED, that the complaints filed against the FX Network television program “Nip/Tuck” are hereby DENIED.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau

⁹Implementation of Section 505 of the Telecommunications Act of 1996, Order, 16 FCC Rcd 20915, 20918, ¶ 9 (2001); see 47 U.S.C. §§ 544(d)(2), 560. For further information on how consumers can restrict access to unwanted television programming, see <http://www.fcc.gov/parents/>.

¹⁰ See <http://www.directv.com/DTVAPP/learn/LocksLimits.dsp>;
http://www.dishnetwork.com/content/programming/parental_control/index.shtml.