

July 23, 2008

INDECENCY UPDATE – THE 2004 SUPER BOWL FINE

At this point, it is hard to assess the significance of the July 21 decision of the US Court of Appeals for the Third Circuit that vacated the FCC's fine against CBS for the notorious Janet Jackson 2004 Super Bowl incident. Some tend to read it as a sweeping rebuke of the FCC's indecency regulatory scheme while others view it as a far more limited exoneration of certain types of unpredictable live broadcasts.

Although the Court called the brief exposure of Jackson's breast during the live halftime show "a deceitful and manipulative act" (insofar as it had deviated from the script), the Court rejected the FCC's punitive fine as an arbitrary departure from its long-established policy of tolerating fleeting indecency. The Court further considered and rejected alternate theories under which the FCC had found CBS liable for its broadcast of the incident. However, the extent to which broadcasters can take comfort in the decision remains far from settled.

The Court's Decision – As is well known, the incident occurred during the "Rock Your Body" finale of the show when Justin Timberlake took his "gonna have you naked by the end of this song" lyric literally and ripped a portion of Jackson's bustier off, exposing her breast on camera for a split second. Following an outpouring of viewer complaints and an investigation, the Commission found CBS liable for indecency.

The Court's analysis began with a lengthy review of the last three decades of FCC indecency enforcement, which the Court found to have been generally restrained and never applied to fleeting material. In the first modern case, involving Pacifica's afternoon broadcast of the late George Carlin's "Filthy Words" monologue, the Commission distinguished the "verbal shock treatment" of his pervasive use of expletives from isolated or fleeting uses that would not be considered indecent. The distinction was maintained through numerous other cases and policy statements until 2004, when the full Commission overruled its own staff, as well as all its prior rulings, to find that Bono's use of a single obscene word in accepting a Golden Globe award was actionable. In a subsequent order, the Commission affirmed that even a single, isolated use of two words or their variants would no longer be permitted under any circumstances. The Bono case currently awaits decision by the Supreme Court.

The Third Circuit concluded from this chronology that the FCC had failed to justify a departure from its prior consistent policy of exempting fleeting or isolated material from indecency sanctions. However, the primary ground upon which it reversed the Super Bowl fine was that it had occurred the month prior to its Golden Globe decision when the FCC first announced its change in policy. Had CBS had sufficient warning of the policy change, the outcome might have been different.

Even so, the Court went on to reject the FCC's rationale that all the prior cases involved indecent speech in the form of expletives, whereas the Super Bowl broadcast (and the cases decided in the 2006 omnibus order) displayed images of nudity. The Court noted that the FCC had never drawn a distinction between indecent words and images before and failed to explain why it was doing so now. Indeed, CBS had presented the Court with several instances in which the FCC had rejected viewer complaints of sexually explicit visuals.

The Court also considered and disallowed two other grounds invoked by the FCC to hold CBS liable for the broadcast. First was the doctrine that holds an employer responsible for the actions of its employees while acting within the scope of their employment. Applying federal law, the Court held that Jackson and Timberlake could not be considered CBS employees at the time of the incident, largely because all aspects of their work as performing artists was not under the control of CBS. Even though CBS had the right to review and provide input into such items as wardrobe, the performers retained discretion to make those choices in the first instance. The Court also considered that Jackson and Timberlake

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selected their choreography without input from CBS; were hired for brief, one-time performances; were not eligible for the assignment of additional work; were compensated with single, lump-sum payments rather than on-going salaries; had no employment tax paid on their behalf; were provided with no employee benefits; and were engaged for their considerable popularity and skill as headliners, not only by CBS but by many other organizations as well. Applying similar reasoning, few guest artists would qualify as network or station employees but rather would be considered independent contractors and thus directly accountable for their own actions.

As a corollary, the FCC had asserted generally that broadcasters cannot delegate responsibility for any material they air and thus should be held strictly liable for all content on their programs. The Court dismissed that argument as applying only in situations in which a third party steps into a broadcaster's shoes to perform managerial, operational or engineering duties routinely performed by licensees. The Court distinguished performance and program content as implicating First Amendment considerations, for which a higher standard is appropriate to shift liability away from the creators of the content to licensees.

Rather, the Court required that when First Amendment values are invoked, liability requires *scienter* (actual conscious knowledge) of unacceptable content, even in the absence of an intent to violate a rule. That, in turn, is a factual determination that hinges upon whether the broadcaster's conduct was not merely negligent but reckless. Here, the FCC had found that CBS had ignored strong warnings that the half-time show could be indecent and assumed the risk of proceeding with the live broadcast. The Court held, though, that there was insufficient evidence that CBS had acted recklessly.

A New Standard? In what may prove to be the most important part of its decision, the Court stated:

The airing of scripted ... indecent material in pre-recorded programming would likely show recklessness, or may even constitute evidence of actual knowledge or intent. But when unscripted indecent material occurs during a live or spontaneous broadcast, as it did here, the FCC should show that the broadcaster was, at minimum, reckless in causing the indecent material to be transmitted over public airwaves. A broadcaster's failure to use available preventative technology, such as a delay mechanism, when airing live programming may, depending on the circumstances, constitute recklessness.

The Court went on to apply the facts of this case to that legal standard. It noted that Jackson and Timberlake had previously performed the same song live on national television without incident, that CBS had rejected other controversial performers, and that CBS had subjected the half-time show to numerous script revisions, wardrobe checks and an industry-standard audio delay. At the same time, the Court credited CBS's claim that video delays were never used at the time (and only were implemented for a subsequent award show in reaction to the Super Bowl incident). Thus the Court faulted the FCC for failing to show that CBS had acted recklessly, and not merely negligently, when it failed to implement a video delay for the half-time show broadcast. Even so, in light of evolving technology and experience, foregoing delay nowadays may no longer be justified, although the question remains as to how much meaningful scrutiny of a crowd shot for potentially offensive T-shirts, banners and gestures is possible in a mere few seconds.

Thus, although this case largely tracks the analysis of the Second Circuit in its Golden Globe decision involving the Bono expletive during the Golden Globe awards, it does seem to extend that analysis by distinguishing between scripted or otherwise planned or foreseeable programming and spontaneous, live coverage of events for which there is no prior reason to suspect that indecent behavior would occur.

What's Next? Even though it held that the FCC could no longer penalize CBS retroactively, nonetheless the Court remanded the case to the Commission to afford it an opportunity to issue a declaratory ruling concerning the matter. (One of the three judges partially dissented – even though he fully concurred in the majority's reasoning and conclusion, he saw no point in a remand, as the Commission could declare a new policy or explain a change in policy through a future case.)

It is unclear at this point whether the FCC is apt to accept the Court's invitation. FCC Chairman Martin expressed surprise and disappointment at the decision and said that he looked forward to guidance from the Supreme Court's upcoming review of the Golden Globe case. In that regard, it is worth noting that the Supreme Court did not agree to review the Golden Globe case due to a split among circuit rulings nor to redress manifest injustice. Thus, it is possible that it plans to use the case as a vehicle to issue a sweeping pronouncement that could reconcile FCC jurisdiction over this area with the demands of the First Amendment, or even suggest its own set of indecency standards (as it once did for obscenity).

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In the meantime, while broadcasters can take some comfort in the CBS ruling, permanent relief – if it comes at all – may depend upon Congress, which is unlikely to take the side of unfettered free expression in an election year in which family values are apt to loom large. For now, perhaps the most that can be said from the CBS case is that a non-employee's occasional, genuinely unexpected, isolated on-air indecency (whether heard or viewed) may be overlooked. In any event, the struggle toward comprehensive and comprehensible standards for suitable broadcast material is far from over.

If you have any questions or would like more information, please contact [Peter Gutmann](#) at (202) 857-4532 or pgutmann@wcsr.com, or one of our other Womble Carlyle [Telecommunications](#) professionals.

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