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Indecency: Commission Position Slipping on Appeal?

Patrick Murck
703-812-0476
murck@fhhlaw.com

The FCC had a long, profanity-laced day before the U.S. Court of Appeals for the Second Circuit shortly before Christmas as the agency's lawyers tried to defend the Commission's ever-expanding definition of indecency. And from the reaction of the judges hearing the case, it appeared that the Court was not favorably impressed with the FCC's defense of its position.

The oral argument was held in an appeal taken by a number of broadcasters – led by Fox Television – with respect to the FCC's "omnibus" indecency ruling issued last March. In that ruling (which we described in the March, 2006 *Memo to Clients*), the Commission addressed complaints about a broad number of programs, ranging from music videos to documentaries to sitcoms to police dramas to awards shows. Some of the target programs were deemed not to be indecent or profane, while others got the big thumbs down. Two in the latter category involved Billboard Music Awards shows in which two awards presenters (Cher and Nicole Richie, in separate programs) used language which the FCC held to be indecent (although it issued no fine in either case).

Throughout the oral argument (which you can check out for yourself at <http://www.c-span.org/rss/video.asp?MediaID=29085>), two of the three judges seemed puzzled by the FCC's justification for its regulation of indecency. While the Commission asserted that its regulation is intended to protect children from being exposed to indecent or profane language, the FCC had to admit that it might be permissible for stations to broadcast portions of the oral argument during a 6:00 p.m. newscast – even those portions of the arguments in which both the attorneys and some of the judges used "fuck" and "shit". One judge even asked whether, in connection with a news piece about the argument, a broadcaster might also be able to air file footage of the supposedly offending remarks as they were delivered during the telecast awards shows. And if the original footage could be broadcast, why would not a child exposed to that latter broadcast be as adversely affected as one who might have seen the original broadcast?

In another potentially telling exchange, one judge picked up on the FCC's claim that material broadcast during "news" coverage might be kind of exempt from indecency concerns. The judge

asked whether a broadcaster could simply label as “news” the Billboard Music Awards show, in which case the remarks by Cher and Ms. Richie would arguably have been exempt. Commission counsel acknowledged that the FCC prefers not to second-guess a broadcaster’s determination of what is or is not “news”, which prompted the judge to snort, “Are you just telling the networks ... to make some sort of cockamamie claim and they’ll survive?”

And so it went for an hour of back-and-forth.

Any observer of appellate courts will tell you that it is a fool’s errand to try to predict, on the basis of oral argument, how a court will rule in any particular case. Judges often play the devil’s advocate, tossing seemingly pointed questions to test the strengths and weaknesses of arguments being presented. But in this case, it did seem reasonably clear that at least two of the three members of the panel were impressed – but not favorably – by the FCC’s argument.

It is not clear when the Court will issue its opinion in this case. Some courts try to get their opinions out within two-three months of oral argument, but that is at most an informal, non-binding, often-disregarded guideline. We’ll just have to wait and see.

And while we’re waiting for the Second Circuit, we can also wait for Episode Two of “The FCC Goes To Court”. The Commission is due to argue its indecency position again in the near future, this time before the U.S. Court of Appeals for the Third Circuit in Philadelphia. That’s where CBS appealed the Commission’s ruling on the 2004 Super Bowl half-time show, featuring the inimitable Janet Jackson and, for approximately half a second, Ms. Jackson’s right breast. The briefing in the Third Circuit has been completed, and next on the agenda should be a yet-to-be-scheduled oral argument where the FCC will again be given the opportunity to explain how its indecency policy works and why it should be upheld.

Many observers assume that no matter how the Second and Third Circuits rule in these two cases, the losing party will seek Supreme Court review. It has been nearly 30 years since the seminal *Pacifica* case in which the Supreme Court upheld the Commission’s conclusion that the broadcast of George Carlin’s “Filthy Words” monologue was indecent. It may be time for the Supremes to take another look at the issue.