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Third Circuit Hears CBS's Janet Jackson Appeal

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

CBS finally got its day in court to protest the \$550,000 dollar fine levied against it in the wake of Nipplegate, the infamous Janet Jackson /Justin Timberlake 2004 Super Bowl performance. Oral argument took place on September 11, 2007, but a decision likely won't be made until early next year. From the tenor of the judges' questions, however, a decision in the FCC's favor seems to be far from a sure thing.

For those who need a refresher, CBS claimed that it was just as surprised as those complaining members of the audience by what occurred that fateful night. The network said that it followed industry standards to prevent the broadcast of indecent material, including a five-second audio delay. The fleeting exposure (which everybody agrees clocked in at about one-half of one second) of Ms. Jackson's breast was not punishable, according to CBS, because the FCC had longstanding precedent for exempting fleeting indecent content – and the Commission failed to explain why that longstanding policy didn't apply to *L'Affaire Jackson*. By contrast, the FCC contended that CBS controlled every aspect of the show and that the network knew or should have known that something outrageous and indecent would be broadcast. According to the FCC, CBS should be vicariously liable for the actions of Timberlake and Jackson.

Unlike the Fox/Second Circuit case, in which the court's questions tended to focus on the nitty-gritty of the indecency policy, the Third Circuit seemed more interested in exploring whether CBS could or should be held liable for the halftime show if that show were held (for the sake of argument) to have been indecent. The court did address some of the standard indecency-related questions, such as the history of the "fleeting expletive" doctrine and the manner in which the FCC supposedly determines whether any particular word(s) or image(s) may be contrary to the national standard for broadcasting. But the judges returned repeatedly to the question of liability, and they seemed reluctant to impose vicarious liability on CBS in view of CBS's assertion of less-than-complete control over the two artists.

You can hear the full 75-minute Third Circuit oral arguments on the Internet. (Fire up Real Player, select "open file", and paste the following URL in for the file name: <rtsp://video.c->

span.org/60days/ac091507.rm.) While it is never prudent to draw any conclusions about the likely outcome of an appeal based on the questions asked at oral argument, the Third Circuit argument does at least hint that the Commission's indecency policy may suffer yet another judicial setback.

How the Third Circuit ultimately rules could have a significant effect on whether the U.S. Supreme Court will weigh in on the indecency issue. The Supremes are under no obligation to take any appeals in this area. However, when there is a "conflict in the circuits" – that is, when two federal courts of appeals reach seemingly inconsistent results in similar cases – the Supremes are usually more inclined to agree to hear the appeal in order to announce a consistent standard of federal law in the area. Since the Second Circuit has already made clear that it does not believe the FCC's indecency policy is good law, a contrary decision from the Third Circuit could mean that the Supremes will consider that question in the next term. Of course, if the Third Circuit agrees with the Second, that could be it for the policy. Stay tuned.