



October 2009

CBS Pleads The First

***Eye Net wants re-match of 2004 Super Bowl Half Time fight,
but this time on constitutional grounds***

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In a supplemental brief recently filed with the U.S. Court of Appeals for the Third Circuit, CBS has asked the court to directly address the question of whether the FCC's indecency rules violate the First Amendment. The brief was submitted in connection with the still-ongoing battle over Janet Jacket's wardrobe malfunction during the 2004 Super Bowl.

As long-time readers will remember, in July, 2008, the Third Circuit found the FCC's \$550,000 fine against CBS to be "arbitrary and capricious" on the basis of a relatively narrow issue of administrative law. In May, 2009, the Supreme Court vacated that decision, shortly after it overturned a similar decision from the Second Circuit (in Fox Network's "fleeting expletive" case). In both cases, the decisions turned on issues of administrative law and avoided direct decisions on First Amendment grounds.

According to CBS, it's time to stop avoiding the issue. "This Court," CBS urged, "should embrace the Supreme Court's invitation to assess the constitutionality of the indecency rules given current realities and find that most applications can no longer survive First Amendment scrutiny." Among those "current realities", CBS's brief notes the rise of other media sources and new parental control technologies that did not exist when the Supreme Court considered the issue thirty years ago in the *Pacifica* case (*i.e.*, the famous "Seven Dirty Words" case). These changes, CBS argues, mean that broadcasting is no longer the "uniquely" pervasive medium that it was in 1978, nor is broadcasting content "uniquely accessible" to children – two of the key assumptions that supported the *Pacifica* court's view that broadcasting should be accorded less First Amendment protection than other media.

CBS's brief responded to a filing from the FCC in which the FCC argued that the Supreme Court's rationale in the Fox "fleeting expletive" case validated the FCC's approach to Ms. Jackson's transgression. Moreover, the FCC disagreed with the Third Circuit's previous finding that there wasn't enough evidence to show that CBS's actions in broadcasting the event were sufficiently "willful" to support a fine. Thus, the FCC

reasoned, the case should be returned to the FCC for further investigation of whether CBS “willfully” violated the FCC’s rules by “recklessly” airing the Super Bowl Halftime Show live, rather than with a delay that could have prevented the nation from exposure to Ms. Jackson’s breast for nine-sixteenths of one second.

According to CBS, any such investigations would unnecessarily prolong the case. “The issues the FCC now raises all have been thoroughly briefed, argued, and decided by this Court, following an exhaustive investigation and three rounds of pleadings at the agency,” CBS stated, before blasting the FCC’s “Ahab-like obsession with this case.” In the meantime, CBS noted, broadcasters’ free speech rights continue to be chilled by the uncertainty surrounding the FCC’s indecency policies. By delaying the ultimate reckoning of its rules, CBS argued, the FCC forces broadcasters to continually second guess themselves as they try to comply with notoriously vague and arbitrary standards.

While both the Third Circuit and the Second Circuit clearly have the opportunity (and now the invitation, thanks to the Supreme Court’s *Fox* decision last Spring) to consider whether the FCC’s indecency rules violate the First Amendment, it is not certain that either will do so. In light of the Supreme Court’s reversals, both courts could choose to simply return the cases to the FCC for further proceedings. On the other hand, both courts, particularly the Second Circuit, previously appeared to be skeptical of whether the FCC’s indecency rules – particularly as applied to such fleeting and isolated words and images – could pass Constitutional muster.

It is also uncertain when the lower courts will make their decisions. The Third Circuit has not requested further oral arguments at this time. If it does, a decision would be unlikely before early 2010. The Second Circuit is likely to take as long or longer. In response to the Supreme Court’s overturning of the Second Circuit decision, Fox filed its brief in the Second Circuit in late September. The FCC’s response was filed October 28, and Fox will have until November 12 to file a further reply. The Second Circuit has indicated that it *will* hold oral arguments, but it won’t be announcing a schedule for the arguments until after all the paperwork has been filed. Thus, we wouldn’t expect to see decisions from the lower courts until early or mid-2010.

Of course, if the lower courts do make a decision on First Amendment grounds, the matter is virtually certain to return to the Supreme Court. But briefing and argument there couldn’t happen until late 2010 or early 2011 – at the *very* earliest – further prolonging the longest fraction of a second in broadcasting history.