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CBS v. FCC: Circuit Seeks Supplemental Submissions

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Last month we reported on the latest development in the long-running saga of the FCC, CBS, Janet Jackson's right breast, and the 2004 Super Bowl halftime show. The Commission was then back up in front of the U.S. Court of Appeals for the Third Circuit, arguing its case there (for the second time). During that argument, the Third Circuit panel seemed much more reluctant than their colleagues on the Second Circuit to address concerns about the constitutionality of the FCC's indecency policy (although the Third Circuit seemed clearly to have such concerns). In an order issued shortly after the argument, the Third Circuit directed CBS and the Commission to file briefs by May 18 responding to a number of specific questions that suggest that the Court may be looking to avoid the constitutional questions and decide the case on other grounds.

As we mentioned last month, one of the issues the Third Circuit raised both at oral argument and in its 2008 decision that initially overturned the FCC's fine was whether any violation of the indecency rules by CBS was, or was required to be, "willful". If the Court's recent Order is any indication, the question of "willfulness" may be the deciding point in the case this time around.

In its post-argument order, the Third Circuit noted that the FCC had fined CBS because, despite CBS's "acute awareness of the risk of unscripted indecent material," CBS "consciously and deliberately" broadcast the half-time show without taking "reasonable precautions to ensure that no actionably indecent material was broadcast." The Court has now asked the parties to discuss what level of *mens rea* would be required by such a standard, and whether the Commission had applied the same standard in its earlier decision in *Young Broadcasting* (the so-called "Puppetry of the Penis" case). The Court asked the parties to discuss, as a preliminary matter, the necessary *mens rea* solely on its own terms, without any reference to the level of *mens rea* that may be required by the Constitution or statute.

[*Mens rea*? For those of you who didn't go to law school, or who did but have happily and understandably forgotten much of that experience, *mens rea* is a Latin term which means "guilty mind". Generally, it refers to the state of mind of the accused: for

example, was the alleged wrong-doer acting intentionally (in which case it may be appropriate to bring the law down on his/her head) or merely negligently (in which case no penalty may be called for). Historically, the Commission's view has been that pretty much any conduct by a broadcaster is "willful", meaning that the requisite *mens rea* is present to permit issuance of a forfeiture.]

The parties will also have to answer questions of the interpretation and application of the Commission's statutory authority to impose fines. The Commission can generally impose fines under two sections of the Communications Act. Section 503(b)(1)(B) authorizes the FCC to impose forfeiture penalties against any party that "willfully" violated the Communications Act or any Commission rules. Section 503(b)(1)(D) allows imposition of forfeitures where the Commission determines that a party has violated one of three specific sections of the Criminal Code (including the section governing obscene or indecent broadcasts). The language of Section 503(b)(1)(D) does not mention willfulness or any other type of intent.

The Court has directed the parties to address what *mens rea* is required for the FCC to impose a forfeiture under either of these two sections, and specifically whether CBS could be liable under the "willful" standard in 503(b)(1)(B) if it did not intend to broadcast the specific indecent material at issue in the case (*i.e.*, the flash of Ms. Jackson's breast). In a question the answer to which could have important implications for the Commission's enforcement regime generally, the Court also asks whether the Commission's interpretation of these sections of the Communications Act is entitled to deference by the Court.

Finally, in what may be a sign of the direction of the Court's thinking, the Court asked whether the FCC, in imposing its fine on CBS, had relied on Section 503(b)(1)(D) at all, and if not, whether the Commission is foreclosed from relying on that section now. In the Court's words, "If [the Commission cannot rely on Section 503(b)(1)(D)] and CBS cannot be held liable under §503(b)(1)(B)'s willfulness standard unless it intended to broadcast the specific material found indecent, is the FCC's *Forfeiture Order* invalid, such that the appropriate remedy is to grant the petition for review without remand?"

It's pretty easy to guess how CBS and the FCC will answer that question. What remains to be seen, however, is where the Court ultimately comes out. Whichever way the Court is leaning on these issues, the Order does suggest that it is perhaps somewhat reluctant to reach the constitutional issues presented by the case. Indeed, the Court's questions seem to present a path by which it could overturn the FCC's decision without even addressing whether the broadcast itself was indecent.

Even if the Court does not reach the constitutional issues, however, its decision could

have a significant impact not only on the Commission's indecency enforcement regime, but on its forfeiture regime more generally. Little if any attention has been paid by the courts to the issue of *mens rea* in Commission enforcement actions. The Third Circuit's obvious interest in precisely that issue could lead the Commission into some unexpected rough waters.

The parties' responses to these questions, which are due May 18, should provide some interesting reading.