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## 3rd Circuit to Hear CBS' Appeal Over Indecency Fine for Janet Jackson's Super Bowl Stunt

Jeff Horwitz  
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As often happens in indecency cases, the legal issues in *CBS Corp. v. FCC* are a good deal more stimulating than the incident itself.

Three-and-a-half years after an ill-advised Super Bowl halftime stunt in 2004 gave America a nine-sixteenths second view of Janet Jackson's right breast, the regulatory and legal fight over the Federal Communications Commission's record indecency fine has arrived at the 3rd U.S. Circuit Court of Appeals, and a lot more is at stake than the \$550,000 that CBS had to pony up before appealing the commission's sanction. Oral arguments are scheduled for Sept. 11.

Both broadcasters and media decency watchdog organizations see the case as one of the first chances in years to challenge the FCC's efforts to sanction broadcasters. If the commission can't penalize a national network for "a striptease in front of millions of people watching a football game," says Tim Winter, president of the Parents Television Council, its ability to enforce the basic terms of broadcasters' licenses comes into doubt.

The Parents Television Council, which was responsible for encouraging many of the complaints over the Jackson incident and other recent TV broadcasts of dubious taste, has filed an amicus brief in the case. But Winter doesn't talk like he's optimistic.

"What we expect and what we hope for are two different things," he says.

While the case could potentially veer into any number of First Amendment issues, it could also be settled on far more limited administrative law grounds. To justify its fine, the FCC will have to defend its finding that CBS took "willful or repeated" actions that led to the infamous breast exposure, despite CBS' uncontested position that its halftime performers never cleared the planned exhibition with the network. Commission attorneys did not respond to a call seeking comment.

But to even defend the appropriateness of its fine, says David Solomon, a communications and media partner at D.C.'s Wilkinson Barker Knauer, the commission will have to defend its own designation of the breast display as "obvious" indecency. In the past, the commission has regularly declined to act on indecency complaints about "fleeting expletives," and in 2006 it was rebuffed by the 2nd U.S. Circuit Court of Appeals when it tried. That court's 2-1 decision was narrowly grounded in its contention that the FCC failed to show that its actions were based on consistent reasoning, though the opinion also mulls over the possibility that any such enforcement might run afoul of First Amendment free speech protections.

Some of the same issues will likely be raised by CBS lawyers in oral arguments on Sept. 11.

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"The threshold issue is whether the material is even indecent at all," says Solomon, who served as the chief of the FCC's Enforcement Bureau between 1999 and 2005, but is not involved in the CBS case.

### **NASTY AS THEY WANNA BE?**

In briefs filed with the 3rd Circuit, the commission argues that Jackson's breast exposure gives it extraordinary cause to pursue fines, and that it has a precedent to do so. In a decision that (as fate would have it) was released just days before the 2004 Super Bowl, the FCC ruled that a brief genital exposure during a news segment about a show titled "Puppetry of the Penis" had run afoul of decency laws because of its "shocking and pandering nature." Likewise, the "sexualized lyrics and choreography" of Jackson's halftime duet with Justin Timberlake qualified the eventual skin exposure as "titillating," the FCC asserts, especially in the context of family football programming.

Ironically, the FCC is also relying on CBS' own self-flagellation over the chest-flash as de facto proof that the incident was indecent -- Mel Karmazin, CEO and president of Viacom (CBS' parent), wouldn't have apologized had not community decency standards been clearly violated, the FCC's brief argues.

CBS makes a case similar to the one that the 2nd Circuit found persuasive. The brief display of a woman's breast was neither willful on the part of the network nor particularly graphic, the company's attorneys write, and the FCC's attempts to pursue an indecency fine against the broadcaster marks a sudden and unwarranted switch of the commission's own policy regarding fleeting references. Along with attributing the FCC's actions to "intense political pressure," the network argues that the commission has failed to determine whether the Janet Jackson incident violated broader community standards, and questions whether the commissioners are competent judges of those standards.

"However the agency may seek to define the relevant unit geographically, it must endeavor to find what the community thinks about the broadcast and not just what the five commissioners think," CBS' brief states.

Overall, Solomon is not convinced that the commission has a solid case.

"I think there's a good chance the commission could lose on the issue of whether it's indecent," he says, adding that it's his personal opinion that it should. "Hopefully, this would send a strong message to the FCC that they're going overboard," he says.

### **A 'PRETTY LIBERAL PANEL'**

While the case will be argued in Philadelphia, the majority of the attorneys weighing in are from Washington, D.C. Davis, Wright & Tremaine's Robert Corn-Revere is one of two attorneys representing CBS directly; Fox Television Stations has filed an amicus brief with the help of Sidley Austin's Carter Phillips. Also in the D.C. amicus mix are the Center for Democracy and Technology's John Morris Jr. and the Center for Creative Voices in the Media's Andrew Schwartzman. Filing for the Parents Television Council on the appellee's side is McLean, Va.-based Christopher Craig of Sparks & Craig.

As a Delaware-based corporation, CBS had standing to file suit in either the 3rd Circuit or the U.S. Court of Appeals for the D.C. Circuit. For the attorneys on CBS' side of the case, the longer drive to Philly may be well worth it. The network's choice of venue was likely strategic, Schwartzman says, noting that the 3rd Circuit has issued opinions strongly protecting First Amendment claims in the past. Its judges twice struck down the Child Online Protection Act for free speech reasons, and they upheld Playboy Television's First Amendment rights against a government challenge in another.

Two of the circuit judges who will decide the case, Julio Fuentes and Marjorie Rendell, are Clinton appointees, Schwartzman says. The third, Chief Judge Anthony Scirica, is a Reagan appointee who has a reputation as particularly sensitive to business concerns, he says.

"This is a pretty liberal panel," he says.

While Winter wouldn't say that the deck was stacked against the FCC, he agrees the venue probably isn't a coincidence.

"Our expectation is that the networks went forum shopping for a reason," he says. "It's clear what the motivations of the networks were when they picked the 2nd and 3rd circuits, respectively."