

Another Free Speech Victory Against the FCC

July 25, 2008

In a victory for free speech, a federal appeals court [ruled this week](#) [1] that the Federal Communications Commission stepped out of bounds when it issued an unprecedented \$550,000 fine against CBS for airing Janet Jackson's infamous breast-bearing "wardrobe malfunction" during the 2004 Super Bowl halftime show.

Echoing the [seminal opinion](#) [2] by Second Circuit Court of Appeals on a related matter, the Third Circuit held that the FCC violated the Administrative Procedure Act (APA) when it changed its enforcement policy to regulate even one-off or "fleeting" indecent images without sufficient prior notice or justification. The Court noted that prior to 2004, the FCC had a policy of not sanctioning broadcasters for single utterances of swear words and brief flashes of nudity or other "indecent" material.

While the Third Circuit didn't squarely rule on First Amendment grounds in evaluating the FCC's censorship regime, the Court did note that, "In cases raising First Amendment issues, we have an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." The Court fulfilled this obligation beautifully and issued a solid opinion.

The related Second Circuit case that was decided last year focuses not on fleeting nudity, but on "fleeting expletives." In that opinion, the Court also ruled on APA grounds but took several additional pages to explicitly question the FCC's underlying First Amendment authority to regulate broadcast indecency in the first place.

The notion that broadcast programming is an uncontrollable "intruder" into the home and so the government has the constitutional power to regulate broadcast content for the public's benefit is increasingly an unpersuasive rationale. As CDT [argued](#) [3] in amicus briefs to both Circuits, [user control technologies](#) [4] are increasingly enabling parents to manage what they and their children watch; and convergence of entertainment technologies - broadcast, cable, satellite, Internet - is making distinctions between them meaningless, especially distinctions that lead to vastly different policy and legal frameworks.

It's not certain yet if the FCC will appeal the Third Circuit's "wardrobe malfunction" decision. But the FCC did appeal the Second Circuit's fleeting expletives decision and the U.S. Supreme Court has decided to take up the case. CDT plans on submitting an amicus brief next month similar to those we submitted to the lower courts urging the high court to affirm the Second Circuit's important free speech decision.

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[1] http://www.cdt.org/speech/20080712_decision.pdf

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