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To: All Broadcast Clients

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COURT OVERTURNS FCC FINE AGAINST CBS FOR THE SUPER BOWL HALFTIME SHOW FEATURING JANET JACKSON'S "WARDROBE MALFUNCTION."

The Third Circuit Court of Appeals recently struck down the FCC's \$550,000 indecency fine against CBS for broadcasting the 2004 Janet Jackson and Justin Timberlake Super Bowl halftime "wardrobe malfunction" performance, during which Jackson's breast was exposed for 9/16 of a second. The court ruled that in finding the broadcast indecent, the FCC departed suddenly and without explanation from its prior policy excepting fleeting broadcast material from the scope of actionable indecency. According to the court, during the 30 years prior to the Super Bowl incident, the FCC consistently held that isolated or fleeting instances of vulgarity or nudity were not actionably indecent. One month after the Super Bowl incident occurred, the FCC held that U2 singer Bono's utterance of a single expletive while accepting a Golden Globe award was actionably indecent, but the FCC made it clear that licensees would not be held liable retroactively for broadcasting fleeting or isolated indecent material prior to the Golden Globes decision.

The FCC, however, attempted to distinguish the Super Bowl incident from the Golden Globes decision, arguing that its prior policy excepting fleeting broadcast material from indecency action only applied to fleeting "expletives", not fleeting "images." The court rejected this argument, citing numerous prior cases in which the FCC consistently applied the same standard to all "fleeting" broadcast material, making no distinction between words or images.

The court emphasized that the FCC "had long practiced restraint in exercising" its indecency enforcement authority consistent with prior court decisions permitting punitive action against "verbal shock treatment," but distinguishing "isolated" or "fleeting" material. While the court affirmed that the FCC could alter its approach, it stated that the FCC may only do so if it provides notice and a reasonable explanation for the change. In this instance, the FCC did not supply any reasoned explanation for changing its policy on fleeting images. Even if the FCC provided notice of the general change in direction in the Golden Globe decision, that order was issued one month after the Super Bowl incident occurred, and the FCC could not apply its new policy retroactively.

The court stated that when First Amendment free speech issues are involved, the FCC may not hold a broadcaster automatically liable for the content of all material broadcast. Instead, liability requires "scienter," a legal concept not specifically defined for purposes of this case, but which generally means that there must be some knowledge, actual or imputed, that the conduct at issue is wrongful. Here, the FCC argued that CBS ignored indications that the half time show might be indecent, and nevertheless proceeded with the live broadcast. The court, however, held that there was insufficient evidence to conclude that CBS knew that indecent material would air or that it acted recklessly.



The court distinguished between live material and scripted material, stating that the airing of scripted indecent material in a pre-recorded program would likely satisfy the legal requirement for a finding of actionable indecency, but that when unscripted indecent material occurs during a live broadcast, the FCC must show that the broadcaster was, at a minimum, reckless in transmitting the indecent material. For example, a broadcaster's failure to use available preventative technology, including broadcast delays when airing live programming, might indicate recklessness sufficient to support an indecency sanction.

The court noted that CBS rejected other controversial performers from its Super Bowl broadcast, that Janet Jackson and Justin Timberlake performed the song previously live on television without incident, and that CBS implemented a standard audio delay (albeit, not a video delay) during the broadcast. The Court determined that the FCC did not show that CBS had acted recklessly, and that the burden was on the FCC to develop specific evidence of recklessness in the absence of evidence of actual licensee knowledge that indecent content would air.

The FCC alternatively contended that CBS was liable for Jackson and Timberlake's performance under a doctrine that holds an employer liable for its employee's actions that are undertaken within the scope of the employee's job duties. The Court concluded that Jackson and Timberlake were not employees of CBS, but instead were independent contractors for the limited purpose of providing entertainment services for a brief, one-time event.

The Court remanded the case to the Commission to allow it the opportunity to issue a declaratory ruling concerning the matter, noting that a policy change could not be applied against CBS retroactively. One judge opposed remand, however, stating that there was nothing to be gained from further proceedings involving the Super Bowl halftime show, and that "CBS should not be forced to be a party to any such remand, with its attendant time and expense."

Despite this ruling, broadcasters must continue to be especially careful when covering live events. As the Court made clear in its ruling, the failure of a broadcaster to utilize available audio and video delays that are readily available could still subject the broadcaster to penalties, even where indecent utterances or visuals are fleeting and isolated. Further legal guidance on this issue can be expected when the Supreme Court issues a decision in its pending review of the Second Circuit's decision in *Fox v. FCC*, expected some time next year.

If you have any questions concerning this case, please contact an attorney in our office.

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This memorandum is intended only as a general discussion of these issues and should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired. To discuss any of the issues presented here, please contact any attorney in our office.