

3rd Circuit Reaffirms Rejection of FCC's "Fleeting Images" Policy, Reverses Super Bowl Fine

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On Nov. 2, 2011, the United States Court of Appeals for the 3rd Circuit reaffirmed and largely readopted its 2008 decision rejecting the \$550,000 forfeiture and finding of indecency violation levied against CBS for the 2004 Super Bowl halftime show featuring Janet Jackson and Justin Timberlake. The appeal involved the live broadcast of the show, which culminated in an unscripted nine-sixteenth-second exposure of Janet Jackson's breast.

The 3rd Circuit previously had held the FCC arbitrarily and capriciously departed from a prior policy of excepting fleeting broadcast material from the scope of actionable indecency, and that the agency could not impose strict liability on CBS, or hold it liable for conduct of Jackson and Timberlake, who were independent contractors not CBS employees. The 3rd Circuit reexamined that decision after the FCC appealed to the Supreme Court, which vacated the 3rd Circuit's original decision and ordered it to decide whether the Supreme Court's 2009 decision in *FCC v. Fox Television Stations* required it to reconsider its decision. In *Fox*, the Court held the FCC had not acted arbitrarily and capriciously in changing its indecency policy to enforce the law against broadcasts of "fleeting expletives."

In the remand proceeding, the 3rd Circuit reaffirmed its earlier decision to invalidate the fine imposed on CBS. It held that, while the FCC had recognized it was changing its policy that made fleeting expletives non-actionable, the Commission failed in the Super Bowl case to acknowledge the prior policy even existed, or to explain its departure from that position. The court granted the CBS petition for review in full, and vacated the FCC's decision.

3rd Circuit's original holding that FCC decision was arbitrary and capricious

In the court's original opinion, the 3rd Circuit found that at the time of the 2004 Super Bowl halftime show, the FCC's policy was to exempt fleeting or isolated material—both images and words—from the scope of actionable indecency. "During a span of three decades," the court observed, "the Commission frequently declined to find broadcast programming indecent, its restraint punctuated by only a few occasions where programming contained indecent material so pervasive as to amount to 'shock treatment' for the audience." Contrary to the FCC's argument that it always treated fleeting images differently from fleeting expletives, the 3rd Circuit found that the agency's indecency enforcement history proved otherwise.

Moreover, regardless of whether the Super Bowl fine was unprecedented because the FCC had previously treated fleeting images and fleeting words the same (or never had articulated a specific policy on how it would treat fleeting images), the court held the FCC's inclusion of fleeting images within the scope of actionable indecency was an unexplained departure from prior policy.

Reaffirmation and Reissuance

On remand from the Supreme Court, the 3rd Circuit held, in an opinion by Judge Rendell, joined by Judge Fuentes, that “[w]hile we can understand the Supreme Court’s desire that we re-examine our holdings in light of its opinion in *Fox* — since both involve the FCC’s policy regarding - fleeting material - ... if anything, *Fox* confirms our previous ruling.” Therefore, the court determined it “should readopt our earlier analysis and holding that the Commission acted arbitrarily in this case.” In doing so, the majority held, there was no reason to depart from the prior ruling’s extensive examination of FCC precedent, which found that it had never treated images and words differently in its historically restrained indecency enforcement policy under which fleeting live material was deemed non-actionable.

The court rejected the FCC’s argument that “one small portion of the background section” in the Supreme Court’s *Fox* opinion supported the position that the fleeting-material policy never applied to images, but always was restricted to words. The FCC claimed that the Court’s brief reference confirmed the fleeting expletives policy was an exception to the general rule that other types of content – words or images – were actionable even if fleeting. But the 3rd Circuit held it could “discern no such meaning” in that language.

The 3rd Circuit explained that “summary recitation of the Commission’s opinions ... appears in the Court’s background discussion of the FCC’s historical approach to indecent language, and is neither reasoning nor holding” but “mere characterization.” In this vein, the court continued, “*Fox* says nothing at all about images” nor did it “suggest that the FCC’s previous fleeting-material policy applied only to ‘words,’ or distinguished between words and images.” In short “the *Fox* Court had no occasion” to consider the FCC’s prior fleeting-material policy in the context of images.

The 3rd Circuit thus held it was “unwilling to read the Court’s silence as overruling our conclusion, based on a careful review of three decades of FCC precedent” in the prior *CBS* decision. “If we were to read the Supreme Court’s background discussion in *Fox* as indicating that the history of FCC enforcement in the area of fleeting material recognized an exception only for non-literal expletives, to the exclusion of images,” the 3rd Circuit continued, “we would be accusing the Supreme Court of rewriting history.”

The 3rd Circuit found that the Commission had attempted to convert “a passing reference in *Fox*’s background section into a holding that undermines what the opinion otherwise makes clear: an agency may not apply a policy to penalize conduct that

occurred before the policy was announced.” The court thus readopted its prior decision, with some alterations to address other conclusions reached by the original majority opinion.

Specifically, the original decision had held that even if the departure from precedent did not invalidate the Super Bowl forfeiture, the FCC could not impose liability on CBS for the actions of Jackson and Timberlake because they were independent contractors and not CBS employees. It also rejected the FCC’s argument that CBS had a “nondelegable duty” to comply with the indecency policy, because the First Amendment bars punishing a speaker for the content of expression absent a showing of scienter, *i.e.*, knowing or reckless violation of indecency law. On all these liability and intent issues, the majority decision on remand held the prior discussion had been unnecessary, and thus excised that portion of the prior opinion from the reissued decision.

Judge Scirica, who had authored the 3rd Circuit’s original opinion, dissented from its reaffirmance and readoption. In his view, the relevant passage of the Supreme Court’s *Fox* decision, and the context in which it arose, supported the FCC’s argument. Even so, Judge Scirica would not have upheld the FCC’s fine against CBS. Instead, he opined, the FCC applied the wrong statutory provision, and misapprehended the level of “willfulness” that would have been required, in seeking to punish CBS. In that view, a remand to determine whether CBS had acted recklessly in airing the Super Bowl halftime broadcast would be required.

Davis Wright Tremaine attorneys Bob Corn-Revere and Ronnie London represented CBS before the 3rd Circuit and the FCC.

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