



# Publications

## CASES OF INTEREST

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### IP/Entertainment Law Weekly Case Update For Motion Picture Studios And Television Networks

November 9, 2011

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- CBS Corporation v. Fed. Communications Commission

**CBS Corporation v. Fed. Communications Commission**, USCA Third Circuit, November 2, 2011

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- On remand from the U.S. Supreme Court following its ruling in *FCC v. Fox Television Stations*, the Third Circuit found that the Supreme Court's ruling did not affect its prior decision, and readopted its previous holding that the FCC's imposition of a \$550,000 penalty against CBS in connection with the Janet Jackson Super Bowl incident constituted an arbitrary departure from the Commission's prior policy concerning the broadcast of fleeting indecent material.

After a much publicized incident at the February 1, 2004, Super Bowl XXXVIII halftime performance in which Janet Jackson's bared right breast was exposed for nine-sixteenths of a second, the Federal Communications Commission cited CBS Corporation and its related entities, which aired the performance, for violating the indecency policy of the commission in effect at the time. Despite the fleeting nature of the indecent exposure, and evidence that CBS had no warning or knowledge that such exposure would occur, the FCC found that the exposure was (1) graphic and explicit, and (2) shocking and pandering, in violation of its indecency policy. Finding, in addition, that CBS's actions in broadcasting the indecent material were willful, the FCC issued a forfeiture order against CBS in the sum of \$550,000.

CBS appealed to the Third Circuit, arguing that the FCC ruling was arbitrary in that it departed from the commission's prior policy that fleeting or isolated use of indecent material in broadcasts did not constitute actionable indecency. The FCC contended that its fleeting-material policy was only intended to cover verbal utterances and not fleeting images. Finding that, historically, the FCC never distinguished between words and images in enforcing its fleeting material policy, that the FCC did not announce a change in its policy regarding fleeting material until March 2004, and that a certain degree of scienter was required to impose a forfeiture order on CBS, the Third Circuit reversed the FCC's decision as an arbitrary departure from prior policy. The FCC filed a petition for certiorari with the U.S. Supreme Court.

While the FCC's petition was pending, the Supreme Court issued its ruling in *FCC v. Fox Television Stations, Inc.*, a case in which Fox Television had challenged the March 2004 change in the FCC's indecency policy providing that a single or fleeting instance of indecent material may be deemed actionably indecent. In the underlying case the Second Circuit had ruled against the FCC, finding that the FCC failed to demonstrate how the new policy effectuated federal law as well or better than the old policy, and the Supreme Court reversed, finding that the FCC was only required to demonstrate that the new policy was permissible under the statute, that there were good reasons for the change, and that the agency believed the new policy to be better. In so holding, the Supreme Court discussed the FCC's historical approach to fleeting instances of indecency, although without reference to the FCC's policy on fleeting images.



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In light of its decision in *Fox*, the Supreme Court remanded *CBS v. FCC* back to the Third Circuit for reconsideration. On remand, the court found that the *Fox* decision did not affect its original holding that the FCC's imposition of sanctions against CBS for violating an unannounced policy change was arbitrary. The FCC argued that the Supreme Court's discussion of the FCC's historical approach to indecent language required the Third Circuit to find that the FCC's policy regarding fleeting material did not apply to fleeting images. The Third Circuit disagreed, finding that the Supreme Court's silence as to the FCC's policy on fleeting indecent images should not be read to overrule the Third Circuit's prior opinion.

The FCC also argued that four days before the CBS Halftime Show, it issued a notice of apparent liability against a television station for showing an exposed penis on a morning show for less than a second, which would have provided CBS with sufficient notice of the FCC's policy regarding fleeting images. The notice was not a final decision of the FCC, however, failed to establish that the FCC would treat fleeting words differently than fleeting images, and did not provide notice of the FCC's policy change. Accordingly, the Third Circuit readopted its earlier decision, except to the extent that it had previously discussed the degree of scienter required before the FCC may issue a forfeiture order. This discussion, the court found, was unnecessary to its decision.

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