



Court Tosses FCC's Indecency Policy

By Ira Teinowitz

A federal court tossed out the Federal Communications Commission's indecency policy Tuesday, July 13 ruling that it violates the First Amendment and admonishing it for vague enforcement of incidents like the Janet Jackson "wardrobe malfunction" and Bono's Golden Globes f-bomb.

In a major victory for Hollywood in general and the broadcast networks in particular, the three-judge U.S. court of appeals panel said the policy is "unconstitutionally vague" and creates "a chilling effect." The challenge was brought by Fox Television Stations, and joined by NBC, ABC and the Center for Creative Voices. "We agree with the networks that the indecency policy is impermissibly vague," said Circuit Judge Rosemary S. Pooler in the decision. "It results in a standard that even the FCC cannot articulate or apply consistently."

Positive reaction to the ruling was swift and, for its part, family-friendly. "The score for today's game is: First Amendment 1, Censorship 0," said Andy Schwartzman, senior VP and policy director for the Media Access Project. "Media Access Project entered this case on behalf of writers, producers, directors and musicians because the FCC's indecency rules are irredeemably vague and interfere with the creative process," he said. "Today's decision vindicates that argument. The next stop is the Supreme Court, and we're confident that the Justices will affirm this decision."

Interestingly, the court chose to directly address the question of sex, validating it as an important "theme" in human culture. "The absence of reliable guidance in the FCC's standards chills a vast amount of protected speech dealing with some of the most important and universal themes in art and science. Sex and the magnetic power of sexual attraction are surely among the most predominant themes in the study of humanity ... By prohibiting all 'patently offensive' references to sex, sexual organs, and excretion without giving adequate guidance ... the FCC effectively chills speech because broadcasters have no way of know what the FCC will find offensive."

The judges suggested that the FCC could create a constitutional indecency policy -- but that the one it has doesn't meet constitutional tests. The ruling, which is likely to get appealed to the Supreme Court, came in a challenge Fox filed after the FCC under former chairman Michael J. Powell attempted to step up indecency enforcement. In one of the first moves of that new enforcement that FCC decided to start regarding so-called fleeting indecency it had traditionally overlooked — usually indecencies uttered during live broadcasts — as violations of its indecency rules. It pointed to comments made by Bono in an NBC telecast of the Golden Globes in describing an award as "f***ing brilliant" as comments it would now consider as "indecent."

The FCC also cites comments Cher and Nicole Richie's made during the Fox's broadcast of Billboard Music Awards shows in 2002 and 2003 and some episodes of ABC's NYPD Blue as violating the new Golden Globes standard. While Fox wasn't fined, it and other networks joined in, arguing that the FCC hadn't provided proper notice for its change in policy before acting and then that the FCC's indecency scheme was unconstitutionally vague. The same appeals court threw out the FCC's indecency order before, but because the FCC hadn't provided proper notice before changing its standard. The Supreme Court overturned that decision, sending the case back.

This time the appeals court in New York responded with a far broader decision. A second appeals court in Philadelphia is due to rule soon on FCC's attempt to fine 20 CBS owned and operated stations \$550,000 for the Janet Jackson Super Bowl halftime show in 2004.