A %$#@ slippery slope on raw talk?

Some wonder how far broadcasters will go in the wake of a court ruling easing limits on 'unscripted expletives.'

By Jim Puzzanghera, Times Staff Writer
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WASHINGTON — A court ruling last week easing restrictions on the inadvertent broadcast of obscenities is touching off a new war of the words.

A federal appeals court's pointed criticism of attempts to regulate broadcast content could liberate television from the government's entire regime for keeping indecent language and images off the airwaves. If the Federal Communications Commission can't sanction a network when a celebrity blurts out an unscripted expletive during a live awards show, as the court found, is its power to deal with other bawdy programming limited as well?

Can the FCC still fine a radio shock jock's improvised, profanity-laced routine? Can it penalize a TV station for a flash of nudity?

It may take the Supreme Court to answer those questions.

In the meantime, the FCC's enforcement of complaints about the isolated use of obscenities remains on hold. Broadcasters themselves could determine the ramifications of the decision if they use the ruling to try to air more salacious material.

"They have a win now. That's a good thing if you're in the industry and you want this kind of freedom to make creative decisions," said Jeremy Lipschultz, director of the school of communication at the University of Nebraska at Omaha and author of a book on the FCC's indecency regulations. "If you push it … ultimately you can weaken what you've just won."

With enormous stakes, federal regulators and broadcasters have tried to frame the consequences of the ruling by the U.S. 2nd Circuit Court of Appeals in New York as the FCC considers whether to appeal.

In a 2-1 vote last week, a panel of the appeals court ruled that the FCC's policy was "arbitrary and capricious" in finding that Fox Broadcasting violated indecency rules in 2002 and 2003 when Cher and Nicole Richie used expletives during the Billboard Music Awards.

The court ruled narrowly that the FCC had failed to properly justify its policy.

The judges went on to question whether technological advances and the growth of cable TV, which is not subject to indecency standards, made the FCC's regulation of the public airwaves outdated. That broader critique set off alarms about the ruling's potential consequences.

"Overnight, the court called into question nearly 30 years of FCC precedents and regulations aimed at protecting children and families from obscene language and indecent programming during family hours," said Sen. John D. Rockefeller IV (D-W.Va.).

FCC Chairman Kevin J. Martin warned in uncharacteristically sharp language that the judges may have opened the spigot to a flood of expletives headed over the airwaves to the nation's children.

Under the FCC's indecency restrictions, TV stations can be fined for airing vulgar language between the hours of 6 a.m. and 10 p.m. because that is when minors are most likely to be watching.

If the FCC can't prohibit the use of expletives during prime time, "Hollywood will be able to say anything they want, whenever they want," Martin said in a statement Monday, after the ruling. In his view, the ruling questioned the FCC's ability to restrict any over-the-air language.

But broadcasters sought to downplay any major change in over-the-air standards. They
said the decision narrowly affected only inadvertent, or "fleeting," expletives, relieving pressure on censors monitoring awards shows, sporting events and other live programs.

Two broadcast executives, who declined to be named because the networks were working together on the legal case, said there were no plans to use the ruling to push the envelope on indecency.

Broadcasters could air expletives after 10 o'clock "every night of the week," one executive said. "We don't for a reason, because we don't think our audiences want to hear it."

John Crigler, a communications attorney at Garvey Schubert Barer in Washington, expects the broadcasters to proceed cautiously.

"I would be surprised if we were all of a sudden flooded with indecent language," he said. "Martin may be wanting to talk up the impact of this decision ... to garner some political support for appeal. I don't think it puts him out of business."

The ruling doesn't affect the FCC's ability to go after a radio host who repeatedly used expletives, even if they were unscripted, Crigler said. But it could affect some cases involving brief, inadvertent nudity.

CBS is appealing the FCC's $550,000 fine for the brief exposure of Janet Jackson's breast during the 2004 Super Bowl telecast.

A different federal court is handling that case, but it could be influenced by last week's ruling, legal experts said.

One of the broadcast executives drew parallels between the two cases.

"Janet Jackson is fleeting nudity," the executive said. "There's a reasonable chance the court will buy that because it's completely logical."

Jerome S. Boros, a communications attorney at Bryan Cave in New York, said the court ruling may make broadcasters less likely to agree to pay FCC fines for indecent language, choosing to challenge them in court instead.

Jackson's infamous "wardrobe malfunction" unleashed a torrent of complaints to the FCC, prompting congressional outrage that resulted in a tenfold increase in indecency fines to a maximum of $325,000 for a violation.

A month after the Super Bowl telecast, the FCC began its latest crackdown on indecency.

When rock star Bono blurted out a profanity while accepting a Golden Globe award in 2003, the FCC's staff at first ruled that the reference was acceptable because Bono used it as an adjective, stripping it of sexual meaning. But in March 2004, the FCC overturned that interpretation, finding that any use of the expletive had sexual connotations and was indecent.

The rulings against Fox in the Cher and Ritchie cases led the network to sue.

Despite the court of appeals victory for the networks, one of the broadcast executives said there still would be employees poised to bleep out expletives on live shows.

"It's not like we're going to fire all the button people and dismantle the buttons," the executive said.

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