FCC efforts on indecency dealt setback

TV networks can't be penalized for unscripted expletives, a court rules.

By Jim Puzzanghera, Times Staff Writer
June 5, 2007

WASHINGTON — In a victory for TV networks but a setback for efforts to shield children from coarse language, a federal court ruled Monday that broadcasters couldn't be penalized for expletives that were considered impromptu.

The appeals judges in New York repudiated the Federal Communications Commission's recent crackdown on broadcast indecency, calling its efforts "arbitrary and capricious."

Television networks have long complained that enforcement of the rules is inconsistent and unpredictable. Although the court's 2-1 decision sent the issue back to the FCC for rethinking, the strong rebuke prompted some advocacy groups and lawmakers to urge the agency to appeal to the Supreme Court.

"We are very pleased with the court's decision and continue to believe that government regulation of content serves no purpose other than to chill artistic expression in violation of the 1st Amendment," Fox Broadcasting said in a statement.

The case specifically involved two Fox broadcasts, and other networks joined in the lawsuit.

At issue has been a series of unscripted obscenities uttered in recent years by such stars as Bono, Cher and Nicole Richie during live award shows. Networks argued that they shouldn't be punished when an expletive slips through their safeguards.

Broadcasters have felt increasingly under siege after the exposing of singer Janet Jackson's right breast during the live halftime show of the 2004 Super Bowl, which CBS executives said caught them off guard. The resulting firestorm helped prompt Congress last year to approve a tenfold increase in fines that boosts the maximum penalty for a violation to $325,000.

Although broadcasters and Hollywood unions cheered the 2-1 decision by the U.S. 2nd Circuit Court of Appeals, FCC Chairman Kevin J. Martin blasted it.

"I view this as having a significant impact on our ability to enforce our indecency regime as to any restrictions on language," he said in an interview.

Martin defended the policy and said FCC attorneys would decide soon whether to appeal. The FCC could ask the entire 2nd Circuit to reconsider, or go directly to the Supreme Court.

Commissioner Michael J. Copps, another strong opponent of broadcast indecency, promised a fight.

"So any broadcaster who sees this decision as a green light to send more gratuitous sex and violence into our homes would be making a huge mistake," Copps said in a written statement.

And the Parents Television Council watchdog group accused the court of having "stolen the airwaves from the public and handed ownership over to the broadcast industry."

But a network executive, who did not want to be named because the companies were working jointly on the case, said broadcasters would still use delays to try to bleep out expletives.

"It just means on the rare occasions where we might make a mistake or error despite our best efforts, it's going to be harder for the commission to cite that as indecency," the executive said.
The FCC ruled in March 2006 that uttering certain expletives was indecent, even in isolated, or "fleeting," instances. The ruling focused on Fox's broadcasts of the 2002 and 2003 "Billboard Music Awards."

An earlier FCC decision came in the wake of an acceptance speech by singer Bono during NBC's 2003 broadcast of "The Golden Globes," in which he uttered an expletive. The FCC's staff originally found that the Bono incident was not indecent because he did not use it to describe sexual "organs or activities."

But in March 2004, a month after the Jackson incident, FCC commissioners reversed the staff. They found that any use of that word has a "sexual connotation" and was indecent.

And after the March 2006 rulings involving the Cher and Richie incidents, the networks banded together in a lawsuit that alleged the FCC's decisions contradicted previous rulings and violated the 1st Amendment.

While expressing support for the networks' constitutional arguments, the judges decided the case on narrow grounds, which some communications law experts believe will hurt the case's chances of being heard by the Supreme Court. The judges found that FCC rulings last year contending that even isolated uses of expletives violated broadcast indecency standards was "a significant departure" from previous commission rulings.

The judges said they were "sympathetic to the networks' contention that the FCC's indecency test is undefined, indiscernible, inconsistent and consequently, unconstitutionally vague." The ruling said the judges were "skeptical that the commission can provide a reasoned explanation for its 'fleeting expletive' regime that would pass constitutional muster."

Senate Commerce Committee Chairman Daniel K. Inouye (D-Hawaii), urged the FCC to appeal to the Supreme Court, as did Timothy Winter, president of the Parents Television Council.

"This is something that's almost expected on every awards show broadcast," Winter said. "That to me is no longer fleeting, that's trying to take advantage of a loophole."

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