Indecency cases stuck in legal limbo at FCC

Stephan Savoia / Associated Press


A rebuke in federal court, a pending Supreme Court decision and broadcasters’ resistance put enforcement efforts in limbo.

By Jim Puzzanghera, Los Angeles Times Staff Writer
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WASHINGTON -- As federal judges consider pivotal cases about what constitutes offensive TV and radio broadcasts, an expletive might best describe the state of the federal government’s enforcement of indecency rules.

It’s all bleeped-up.

Thousands of viewer and listener complaints about programs are backed up at the Federal Communications Commission, where officials acknowledge the legal limbo has tied their hands. The FCC is reluctant to rule on these cases until the U.S. Supreme Court hands down a decision on indecency standards -- its first in three decades.

"The FCC finds itself in a very difficult position," said Jeremy Lipschultz, director of the school of communication at the University of Nebraska at Omaha and author of a book on indecency regulation. "They’re in the cross hairs of this battle, and I think they’re trying to navigate as carefully as they can."

Just last month, a Fox station in St. Louis dodged a proposed $27,500 fine for a 2003 broadcast of the movie “The Pursuit of D.B. Cooper,” riddled with variants of the s-word, because the FCC did not act on the network’s appeal within five years of the airing, as required by law.

Since a federal court struck down the FCC’s aggressive policy on unscripted expletives in June, commissioners have handed out only two indecency fines (by contrast, seven were issued in 2006). Both cases were facing statutory deadlines. Apparently emboldened by their court victory last year, broadcasters have chosen to
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ABC has taken the FCC to federal court over a $1.24-million fine for a 2003 episode of "NYPD Blue" that included a scene of a woman's naked buttocks. Fox went a step further.

Whereas ABC paid the fine before filing the appeal, five Fox-owned stations and three affiliates owned by Sinclair Broadcast Group took the unusual step of refusing to pay their portion of a $91,000 fine the FCC ordered against 13 stations for a 2003 reality program, "Married by America." That broadcast featured blurred images of naked strippers.

"The FCC, and many viewers, may find it personally reviling to contemplate bachelor and bachelorette parties taking place with strippers in Las Vegas," Fox said in a 39-page appeal that the FCC rejected Friday for being too long. "Subjective assessments about the morality of a program should not however be used as the foundation for an indecency finding."

Faced with the expiration of the five-year statute of limitations on the case on April 7, the Bush administration went to court on April 4 to force the stations to pay the combined $56,000 they owed. Fox publicly slammed the FCC for tossing out its appeal on "specious grounds," while an FCC spokeswoman shot back that the network needed to finally "take responsibility for airing indecent programming."

The decision by Fox and the FCC to go to the mat over such a relatively small fine demonstrates the increasing bitterness of the indecency dispute. The case also raises a new legal question -- whether blurring naked images is the equivalent of bleeping foul words -- that could further complicate an issue already hinging on pending court cases.

Then there is the case of Janet Jackson's "wardrobe malfunction." Appellate judges in Philadelphia are expected to issue a ruling soon on CBS' appeal of a $550,000 fine for the incident during the 2004 Super Bowl telecast, which gave viewers a momentary glimpse of the singer's naked breast. Supreme Court justices soon will be reading legal briefs riddled with the f-word and the s-word as they prepare for oral arguments this fall on the Bush administration's appeal of the June court ruling covering so-called fleeting expletives.

The Supreme Court's decision could dramatically reshape the rules for what's acceptable on broadcast TV and radio. With a ruling not expected until early next year, the FCC is hesitant to make decisions that could be invalidated by the justices.

"Obviously the commission's pending litigation has impacted our ability to take action on a whole host of issues," FCC Chairman Kevin J. Martin said this year.

Federal law and earlier court rulings give the FCC the responsibility to police the public airwaves for "obscene, indecent or profane" content broadcast between 6 a.m. and 10 p.m., when there is a "reasonable risk" children will be watching. Defining those terms has become increasingly controversial.

After Bono, Cher and Nicole Richie used expletives on live award show broadcasts in 2002 and 2003, the FCC adopted a near zero-tolerance policy for the f-word and the s-word. Broadcasters complained that the commission had reversed its own precedent of not issuing fines if the words were unscripted and isolated or, in legal terms, "fleeting." Congress then upped the ante, responding to the public outcry over Jackson's Super Bowl incident by increasing the maximum each station could be fined for an incident tenfold, to $325,000.

Facing the prospect of multimillion-dollar fines if an expletive slipped passed their censors, the major TV broadcast networks banded together to challenge the FCC. A panel of judges on the U.S. 2nd Circuit Court of Appeals in New York sided with them last year, throwing out the FCC's tougher fleeting expletives policy, calling it "arbitrary and capricious."

Since then, the FCC's indecency enforcement has nearly ground to a halt. Complaints continue to roll in -- more than 153,000 in the first half of 2007, the latest FCC figures available, although many of those are duplicates lodged against the same program. And the commission's staff of 23 people dedicated to indecency continues to investigate complaints, asking broadcasters for video and transcripts of shows.

But in 2007, more than 80% of the FCC's 3,226 indecency investigations were pending more than nine months, the time frame in which the agency tries to either dismiss or resolve complaints, according to its annual performance report. The report noted that some of those investigations were "the subject of pending litigation."

"There are literally hundreds of thousands, if not millions, of unadjudicated indecency complaints sitting at the FCC," said Dan Issett, director of corporate and government affairs for the Parents Television Council, whose members filed many of those
complaints after receiving alerts from the watchdog group encouraging them to object to offensive programs. Although the Supreme Court case has tied the commission's hands on fleeting expletives, he said the FCC should be acting on other types of complaints, such as scripted language and nudity.

But commissioners have acted only when facing a statute of limitations deadline.

"We hoped to get clarification on some of these rulings before we moved ahead with any more indecency cases," said an FCC official, who did not want to be identified talking about pending matters. "However, once it became clear that we would not get such clarification very quickly and that we saw we were facing a statute of limitations issue in some cases, the commission acted so as not to lose the cause of action."

In other cases, the FCC has been asking broadcasters to waive the deadline until the courts act. Fox turned down such a request for the "Pursuit of D.B. Cooper," spokesman Scott Grogin said.

Broadcasters say privately that the FCC can make their lives difficult if they don't agree to waive the statutory deadlines by delaying station license renewals that can complicate attempts to sell them. But with the cases pending, executives did not want to comment publicly. The FCC official said requests to waive statutes of limitation were standard.

But after years of being on the defensive, broadcasters aren't willing to go along so easily, said John Crigler, a longtime communications attorney.

"For the first time they've got some hope there is going to be some relief in the courts," he said. "Broadcasters who are issued fines are much more likely than they were before... to appeal rather than just roll over and pay the fine."

jim.puzzanghera@latimes.com

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