

## FCC Seeks Supreme Court Review of "Wardrobe

### Digital Media and Data Privacy Law Blog

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Posted in Indecency

The FCC this week filed a petition with the U.S. Supreme Court seeking review of a federal appellate decision overturning \$550,000 in fines levied by the FCC over Janet Jackson's infamous "wardrobe malfunction" during the 2004 Super Bowl halftime show. The FCC fined CBS that amount -- representing the then-prevailing statutory maximum of \$27,500 per CBS-owned station that aired the Super Bowl -- on the grounds that the split-second exposure of Janet Jackson's right breast (for 9/16 of a second) at the end of her performance was indecent.

On July 21, 2008, the Third Circuit vacated the FCC's imposition of a fine against CBS and sent the matter back to the FCC, finding that the FCC had acted arbitrarily and capriciously in concluding that the sequence was indecent. The basis of its ruling was that the FCC had failed to adequately support the shift in its enforcement policy, which traditionally had not sanctioned fleeting or isolated depictions or descriptions of otherwise indecent material, particularly when aired during a live or unscripted program. According to the court:

Like any agency, the FCC may change its policies without judicial second-guessing. But it cannot change a well-established course of action without supplying notice of and a reasoned explanation for its policy departure. Because the FCC failed to satisfy this requirement, we find its new policy arbitrary and capricious under the Administrative Procedure Act as applied to CBS.

In its petition for certiorari to the U.S. Supreme Court, the FCC took issue with the Third Circuit's characterization of its prior enforcement policy, distinguishing its treatment of fleeting expletives from its treatment of fleeting depictions of sexual organs or activity. The FCC argues:

In the orders at issue here, the Commission explained that, while it formerly required expletives to be repeated before it would treat them as actionably indecent (which accounts for the change in policy at issue in Fox), it had never exempted the broadcast of images -- however brief -- from federal indecency restrictions.

FCC Seeks Supreme Court Review of "Wardrobe Malfunction" Case

The FCC's reference to "Fox" refers to the indecency case currently pending before the Supreme Court and that was argued just this month. We reported on the oral argument in that case in a prior post. The FCC goes on in its petition for review in the CBS case to ask that the Court hold the petition in abeyance until the Fox case is decided. It may be that based on the Justices' questions and statements during the oral argument in Fox the FCC is optimistic about its prospects in that case. Because the Third Circuit's reasoning in CBS largely tracks that of the Second Circuit's in Fox, the Supreme Court's decision in Fox may well determine the outcome of both cases.