

Tuesday, July 22. 2008

Of FCCENSORSHIP, Bono, and Janet Jackson's bared right breast.

Â Bill of Rights.Â (From the public domain.)Â Welcome to the land of bland: A land where television is dumbed down toÂ a child's level, where broadcasters furiously self-censor, and where most Americans keep returning for more and more and more. It is the land of broadcast television, where so-called oral and visual "indecenty" is forbidden from 6:00 a.m. to 10:00 p.m.Â When courts first permitted indecenty bans on broadcast (versus cable and Internet) television and radio, the theory behind it apparently included reliance on the limited number of available space for broadcasters, who are required by law to include service to the so-called "public interest." That basis by now is archaic, when cable stations and satellite radio abound. Â Americans ultimately have themselves to thank for this state of affairs, not only because the anti-censors have not spoken out enough and effectively enough (do too many of them fear television content that they do not like if they speak up against broadcast censorship?), but also because tens of millions of viewers daily return for more of such broadcast pablum. Â Enter Janet Jackson and Justin Timberlake at the 2004 Super Bowl, challenging the land of bland during the halftime show, with Timberlake singing "gonna have you naked by the end of this song," while, unscripted, ripping off part of Jackson's costume to reveal her right breast for nine-sixteenths ofÂ a second until CBS cut the image. Were this Europe, the reaction would have been no different than to the thousands of barebreasted women sunning themselves on beaches in France and Italy, exercising their right not to cover up any more than men are required.Â This not being Europe, though, countless Americans fear bared breasts. Fortunately, women have won the right to breastfeed in public in most places, and in some locales publicly bared breasts are permitted, whether by legislative intention or oversight. For whatever reason, bared breasts are more eroticized overall in American society than the many places where it is commonplace for women to be barebreasted all the time in public, causing little more notice than if they were covered up. Â No sooner does Janet Jackson get removed from the halftime stage than the complaints of her bared breast come flooding into the Federal Communications Commission. Ultimately, finding Ms. Jackson's and Mr. Timberlake'sÂ bared breastcapade "indecent" -- how on earth can a bared breast be indecent? -- the FCC hit CBS with a \$550,000 fine, which I decried in an interview with the USA Today McNewspaper. Mind you, a \$550,000 fine in and of itself is a drop in the bucket for CBS, which likely paid its lawyers more than that amountÂ to litigate against the fine through the appellate level, but repeated indecenty fines can add up and can lead to more self censorship. Â CBS's investment in legal counsel paid off yesterday with the Third Circuit's reversal of the entire half million dollar fine. CBS v. FCC, ___ F.3d ___ (3rd Cir. July 21, 2008).Â Â Kudos to fellow First Amendment Lawyers Association member Robert Corn-Revere for successfully arguing the case.Â Shame on the FCC forÂ having levied any fine, and shame even more for having imposed such a huge fine as to chill smaller broadcasters with much shallowerÂ financial pockets. Â The Third Circuit -- in a 2-1 opinion, with the concurring-dissenting judge as spiritedly in agreement with the result and with most of the reasoning therefor -- reversed the FCC's fine on CBS on two grounds. First, the court found that the FCC's fine amounted to an arbitrary and capricious retroactive application of a new policy banning fleeting indecent images (the change was spurred by Golden Globe award-accepting Bono's exclamation thatÂ "this is really, really f--king brilliant," where if I were theÂ awardee, I might have opted for theÂ pithier "F--king 'A'") where previously the FCC had at least allowed indecent fleeting words. Second, the Third Circuit found that CBS -- which the FCC conceded had no foreknowledge of the then-impending bared breast -- was not liable (with willfulnessÂ being the liability standard)Â for the breast-baringÂ actions of independent contractors Jackson and Timberlake no matter how one slices it, whether, for instance,Â on a theory of employer liability or vicarious liability, or on a theory of a responsibility to have time-delay technology for presenting visual images, which technology CBS only had implemented for sound transmissions. Â As the Third Circuit recounts, in the FCC's upholding the half million dollar fine on CBS, "the FCC relied on a contextual analysis to find the broadcast of Jackson's exposedÂ breast was: (1) graphic and explicit, (2) shocking and pandering, and (3) fleeting... It further concluded that the brevity of the image was outweighed by the other two factors... The standard applied by the Commission is derived from its 2001 policy statement setting forth a two-part test for indecenty: (1) 'the material must describe or depict sexual or excretory organs or activities,' and (2) it must be 'patently offensive as measured by contemporary community standards for the broadcast medium.'Â CBS v. FCC, ___ F.3d ___. Â CBS v. FCC, explains that, unlike obscenity, indecenty still gets First Amendment protection on the airwaves, which ledÂ the FCC to "confine[] enforcement of indecenty restrictions to the hours 'between 6:00 a.m. and 10:00 p.m.'" See 47 C.F.R. Â§ 73.3999," which are the hours when youngsters are more likely to be watching and listening to broadcasts. CBS v. FCC, ___ F.3d ___. Â Will the FCC seek review of this case in the Supreme Court? The agency probably has at least four good friends if cert. is granted: certainly Justices Thomas and Scalia, and likely Chief Justice Roberts and Justice Alito. From considering his concurrence inÂ Los Angeles v. Alameda Books, 535 U.S. 425 (2002) -- which left open the door to challenging the multitude of tired and disingenuous negative secondary effects "studies" that are repeatedly recycled by municipalities to try to zone out adult video stores and strip clubs -- Justice Kennedy might be a wild card if the FCC is permitted a Supreme Court appeal. Considering their joining the dissenting camp in Alameda Books and their overall records, it seems a good bet that CBS will find a friend in

Justices Stevens, Souter, Ginsburg and Breyer. Â In the meantime, congratulations CBS, Janet Jackson, and Justin Timberlake, and thanks to the Third Circuit for keeping life breathed into the First Amendment.Â Jon Katz.Â ADDENDUM: See my First Amendment defense brother Marc Randazza's views on this CBS v. FCC case.

Posted by Jon Katz in Constitutional Law at 00:00