



FCC Enforcement Monitor

March 2006

FCC Decides Numerous Indecency Cases; Assesses Highest Fines Ever in Enforcement Actions

The FCC has resolved a multitude of indecency cases dating back to 2002, including the now-infamous Janet Jackson/Super Bowl “wardrobe malfunction” incident. In the orders released mid-month, the Commission determined that a number of the broadcasts in question were indecent. The Commission imposed some of the highest fines ever against the stations involved in broadcasting the indecent material. In some instances, the Commission found a broadcast indecent but declined to assess a monetary penalty, and in others the Commission found the material to not be indecent and dismissed the complaints outright. A brief summary of the Commission’s decisions in these cases is offered below. The Firm previously released a more detailed Client Alert discussing the decisions and their ramifications for broadcasters. A copy of this Client Alert may be found at the Firm’s website, www.pillsburylaw.com. The decisions themselves can be obtained at the Commission’s website, www.fcc.gov, or by contacting the Editor.

In the first order, the FCC imposed a fine of \$550,000 against CBS Corporation, the ultimate parent company of the twenty owned and operated CBS stations which broadcast indecent material during the halftime show of Super Bowl XXXVIII. The Commission assessed the then-maximum forfeiture amount of \$27,500 per station for violations of 18 U.S.C. §1464 and Section 73.3999 of the Commission’s Rules, finding that the stations broadcast indecent material involving the exposure by Justin Timberlake of one of Janet Jackson’s breasts during the halftime show. In reaching its decision, the FCC rejected the assertion made by CBS that “the material at issue is not indecent because it is not patently offensive.” CBS also asserted that the incident was accidental rather than willful under Section 503(b)(1)(B) of the Communications Act. The Commission rejected the explanation offered by CBS, claiming that CBS was “acutely aware of the risk of unscripted indecent material in this production, but failed to take adequate precautions that were available to it prevent that risk from materializing.” Therefore, the Commission assessed the maximum fine in this instance.

In its next order, the Commission imposed a fine of \$3.5 million against CBS affiliated stations and the CBS owned and operated stations in the Central and Mountain time zones that aired the December 31, 2004 *Our Sons and Daughters* episode of *Without a Trace* at 9:00 p.m. The proposed forfeiture is \$32,500 per station, the statutory maximum for violations occurring on or after September 7, 2004. The episode in question involved the disappearance and possible rape of a high school student and, in a flashback sequence, depicted teenage boys and girls engaging in various sexual activities. While no nudity was shown, the FCC found that the scene depicted teenagers participating in a sexual orgy and was pandering, titillating and shocking. Since the program was prerecorded, the FCC stated that CBS and its affiliates could have edited or declined the content prior to broadcast.

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In its third order, the Commission took action on a large number of outstanding indecency complaints, determining if the material cited in particular complaints was actionably indecent. The Commission assessed fines ranging from \$15,000 to \$220,000 in six of the cases after determining that the material broadcast was indecent. Another four cases were found by the Commission to be actionably indecent, but because the material was broadcast prior to the Commission's *Golden Globes Awards* case (which reversed the previous precedent that a "fleeting use" of an offensive word like the "F-Word" was not necessarily indecent), the Commission was unwilling to assess a fine. An additional seventeen cases were dismissed after the Commission determined that the material in question was not actionably indecent. More detail on the specific content involved in these complaints can be found in our *Client Alert* mentioned above.

FCC Fines Non-Commercial Educational Broadcaster for Public Inspection File Violation

In a decision that has significant implications for all broadcasters, the FCC has fined a noncommercial educational station \$3200 for violating the public inspection file rule, Section 73.3527 of the Commission's Rules. In its decision, the Enforcement Bureau emphasized that the licensee's public inspection file obligation goes farther than merely ensuring that its public inspection file is complete, and that stations must make sure their employees are familiar with the public file and actively assist members of the public in locating documents.

An agent from the FCC's Kansas City, Missouri field office had found that the station was missing certain documents required to be kept in the public file, including the station's contour map, a copy of the "Public and Broadcasting" manual, and certain issues/programs lists. As a result, the FCC proposed a fine of \$4,000. The fine was adjusted downward from the \$10,000 base forfeiture amount for violations of the public inspection file rule because "the public inspection file contained a portion of the required items."

The licensee sought cancellation of the fine, arguing that two of the items – the contour map and the manual – were in the file at the time of the inspection but were not shown to the FCC agent because the station employee who was present during the inspection was unfamiliar with the contents of the public file. In addition, the licensee argued that the employee tasked with the responsibility of maintaining the issues/programs lists had failed to do so. The Enforcement Bureau held that the licensee "could not escape liability for the incomplete issues/programs lists due to the lapse of an employee that was tasked with the responsibility of updating those lists." The Bureau also found no reduction of the \$4,000 fine was warranted.

The licensee filed for reconsideration of the Bureau decision. Although the Chief of the Enforcement Bureau did reduce the fine to \$3,200 based upon the licensee's history of overall compliance with FCC rules, the Bureau disagreed with the licensee's argument that the one who seeks to inspect the public file has the responsibility to locate the documents within that file. Instead, the Bureau cautioned:

"The rule requires station staff to have hands-on knowledge of the contents of the public inspection file. Where a licensee maintains its main studio and public inspection file outside of its community of license,



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Section 73.3527(c) (2)(i) of the Rules requires staff to respond to telephone requests for public inspection file materials by copying and delivering the most recent documents (except for the Political file). In addition, Section 73.3527(c) (2)(ii) requires staff to mail the most recent version of the manual to any member of the public that requests a copy. Moreover, Section 73.3527(c)(2)(iii) of the Rules requires staff to “[b]e prepared to assist members of the public in identifying the documents they may ask to be sent to them by mail, for example, by describing to the caller, if asked, the period covered by a particular report and number of pages included in the report. It follows, then, that Section 73.3527(c) of the Rules requires staff to have this same hands-on knowledge of the public inspection file when members of the public visit the station for the purpose of examining the files. The licensee cannot shift the burden of identifying the materials in the public inspection file to the public.”

The effect of this decision is to make a station liable not just for documents that are missing from its public file, but also for any documents it is not able to quickly locate and provide to the person examining the file. Stations should therefore make sure that not only are their employees familiar with the station’s public file responsibilities, but that their public file is sufficiently neat and organized to allow quick location of requested documents. The Firm has worked with hundreds of stations in providing on-site or by-mail organization and clean-up of public inspection files, as well as training sessions for employees relating to the public file or other compliance issues. If your station is interested in performing a public file review or related training, please contact the Editor.

FCC Fines Manufacturer/Importer \$1,000,000 for Marketing Unauthorized Devices

The Commission recently fined a manufacturer and importer of radio devices \$1,000,000 for willful and repeated violations of Section 302(b) of the Communications Act and Section 2.803(a) of the Commission’s Rules, which prohibit the manufacture and marketing of unauthorized radiofrequency devices. The manufacturer imported and marketed more than fifty models of unauthorized radio frequency devices, specifically digital audio music devices. The FCC determined that the “egregious nature” of the company’s non-compliance warranted the substantial fine.

According to Section 15.101 of the Commission’s Rules, certain Class B digital devices (those devices intended for residential use and marketed to the general public) must be approved by the FCC. Specifically, these devices must be tested and verified to comply with radiofrequency emission limits (per Sections 15.107 and 15.109 of the Rules), must be labeled (per Section 15.19(a)(3) of the Rules), and must comply with user manual requirements (per Section 15.105(b) of the Rules) regarding radiofrequency emissions. Between January 2000 and February 2005, the manufacturer imported and marketed 66 different models of digital audio devices and distributed more than two million of them to the general public. Only sixteen of the models were found by the Commission to be fully compliant with the rules listed above.

In March 2004, the FCC received a complaint alleging that the company was marketing digital audio equipment that was not labeled and therefore may not have been authorized by the FCC. The FCC issued a Notice of Inquiry on March



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29, 2004. The company responded by admitting that between January 2000 and April 2004 it manufactured 1.33 million devices and imported another 1.17 million, all of which were distributed to retail outlets for sale to the general public. The company also admitted that of the 66 models in question, all were Class B devices and therefore subject to the rules mentioned above. The Company stated that none of the devices were verified as complying with the rules. In its defense, the company claimed that a “range” of its digital devices had been tested and verified for emission compliance. Documents submitted to the FCC subsequently confirmed that sixteen of the devices had been properly tested. The company also stated that prior to the issuance of the FCC’s Notice of Inquiry, it had already initiated measures to ensure future equipment verification and compliance. The company promised to properly label all devices and include the appropriate user information.

The FCC continued its investigation and discovered late in 2004 that the company was continuing to market untested devices. After reviewing Customs documents, the Commission also determined that the company failed to file FCC Form 740 (Statement Regarding the Importation of Radio Frequency Devices Capable of Causing Harmful Interference) for the digital devices it imported into the United States. The FCC issued a further Notice of Inquiry in December 2004. In its response to that inquiry, the company admitted that it “exported additional products to the United States that have not yet been tested for compliance.” The company admitted that since issuance of the first Notice of Inquiry in March 2004, it had imported 93,620 units and sold 100,304 units that had not been tested for compliance. The company also admitted failing to file the necessary FCC Form 740 until February 2005.

The Commission was not impressed by the company’s explanations and assessed a fine of \$1,000,000. The minimum forfeiture amount in this type of case is \$350,000, but because of the egregious nature of the company’s misconduct, its unwillingness to comply, and the substantial economic gain derived from the continued marketing of unauthorized devices, the Commission increased the forfeiture amount to \$1,000,000.



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