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Appellate Court Overturns FCC Policy That “Fleeting Expletives” are Indecent

June 7, 2007

To: Broadcast Clients
From: Peter Gutmann

A panel of the United States Court of Appeals for the Second Circuit has rejected the policy of the Federal Communications Commission that had imposed liability for the broadcast of a single expletive. This action should provide some immediate relief to broadcasters who had become concerned over potentially massive liability from inadvertent utterances or images during live broadcasts or other circumstances beyond their reasonable control. (The timing is especially propitious, as the FCC just announced a whopping ten-fold increase of its fines for broadcast indecency, as mandated by the Broadcast Decency Enforcement Act.)

This appeal was brought by Fox to challenge FCC sanctions for having broadcast the so-called “f-word” and “s-word” during music awards shows in 2002 and 2003.¹ During the prior three decades, the FCC’s indecency enforcement had always exonerated single, isolated, fleeting and unforeseeable utterances such as these. Indeed, in its 1978 *Pacifica* decision, the Supreme Court had held an afternoon broadcast of the George Carlin “Seven Dirty Words” monologue to have been indecent due to the “verbal shock treatment” of repeated indecent language, yet specifically distinguished “cases involving the isolated use of a potentially offensive word in the course of a radio broadcast.” Applying that standard, Commission staff had denied numerous complaints, including one against Bono’s use of the f-word in his acceptance speech during the 2003 Golden Globe Awards. However, the full Commission reversed its staff, finding that henceforth any use of the f-word or its variants had inherent sexual connotations and therefore fell within the scope of its definition of indecency (that is, descriptions or depictions of sexual or excretory organs or activities in a way that is patently offensive as measured by contemporary community standards for the broadcast medium). In the Fox situation, the Commission extended its analysis to include all variants of the s-word, which it found presumptively indecent and profane regardless of frequency or context.

The Court held that the Commission had failed to justify its change in policy and could not simply ignore the contrary outcome of all its previous cases. The Commission had contended that a broadcast of even a single indecent word comprised a “first blow” from which an assaulted listener or viewer could no longer escape, but the Court noted that the Commission apparently did not apply the same theory to the barrage of expletives it permitted in a prime-time network airing of the movie “Saving Private Ryan,” which it found appropriate to preserve the power,

¹ As with our prior memoranda on this subject, we are resorting to euphemisms not out of squeamishness, but rather to avoid triggering spam filters and other text-based blocking devices.

realism and immediacy of that artistic work. The Commission also had claimed that the words always have a literal meaning as describing sexual or excretory functions. The Court noted, though, that in common usage the words mostly are used merely for emphasis or disdain, and cited as specific examples President Bush's use of the s-word in an aside to the British Prime Minister and Vice President Cheney's use of the f-word on the floor of the US Senate.

The Court's decision was unusual in that it went well beyond the narrow ground for judgment to provide considerable *dicta* (non-binding commentary) and a number of practical observations that offer considerable insight into the Court's thinking and probable approach to comparable indecency questions that might be presented for its review in the future. It rejected the Commission's fear that exempting fleeting expletives would "permit broadcasters to air expletives at all hours of the day so long as they did so one at a time," citing a lack of evidence that broadcasters ever had acted in that way before the Commission's policy change. The Court further noted that there is no evidence that exposure to a fleeting expletive is harmful and observed that children are far more likely to hear such language from other sources nowadays than in the 1970s when the Commission first began sanctioning indecent broadcast speech. Finally, the Court rejected the Commission's parallel attempt to declare the two words as "profane," noting that by definition profanity refers only to sacrilege.

In its *dicta*, the Court went on to state its skepticism that the Commission ever could justify its "fleeting expletive" policy so as to pass constitutional muster. Citing the Supreme Court's 1997 decision that struck down an attempt to regulate indecency over the Internet as constitutionally vague, the Court found the operative terms such as "indecent" and "patently offensive" in the Commission's definition to be just as vague, and their interpretation just as hopelessly subjective. The Court suggested that a total ban was unnecessary when lesser means, such as parental warnings, "V-chip" type controls and channeling adult programming to late-night hours, would be effective yet less intrusive on First Amendment rights. Thus, although the Court remanded the case to the Commission with an invitation to provide a stronger analysis, the Court doubted that the result would survive judicial challenge.

The decision was issued by a panel of three judges, one of whom dissented on the ground that the Commission indeed had provided sufficient reason for what he viewed as a relatively modest change of standard. In his view, all the new policy did was remove an assumption that an isolated utterance would always be pardoned, so that now all instances of potential indecency would be subject to a contextual analysis. He felt that the Commission had reconciled conflicting values and had sought to protect children from potential harm by considering indecency as a matter of context. Thus, he found no inconsistency in permitting limited amounts of indecency during a newscast or where required for artistic integrity. Noting that a court must not substitute its own judgment for that of an expert agency, he found the Commission's reasoning "sensible, although not necessarily compelling," but to which the courts are bound to defer. Even so, the dissenting judge drew a clear distinction between the two words, noting that children could not possibly be harmed by hearing references to excrement which "is a main preoccupation of their early years," and thus "at least some of the Commission's prohibitions are not justified at all by the risk of harm to children but only by concern for good manners" which cannot justify censorship.

At this point, the Commission faces several procedural choices. It can accept the remand and attempt to justify its policy, notwithstanding the Court's warning that the burden will be steep. It can seek a rehearing before the same panel, although the chance of changing the judges' recently-expressed views seems remote. Since this decision was issued only by a panel of the Court, and a divided one at that, the Commission can seek rehearing before the full complement of judges of the Second Circuit Court of Appeals. The Commission can appeal the Court's decision to the Supreme Court. Finally, it can accept the Court's decision and revert to its former policy, which remains in effect at this time.

Interestingly, FCC Chairman Kevin Martin and Commissioner Michael Copps, usually ideological opponents, both issued statements condemning the Court's action as ignoring the Commission's attempt to protect children and uphold family values. While doubting the efficacy of current blocking techniques to prevent exposure to incidents of the type that led to this decision, Chairman Martin concluded his statement by urging Congress to consider "content-neutral solutions to give parents more tools and consumers generally more control and choice over programming coming into their homes," including a la carte cable subscriptions.

While most commentators have focused upon the broad public policy implications of the Court's action and reasoning, perhaps the most immediate impact will be upon broadcasters and performers who had been placed in considerable jeopardy by the Commission's absolute approach to even fleeting indecency. Although the vast majority of broadcasters do not intentionally air material likely to run afoul of indecency regulations, significant risk was presented by any broadcast in which an unintended, isolated indecency could have appeared, even as a background image or sound. Of course, nothing in the Court's decision even remotely would exempt offensive material that is deliberate, foreseeable, intense or thoroughly gratuitous. Indeed, Commissioner Copps specifically stated that enforcement of the indecency laws remains not only a legal obligation but a Commission priority and cautioned that: "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." Yet, broadcasters can breathe a sigh of relief that a measure of common sense has been restored to the vexing issue of broadcast indecency – at least for now.

The text of the Court's decision and a video of the oral argument held before the Court both can be accessed on our firm's website at: <http://www.wcsr.com/telecom>.

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