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In Second Circuit, FCC Seeks Second Shot

TV nets, affiliates split over FCC request

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The FCC has asked the U.S. Court of Appeals for the Second Circuit in New York for a chance to take another look at its recent decisions on broadcast profanity.

Over the past few years, the FCC has conjured up the concept of “profanity” as a category separate and distinct from “indecent” in the lexicon of material that you’re not supposed to broadcast. Unlike indecency, which focuses on the relative offensiveness of a depiction or description of sexual or excretory acts or body parts, the FCC’s conception of profanity is that certain words involving sex or excretion are, in and of themselves, so offensive as to constitute an impermissible nuisance. Precisely defining this concept for practical application, however, has proven difficult.

The FCC has now requested that the Second Circuit send back to the FCC four cases involving broadcast profanity that are currently on appeal before that court. The FCC’s move has drawn opposition from the CBS and NBC networks and the Fox network and its affiliates. The network affiliate associations for ABC, CBS, and NBC, along with the ABC network, on the other hand, are supporting the FCC’s request. Depending on whom you ask, shipping the matter back to the FCC (as the FCC has requested) will either (a) speed up the process of clarifying the FCC’s still-shifting definition of profanity or (b) further delay and muddle the situation.

As you may recall, in its “omnibus” indecency ruling back in March, the FCC found that four broadcast programs had featured impermissible profanity. The programs included an episode of *NYPD Blue* (in which the word “bullshit” was used), two *Billboard Music Awards* shows (Cher used the word “fuck”, and Nicole Richie used “the F-Word” and the “S-Word”, as the Commission so delicately reported), and a broadcast of *The Early Show* (a contestant on “Survivor” described another contestant as a “bullshitter”).

The FCC found that all these broadcasts violated the FCC’s newly-revised profanity standards. *But* it also recognized that, at the time of the broadcasts, stations were not on

notice that isolated or fleeting profanities would be subject to enforcement action. Accordingly, the FCC chose *not* to fine the stations in question and promised not to hold the violations against them at renewal time. Because the FCC did not issue Notices of Apparent Liability to the stations in question (no fine, no NAL), the stations had not had any opportunity to address the Commission's reworked interpretation of "profanity" before the Commission announced it. Once the decision was announced, the affected stations had the option of asking the FCC to reconsider the matter or, instead, heading to court to let the FCC defend its decision there. The stations took the latter course.

The FCC now wants an opportunity to re-think its "profanity" decision and to give the stations targeted in that decision the opportunity to plead their cases before the FCC before letting the court get its hands on the matter. If the Commission were given this opportunity, in theory it could reconsider its rationale and reverse its rulings. On the other hand, the FCC could use the opportunity to strengthen its arguments and impose the fines and penalties it forgave in the prior cases.

In asking the Court to give it a second whack at the "profanity" analysis, the FCC promised to conclude its reconsideration within 60 days. The FCC also suggested that a decision on remand could moot some or all of the case, meaning that it could reverse some portion of its prior decisions.

This wasn't good enough for CBS, NBC, and Fox, who argued that the FCC has been sitting on its review of the Golden Globes case for over two years. In that case, which concerned Bono's use of a variation of "fuck" (*i.e.*, "fucking brilliant"), the FCC reversed its long-standing position that isolated or "fleeting" utterances of four-letter words would not be punished. The request for remand, the networks argued, is just another ploy to avoid and delay judicial review of an unconstitutional policy.

By contrast, the network affiliate groups and ABC, as noted above, are taking a different tack. While they still maintain that the FCC incorrectly decided the four cases, they have filed motions supporting the FCC's request for remand of the case. The motives behind this filing are not entirely clear. Some press reports have suggested that their support may be payback for FCC Chairman Martin's broadcaster-friendly stances on ownership restrictions and multicast must-carry. The remand also gives those stations the opportunity to argue their case before the FCC and, perhaps, develop better policy on profanity.

The affiliates should not, however, hold out much hope for restoring the old exception for "fleeting" profanities. The networks claim that they would have supported the remand if the FCC had agreed not to enforce its new profanity standards while they are under review. Reportedly, however, the FCC flatly refused such a stay of enforcement,

characterizing it as a “two-month free pass” for broadcasters to broadcast profanity, so long as they could argue that the profanity was not repetitive. This suggests that, whatever other fine tuning the FCC may be considering, a return to the “fleeting utterance” exception is not likely.

Regardless, even if the Court grants the requested remand, a return to the appeals court seems inevitable. A decision to remand the cases back to the FCC, however, may give us yet another definition of profanity while we wait for the courts to sort this out.