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Second Circuit Bleeps Fleeting Expletive Policy

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In a long-awaited decision, the U.S. Court of Appeals for the Second Circuit finally dropped the hammer on the Commission's indecency policy. In an opinion issued on June 4, 2007, a three-judge panel (with one dissent) held that the "fleeting expletive" policy invoked by the Commission in 2004 and then again in the 2006 "Omnibus" indecency decision is arbitrary and capricious. In the court's view, the FCC's asserted justifications for the "fleeting expletive" policy were less than persuasive.

The "fleeting expletive" policy – as first announced in 2004 and then reaffirmed in 2006 – provided that any broadcast of the words "fuck" or "shit", in almost any context, would be deemed indecent. Historically, the Commission had been far more restrained, acknowledging that the occasional slip-up resulting in the broadcast of an isolated expletive should not warrant censure. But in the wake of the public uproar over the Janet Jackson/Super Bowl incident, the Commission suddenly reversed course and took an exceedingly hard line on indecency generally, and the use of those two words in particular.

The court's decision seems at first blush relatively narrow, finding only that the new "fleeting expletive" policy is arbitrary and capricious and thus inconsistent with the Administrative Procedure Act. But in a surprising six-page portion of the opinion, the court offers its very strong suggestion that the policy would not survive First Amendment analysis. (As a matter of practice, courts generally decline to delve into weighty constitutional issues if a case can be resolved on less radical grounds.)

The majority also indicates that the FCC's "profanity" policy – which first popped up in 2004 – essentially overlaps the indecency policy. Since the court finds that the indecency policy is arbitrary and capricious, we can conclude that it would find the profanity policy fatally flawed for the same reason.

The case has now been remanded to the Commission for further action consistent with the court's decision – but the court seems clearly to signal that if the Commission tries to shore up its

policies on remand (as opposed to running up the white flag and abandoning them), the court anticipates yet another appeal, the result of which would not be favorable to the Commission.

In the wake of the court's decision, the FCC – as expected – vehemently disagreed with the court's reasoning. Ironically displaying no apparent reluctance to use the words which the FCC has found to be maximally unacceptable, Chairman Kevin Martin fired back at the court, stating, "I find it hard to believe that the New York court would tell American families that 'shit' and 'fuck' are fine to say on broadcast television during the hours when children are most likely to be in the audience. . . . It is the New York court, not the Commission, that is divorced from reality in concluding that the word 'fuck' does not invoke a sexual connotation." (Note: The Second Circuit is located in New York, but it is a federal, not a state court. Chairman Martin's insistence on describing it as a "New York court" is odd, to say the least – and possibly reflects an effort by him to suggest that New Yorkers have different standards than the rest of the country.)

Apparently embracing the notion that if life gives you lemons, you should make lemonade, Chairman Martin also used the Court's decision as an opportunity to press the case for requiring cable companies to sell programming on a channel-by-channel (or "à la carte") basis. Mirroring the arguments made in the FCC's recent report on televised violence, the Chairman suggested that requiring an à la carte programming option "may prove to be the best solution to content concerns" because it would allow parents to limit children's exposure to inappropriate programming by not buying channels that tend to contain inappropriate programming. Martin, of course, has long been an advocate of the à la carte approach. However, the fact that he chose to raise it in this particular context is somewhat unexpected, since the indecency policy relates to over-the-air broadcast content, while the à la carte approach affects subscription services (*i.e.*, cable- and satellite-delivered programming) which are *not* currently subject to indecency constraints.

The FCC has not yet announced its next move. Some commentators have suggested that the FCC could appeal the ruling directly to the Supreme Court. This seems unlikely for a few reasons. For starters, the Supreme Court is unlikely to take the case. The Supreme Court typically takes cases that involve a question of constitutional importance or present a conflict between different appellate courts. The Second Circuit, however, was careful to point out that it was deciding the case on the basis of administrative law, not constitutional law. In addition, the Janet Jackson case is still pending in front of a separate federal court of appeals (in the Third Circuit, located in Philadelphia). If that case were to swing in the FCC's favor, the FCC would be in a stronger position both in terms of supporting its rules and in getting the case heard by the Supreme Court. A decision from the Third Circuit, however, is not expected until the end of this year, at the earliest. Thus, an appeal to the Supreme Court may be premature from the FCC's perspective.

A more likely path for the FCC may be to request an "en banc" hearing by the full Second Circuit. Initial decisions by federal appeals courts are made by three-judge panels. A circuit court, however, includes over a dozen judges and, in extraordinary cases, the court may consent to re-hear a case with all of the judges of the circuit. This is known in lawyer-speak as an "en banc hearing." This may be a more attractive option for the FCC. As noted above, the decision was made on a 2 to 1 vote. The dissent characterized the case as "a difference of opinion

between a court and an agency.” Additional votes could sway that opinion in the FCC’s favor. Moreover, in the time it would take to receive an “en banc” hearing, the Third Circuit may have decided the Janet Jackson case, which will certainly affect the playing field (although not necessarily in the FCC’s favor).

Another option would be for the FCC to do what the court suggested and seriously rethink and reformulate its indecency rules and policies. This would be the most difficult path for the FCC but could be the most successful in the long run. As the court noted, the networks and other parties seem likely to continue to appeal any application of the rules as they are currently structured and enforced. If the FCC could develop a well-supported, clearly stated definition of indecent material and find a consistent way of applying it – and on the basis of several decades of experience, neither of those is likely to happen – it would go a long way toward addressing the court’s problems with the current rules.

In the meantime, broadcasters should be careful to note that the court’s decision did *not* invalidate the FCC’s indecency rules as a whole. Indeed, FCC Commissioner Michael Copps promised that the FCC would continue to rigorously enforce the FCC’s indecency rules, adding, “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.” In addition, broadcasters should note that the new, increased fines of \$325,000 per utterance were recently published in the Federal Register, officially enshrining that super-increased penalty level in the FCC’s rules. Stations would be well advised to continue to actively police the content of their programs and refer any questions to communications counsel.