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## **Situation Normal On The Indecency Front**

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Earlier this month, the FCC requested that the U.S. Supreme Court review the decision of the U.S. Court of Appeals for the Second Circuit, which overturned the FCC's ruling that even "fleeting expletives" may be penalized under the FCC's indecency rules. When contemplating what this development may mean to the state of the FCC's indecency rules, one might stop and consider the word "snafu."

By and large, snafu is an innocuous word, regularly used in major newspapers throughout the country. Merriam-Webster's defines snafu as "1. n. a situation marked by errors or confusion; 2. adj. snarled or stalled in confusion." This innocent-sounding term was an acronym, coined by American GIs during World War II, which became so widespread that the War Department eventually sponsored a series of educational cartoons featuring "Private Snafu," written by Theodor "Dr. Seuss" Geisel and directed by Frank Capra. The acronym's original meaning – situation normal: all fucked up (although Webster's does offer "fouled up" as a bowdlerized secondary alternative).

Regardless of whether you favor the modern or antique definition of the word snafu, it remains an apt way to sum up the state of the FCC's indecency rules as illustrated by the FCC's filing with the Supreme Court.

As our readers will remember, the FCC's 2006 "omnibus" order covering several indecency cases reversed the FCC's long-standing policy of exempting "isolated" or "fleeting" expletives from penalty. In June, 2007, the Second Circuit reversed the FCC's decision and returned the case to the FCC for further consideration. In reversing the FCC's decision, the Second Circuit found that the FCC had not adequately justified its departure from decades of prior decisions as required under the federal law. Although the Second Circuit decided the case on these somewhat technical grounds, the court's decision went on to criticize the FCC's policy on First Amendment grounds, pointing out the inconsistency of protecting children from the "first blow" of a single expletive from Cher or Nicole Richie at the Billboard Music Awards Show but not from GIs fighting World War II in "Saving Private Ryan" (which includes a lengthy treatment of another

vintage military acronym: “FUBAR”, the last three letters of which stand for “beyond all recognition”).

After the Second Circuit issued its decision, the FCC could have simply returned to its former policy of exempting fleeting expletives, although no one seriously believed that the FCC would do so. Alternatively, the FCC could have attempted to re-assert its decision by coming up with additional arguments and evidence to support its original conclusion. But that would almost certainly have led to another trip to the Second Circuit with an appeal of the New-And-Improved policy. But since the Second Circuit had already indicated that it doesn’t think much of the FCC’s entire approach to indecency regulation, the conventional wisdom is that virtually no “do over” by the FCC would be upheld by the Second Circuit. Some observers believed that the FCC would wait for additional back-up from either the Third Circuit’s decision in the Janet Jackson/Super Bowl case or new legislation from Congress. Ultimately, however, the FCC decided to go straight to the top and ask the Supremes to review the matter.

The FCC’s request (more formally known as a “petition for a writ of certiorari”) argues that Supreme Court review is needed for several reasons. First, the FCC argues that the Second Circuit’s analysis did not dismiss merely the FCC’s reasoning for penalizing fleeting expletives, but rather the entire approach of taking context into account in deciding indecency cases. As the Supreme Court itself considered context to be “all important” in evaluating indecency, the FCC argues, the Second Circuit’s attack on the use of context (at least as perceived by the FCC) must be overturned.

In addition, the FCC argues that the Second Circuit incorrectly applied the standards for overturning FCC actions under the Administrative Procedure Act (APA). The APA requires courts to treat the judgments of federal agencies with some deference as long as the agencies provide reasoned explanations for their judgments. Because the FCC, in the FCC’s view, provided a thoroughly reasoned explanation for reversing its policy on fleeting expletives, the Second Circuit should have deferred to its judgment.

Moreover, the FCC argues, the Second Circuit’s overtly critical analysis of the FCC’s indecency policies sent the clear message that any attempt to reassert the FCC’s policies would be rejected. “In the meantime,” the FCC complains, “the Commission is left in the untenable position of having a grant of authority that the public expects it to exercise ... but that the Second Circuit has indicated cannot be meaningfully exercised.”

Whether or not one finds the FCC’s arguments convincing, there are lessons that can be drawn from the FCC’s petition. First, it is very clear that the FCC is not backing off its position that (a) vigorous enforcement of indecency regulations is in the public interest and (b) even fleeting expletives should be subject to penalties. At the same time, the

FCC seems to recognize that the Second Circuit's decision stands in the way of "meaningful" enforcement of the indecency rules.

Taken together, this creates a snafu for broadcasters. Several FCC officials and Commissioners have pointedly stated that broadcasters must continue to maintain absolute compliance with the indecency rules or face hundreds of thousands of dollars in penalties. At the same time, the cases to date leave broadcasters grasping to determine what is forbidden in any given circumstance, while the FCC all but acknowledges that it will not be able take any substantial enforcement action until either the Supreme Court or Congress clarifies its authority.

Several parties will no doubt come forward to oppose the FCC's petition for certiorari. Indeed, the case does not seem like one that the Supreme Court would accept. Hundreds of parties seek Supreme Court review each year but the Supreme Court typically reviews only those cases that present issues of constitutional significance that different lower courts have treated in conflicting ways. In this case, the Second Circuit specifically decided the case on administrative, not constitutional, grounds (although it did provide considerable discussion of constitutional considerations in a portion of the opinion that was expressly not part of its decisional rationale for the bottom line ruling). Moreover, the Janet Jackson case – pretty much the only one in the appellate pipeline that could possibly produce a conflicting "circuit split" (and even that is viewed by knowledgeable observers as extremely unlikely) – has not been decided yet. Nevertheless, the Supreme Court may choose to review this case, in part because of the high profile nature of the dispute and in part because the FCC's indecency cases have placed broadcasters into a situation marked by errors and confusion of Constitutional significance. The next several months will tell as the Supremes consider the petition and the Third Circuit prepares to issue the Janet Jackson decision. In the meantime, situation normal...