

Second Circuit Rules FCC Indecency Policy Unconstitutionally Vague

This week, the US Court of Appeals for the Second Circuit found that the Federal Communications Commission's (FCC or Commission) current enforcement policy against indecent content in television and radio station broadcasts is unconstitutionally vague under the First Amendment. The decision in *Fox Television Stations, Inc. v. FCC*¹ is the latest chapter in a long-running legal battle over the FCC's indecency standard, which ultimately may be decided by the US Supreme Court.

History of FCC Indecency Policy

Federal law and Commission rules prohibit radio and television stations from broadcasting indecent material, except during the safe harbor hours between 10 p.m. and 6 a.m.² In the seminal 1978 case of *FCC v. Pacifica Foundation*,³ the Supreme Court in a plurality decision upheld the FCC's finding that an afternoon radio broadcast of George Carlin's "Filthy Words" monologue, a 12-minute recitation of expletives, was indecent. The Supreme Court limited *Pacifica* to the specific facts of the case, noting the deliberate and repetitive use of the expletives in question. For decades following *Pacifica*, the FCC pursued a restrained enforcement policy, declining, among other things, to bring an enforcement action when a broadcast station aired "fleeting" or "isolated" expletives (a single, non-literal use of an expletive).

The FCC provided guidance to the industry in its 2001 Indecency Policy Statement,⁴ adopting a context-based indecency standard that involved the following two determinations:

1. Whether the material describes or depicts sexual or excretory organs or activities; and
2. Whether the broadcast is patently offensive as measured by contemporary community standards for the broadcast medium, taking into account three factors:
 - (i) The explicitness or graphic nature of the description or depiction;
 - (ii) Whether the material dwells on or repeats at length the depiction or description; and

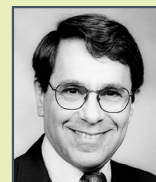
¹ *Fox Television Stations v. FCC*, No. 06-1760-ag, 2010 WL 2736937 (2d Cir. July 13, 2010) (*Fox II*).

² 18 U.S.C. § 1464; 47 C.F.R. § 73.3999.

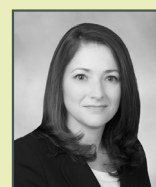
³ *FCC v. Pacifica Found.*, 438 U.S. 726 (1978).

⁴ *In re Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464*, Policy Statement, 16 FCC Rcd. 7999 (2001).

Contacts



Theodore D. Frank
+1 202.942.5790



Maureen R. Jeffreys
+1 202.942.6608

- (iii) Whether the material appears to have been presented to pander, to titillate or for shock value.

The FCC also noted that, under the second prong of this analysis, fleeting and isolated expletives were not considered actionably indecent.

The FCC shifted its enforcement policy in 2004, finding that Bono's unscripted utterance of a fleeting expletive during a live broadcast of the *Golden Globe Awards* was indecent.⁵ In order to provide additional guidance to the industry, the FCC issued an Omnibus Order in 2006, holding that any broadcast of any variant of "f*ck" or "sh*t" was presumptively indecent and profane.⁶ Among other things, the FCC found four programs that contained variations of such fleeting expletives to be indecent and profane: the 2002 and 2003 *Billboard Music Awards* (broadcast on Fox), certain episodes of ABC's *NYPD Blue*, and CBS's *The Early Show*. This Omnibus Order is the subject of the appeal in *Fox*.

Procedural History of *Fox*

Fox, CBS, ABC, and various network affiliates filed for review of the Omnibus Order, and the appeals were consolidated in the Second Circuit. Before the court heard the case, the FCC asked for a voluntary remand, which was granted. The Commission subsequently issued an order reaffirming its indecency finding regarding the 2002 and 2003 *Billboard Music Awards* but reversing its findings regarding *The Early Show* on the grounds that the fleeting expletive was uttered during a news interview and dismissing the *NYPD Blue* complaint on procedural grounds.

The television networks again appealed the decisions, challenging them under the Administrative Procedure Act (APA) and on First Amendment grounds. In 2007, the Second Circuit held that the FCC's new policy of sanctioning fleeting expletives was arbitrary and capricious under the APA.⁷

⁵ *In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, Memorandum Opinion and Order, 19 FCC Rcd. 4975 (2004).

⁶ *In re Complaints Regarding Various Television Broadcasts Between Feb. 2, 2002 and Mar. 8, 2005*, Notices of Apparent Liability and Memorandum Opinion and Order, 21 FCC Rcd. 2664 (2006).

⁷ *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444 (2d Cir. 2007).

Because it decided the case under the APA, the Second Circuit did not reach the First Amendment issues in the case. However, the Second Circuit signaled that, if called upon to decide the case under the First Amendment, it was doubtful that the FCC's policy would pass constitutional muster.

In 2009, the Supreme Court, in a 5-4 decision, reversed the Second Circuit's ruling, holding that the FCC had articulated rational reasons for expanding the scope of its indecency enforcement and that the change in policy was neither arbitrary nor capricious.⁸ The Court remanded the case to the Second Circuit to consider the First Amendment challenges in the first instance.

On remand, the networks argued, among other things, that the FCC indecency policy, as developed through the agency's policy statements and enforcement decisions, was unconstitutionally vague under the First Amendment.

Second Circuit Holding in *Fox II*

In *Fox II*, the Second Circuit again struck down the FCC's indecency policy, this time on the grounds that it violated the First Amendment.

The Vagueness Doctrine. Noting that "[t]he First Amendment places a special burden on the government to ensure that restrictions on speech are not impermissibly vague[.]" the Second Circuit discussed the two important objectives served by this vagueness doctrine:

1. It provides fair notice of what conduct is prohibited so that permissible speech is not chilled due to fear of government sanction; and
2. It guards against subjective and discriminatory enforcement.

With both of these purposes in mind, the Second Circuit evaluated whether the FCC's policy was impermissibly vague.

FCC's Policy Lacks Fair Notice. First, the Second Circuit noted and dismissed both parties' arguments that the 1997

⁸ *FCC v. Fox Television Stations, Inc.*, 129 S.Ct. 1800 (2009).

Supreme Court decision *Reno v. ACLU*⁹ was controlling in the instant case. The Second Circuit also disagreed with the FCC's argument that *Pacifica* foreclosed the vagueness argument, finding that *Pacifica*'s narrow holding did not reach the vagueness question.

Looking at both the terms of the FCC's indecency policy and its history of enforcement since the 2001 Indecency Policy Statement, the Second Circuit found that the FCC had not given broadcasters fair notice as to what might be considered indecent. Specifically, the court found that it was unclear which words are patently offensive under the second prong of the FCC's analysis. In practice, according to the court, the FCC has made arbitrary distinctions between words without substantive discussion of the basis for such a distinction. "[T]he Commission's reasoning consisted of repetition of one or more factors without any discussion of how it applied them."¹⁰

Risk of Subjective and Discriminatory Enforcement.

Moreover, the court found that, although the FCC had determined that the words "f*ck" and "sh*t" are presumptively patently offensive, there are two exceptions to this prohibition—*bona fide* news programs and material that is integral to the artistic nature of the work—that create an indiscernible standard and thus the risk of discriminatory enforcement. First, the court found that the FCC had failed to explain its *bona fide* news exception beyond noting that its protection is not absolute. Second, the court held that the artistic necessity exception had resulted in decisions with "little rhyme or reason" to them. For example, the Second Circuit noted the "disparate treatment" of the film *Saving Private Ryan* and the documentary film *The Blues: Godfathers and Sons*. The FCC had concluded that multiple

expletives during *Saving Private Ryan*, a fictional depiction of soldiers during war, were integral to the film, whereas multiple expletives spoken by blues musicians during *The Blues* were not integral. According to the court, these exceptions impermissibly "allow the FCC to decide, in each case, whether the First Amendment is implicated[,] resulting in a policy that the FCC "cannot articulate or apply consistently" and that risks subjective and discriminatory enforcement.

Chilling Effect of Speech. The Second Circuit found that "the absence of reliable guidance in the FCC's standards chills a vast amount of protected speech dealing with some of the most important and universal themes in art and literature." The court hypothesized that, faced with the risk of massive fines or the potential loss of a broadcast license, broadcasters could stop carrying live events, decline to invite controversial guests on news and public affairs programs, and stop producing challenging material that contains no expletives, but relates to or discusses sex, sexual organs, or excretion. The court noted that "[t]o place any discussion of these vast topics at the broadcaster's peril has the effect of promoting wide self-censorship of valuable material which should be completely protected under the First Amendment."

For all these reasons, the Second Circuit found "that the FCC's current policy fails constitutional scrutiny." However, the court also noted specifically that it did "not suggest that the FCC could not create a constitutional policy."

Level of Scrutiny for First Amendment Cases Involving Broadcast Stations. Although not central to the vagueness analysis, the Second Circuit also discussed in *dicta* a tenet of First Amendment jurisprudence, delineated in *Red Lion Broadcasting Co. v. FCC*¹¹ and reaffirmed in *Pacifica* and subsequent Supreme Court cases addressing the First Amendment rights of broadcast stations. Because of the nature of the broadcast medium, government restrictions on broadcast stations are entitled to a lower level of First Amendment scrutiny than restrictions on other media. The Second Circuit read *Pacifica* as resting this determination

9 *Reno v. ACLU*, 521 U.S. 844 (1997). In *Reno*, the Supreme Court found that a portion of the Communications Decency Act that criminalized the knowing transmission of indecent speech through the Internet was not narrowly tailored and unconstitutionally vague. Both parties in *Fox* had argued, for different reasons, that *Reno* compelled the Second Circuit to rule in their favor on the vagueness issue.

10 For example, the court noted that the Commission had justified finding that one word was indecent "because it is 'vulgar, graphic and explicit'" while another word was not indecent because it was "not sufficiently vulgar, explicit, or graphic."

11 *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

on “the twin pillars of pervasiveness and accessibility to children.” Citing the pervasiveness of cable television and omnipresence of the Internet, along with technological innovations that give parents greater control over what their children can watch, the Second Circuit asserted that these “pillars” underlying *Pacifica* were no longer valid and the Supreme Court precedent no longer “reflects today’s realities.” Although the court noted that it could not overturn Supreme Court precedent and was constrained to follow *Pacifica*, it did not need to “wade into the brambles” to determine the limits of FCC authority outlined by that case. Instead, it found that regardless of the extent of this authority, the FCC’s indecency policy is unconstitutionally vague.

* * *

The statute and FCC rule prohibiting radio and television station broadcasts of indecent material (other than during the safe harbor hours) remain in place. As of this writing, the FCC has not announced how it plans to respond to the Second Circuit decision. The FCC could seek a rehearing *en banc* at the Second Circuit, file a petition for *certiorari* with the Supreme Court, and/or begin work on a new indecency standard. It could take a year or longer until the applicable standard for broadcast indecency is clarified.

We hope that you have found this advisory useful. If you have additional questions, please contact your Arnold & Porter attorney or:

Theodore D. Frank
+1 202.942.5790
Theodore.Frank@aporter.com

Maureen R. Jeffreys
+1 202.942.6608
Maureen.Jeffreys@aporter.com

© 2010 Arnold & Porter LLP. This advisory is intended to be a general summary of the law and does not constitute legal advice. You should consult with counsel to determine applicable legal requirements in a specific fact situation.