



To: All Broadcast Clients

June 11, 2007

## **SECOND CIRCUIT VACATES FCC ORDER THAT SUBJECTED “FLEETING EXPLETIVES” TO INDECENCY PENALTIES**

The U.S. Court of Appeals for the Second Circuit, in a 2-to-1 decision, has vacated the FCC’s three-year-old policy under which broadcasters could be subject to indecency fines for the broadcast of “fleeting expletives.” The court found that the FCC failed to articulate a reasoned basis for its change in longstanding policy.

As a matter of background, for decades, the FCC did not treat the broadcast of fleeting and isolated expletives as within the scope of its indecency prohibition. That policy of restrained enforcement abruptly changed in 2004 when, reversing an earlier decision by its own Enforcement Bureau, the FCC held that any variant of “the F-Word” has an inherent sexual connotation and therefore falls within the scope of the indecency definition. This FCC decision held that Bono’s use of a variant of the “F-Word” in his acceptance speech at the Golden Globe Awards was indecent, and that (i) the fleeting or isolated nature of the use of the word was irrelevant to its indecency analysis, despite prior decisions to the contrary; and (ii) the material broadcast was also profane.

The recent Second Circuit ruling stemmed from the FCC’s determination that fleeting expletives aired during Fox’s broadcasts of the 2002 and 2003 Billboard Music Awards were both indecent and profane, and that the repeated use of an expletive is not necessary for a finding of indecency. Because the broadcasts occurred before the 2004 Golden Globes decision, however, the FCC did not issue a forfeiture for either broadcast. Fox and other broadcast networks petitioned for review of the decision.

The court agreed with the broadcast networks that the FCC’s new policy to treat fleeting expletives as indecent and/or profane was arbitrary and capricious because the FCC changed its longstanding policy without sufficient justification. The court rejected each of the FCC’s justifications for its policy change:

- The court rejected the FCC’s claim that exempting fleeting expletives from its indecency prohibition would force viewers, including children, to take “the first blow” from indecent material. According to the majority, the FCC provided no reasonable explanation for why it had changed its earlier perception, held for nearly 30 years, that a fleeting expletive was not a harmful “first blow.” Additionally, the court noted the FCC explanation had no rational connection to the FCC’s actual policy, which has exempted from enforcement action a fleeting expletive that was broadcast in a *bona fide* news interview, deemed appropriate for journalistic or artistic purposes, or considered integral to an artistic work.
- The court rejected the FCC’s reasoning that it is difficult, if not impossible, to distinguish whether a word is being used as an expletive or as a literal description of sexual or excretory functions. The court stated that under a “common-sense understanding of these words,” the general public knows that words are often used without any “sexual or excretory” meaning.

- The court dismissed as “divorced from reality” the FCC’s contention that allowing any fleeting expletive to air without penalty would give broadcasters permission to air expletives throughout the day, so long as they aired them only one at a time. The court noted that even under the FCC’s prior restrained indecency enforcement policy, broadcasters had not barraged the airwaves with expletives.
- Finally, the court dismissed the FCC’s claim that a requirement that repeated use of expletives is necessary for a finding of indecency is inconsistent with the FCC’s context-based approach to indecency enforcement. The court determined that the FCC’s policy of treating all variants of certain expletives as presumptively indecent and profane, whether used in a literal or non-literal sense, is also inconsistent with a context-based enforcement approach. Further, the court determined that the FCC did not reasonably explain why, even though the FCC’s indecency test has not changed, a fleeting expletive should now be deemed indecent when it was not indecent in the past under the same test.

The court indicated that the FCC may change its previously settled view about whether fleeting expletives are indecent only if it provides a reasoned basis for that change. The court held that the FCC provided no evidence that exposure to a fleeting expletive is harmful, let alone that the potential harm of such exposure is serious enough to warrant government regulation.

The court also held that the FCC provided no independent reasons that would justify its newly expanded definition of profane speech, and indicated that it was insufficiently distinct from its indecency definition. The court further noted that the FCC failed to provide any explanation as to why a separate ban on profanity is even necessary in light of the FCC’s prior view that a ban on profane speech would be unconstitutional.

The court vacated the FCC’s order, and remanded the matter to the FCC for further proceedings consistent with the court’s opinion. Because the court vacated the FCC’s order on the ground that it was arbitrary and capricious, it did not render a binding decision concerning several other constitutional arguments made by the broadcast networks. However, the court noted that it was skeptical that the FCC would be able to provide a constitutionally sufficient, reasoned explanation for penalizing broadcasters for fleeting expletives. As for the FCC’s indecency test generally, the court stated that it is “sympathetic to the networks’ contention that the FCC’s indecency test is undefined, indiscernible, inconsistent, and consequently unconstitutionally vague.”

The dissenting opinion found that the FCC had presented a reasoned explanation for its change of policy and that the court was obligated to defer to the FCC’s judgment in this matter.

Should you have any questions concerning this decision or the FCC’s indecency policy in general, please contact our office.

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This memorandum is intended only as a general discussion of these issues and should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired. To discuss any of the issues presented here, please contact any attorney in our office.