

## E-ALERT | Communications and Media

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### COURT STRIKES DOWN FCC INDECENCY POLICY

Yesterday, the U.S. Court of Appeals for the Second Circuit issued a decision in *Fox Television Stations, Inc. v. FCC*, in which it struck down the Federal Communications Commission's broadcast indecency policy as unconstitutional. In its decision, which arose out of two live broadcasts of the Billboard Music Awards in which the celebrities Cher and Nicole Richie used expletives, the Court held that the FCC had failed to provide broadcasters with sufficient notice about what content would and would not be indecent. Although further litigation is likely, the effect of this decision is to foreclose all or virtually all indecency enforcement by the FCC in the immediate future.

In its decision, the Court concluded, "By prohibiting all 'patently offensive' references to sex, sexual organs and excretion without giving adequate guidance as to what 'patently offensive' means, the FCC effectively chills speech, because broadcasters have no way of knowing what the FCC will find offensive." It also observed 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."

As one example of this problem, the Court contrasted the Commission's decision regarding the Steven Spielberg film *Saving Private Ryan*, which upheld the repeated use of expletives in that program because of the importance of those words to the "realism and immediacy of the film experience," against its decision finding the public television documentary *The Blues: Godfathers and Sons* indecent because of the documentary's use of expletives in interviews. Addressing the apparent inconsistency, the Court wrote, "We query how fleeting expletives could be more essential to the 'realism' of a fictional movie than to the 'realism' of interviews with real people about real life events, and it is hard not to speculate that the FCC was simply more comfortable with the themes in 'Saving Private Ryan,' a mainstream movie with a familiar cultural milieu, than it was with 'The Blues,' which largely profiled an outsider genre of musical experience."

The Court also attacked the FCC for providing little guidance about why a program was indecent—noting that the FCC found the word "bullshit" indecent because it is "vulgar, graphic and explicit," while it concluded that the word "dickhead" is not indecent because it is "not sufficiently vulgar, explicit, or graphic." The Commission offered no reason for this difference in treatment, and its distinction, the Court observed, "hardly gives broadcasters notice of how the Commission will apply the factors in the future."

In its decision, the Court relied heavily on the fact that the vagueness in the FCC's indecency policy, together with the significant monetary exposure associated with indecency enforcement, chilled broadcasters' speech. It cited, for example, episodes of *That 70s Show* and *House* that were not rebroadcast and were rewritten before broadcast, respectively, because of concerns about how the FCC would react to their sexual themes.

Although the Court acknowledged that it remains bound by the Supreme Court's 1978 decision in *Pacific Foundation* (the "seven dirty words" case) and emphasized that its decision to strike down

the FCC's indecency policy for vagueness was not dependent on *Pacifica*, it agreed with broadcasters that the world has changed dramatically since 1978 such that “[c]able television is almost as pervasive as broadcast . . . and most viewers can alternate between broadcast and non-broadcast channels with a click of their remote control.” Emphasizing the technological change since the *Pacifica* decision, the Court quipped, “Not only did Youtube, Facebook, and Twitter not exist, but their founders were either still in diapers or not yet conceived.” Ultimately, the Court noted that the broad availability of the V-chip means that “there now exists a way to block programs that contain indecent speech in a way that was not possible in 1978,” making it more likely that the current indecency regime could not satisfy First Amendment scrutiny even if it were not impermissibly vague.

Although the Second Circuit's decision focuses heavily on expletives, the analysis is not limited to that context. Among other observations, the Court cited examples relating to sexual depictions or descriptions (as opposed to the broadcasts directly before the Court, which involved expletives that were not used in a sexual context). It also reiterated the FCC's own view that “any strict dichotomy between expletives and descriptions or depictions of sexual or excretory functions is artificial and does not make sense. . . .” In view of these observations, the Second Circuit's decision appears to foreclose all or virtually all indecency enforcement in the near term.

The FCC now has the option of appealing the Second Circuit's decision to the Supreme Court, which appears to be open to hearing a case presenting a question about the viability of indecency enforcement under the First Amendment. The agency also could launch its own proceeding to develop a new indecency policy that would satisfy First Amendment scrutiny. In addition to these approaches, the FCC could seek a stay of the Second Circuit's decision pending further proceedings.

At the same time, litigation will continue over the FCC's decision to fine CBS for its brief display of Janet Jackson's nipple in the halftime show of *Super Bowl XXXVIII*. That case is awaiting a decision from a different court, the U.S. Court of Appeals for the Third Circuit in Philadelphia.

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