[US] Supreme Court Upholds FCC's Changes in Broadcast Indecency Policy on Administrative Law Basis

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The US Supreme Court recently upheld the FCC's modified broadcast indecency policy, which prohibits the on-air use of indecent "fleeting expletives'—that is, sudden, usually surprised outbursts of one or two indecent words. The Commission's policy went back to FCC v. Pacifica Foundation, 438 U.S. 726 (1978), which emphasized the harm of the "repetitive occurrence" of indecent language - in that case, George Carlin's famous 12-minute "Seven Dirty Words" monologue. The changes also were challenged under the free speech clause of the Constitution, but the Court refused to consider these arguments (the rules do not apply to cable or other multichannel media, and obscenity is completed banned from the airwaves).

The new policy came in the context of two Fox broadcasts. One involved the singer Cher saying "fuck them" to critics, the other Paris Hilton exclaiming: "Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple".

The Commission based its fines again Fox and its policy changes on three considerations: (1) a new conclusion that indecency was a "harmful first blow" for children; (2) its perception that indecent fleeting expletives were more dangerous than other offensive statements; and (3) a new finding that "bleeping" of content had become easy and inexpensive for radio stations.

On appeal, the Court of Appeals for the Second Circuit found the FCC's reasoning to be "arbitrary" and "capricious" under the Administrative Procedure Act, 5 U.S.C. § 706. The Circuit Court reasoned that the Commission never had been concerned about "first blows" in the past: it was impossible to differentiate indecency from other offensive language; and "bleeping" equipment still was very expensive.

The Supreme Court held that the Circuit Court had erred as to all three issues, in requiring the FCC to supply "a more substantial" explanation of its actions. It stated that requirements to change an existing rule were not necessarily higher than to adopt a new one. As to the "first blow" issue, the Commission's conclusion was found to be intuitive and did not demand "empirical evidence." Similarly, the FCC's prohibition of only indecent fleeting expletives was within its discretion. Finally, despite the lack of any record evidence, the Court supported the

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Commission’s conclusion that “bleeping” was feasible and affordable.

The Supreme Court remanded the case to the Second Circuit “for further proceedings consistent with this opinion”—but with the cryptic comment that the constitutional issue might be resolved “perhaps in this very case.” The Supreme Court seems to expect the Second Circuit to decide the free speech question, resulting in a second appeal to the Supreme Court. But this raises an interesting possibility. If the Second Circuit declines to decide the point, there would be no substantive issue to appeal to the Supreme Court. The result would be to leave the question unresolved, after yet more years of litigation.

Federal Communications Commission v. Fox Television Stations, Inc., (No. 07-582) 489 F. 3d 444, reversed and remanded

http://www.law.cornell.edu/supct/html/07-582.ZO.html

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