[US] Supreme Court on Indecency

IRIS 2012-8:1/38

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On 21 June 2012, the Supreme Court issued a much-commented decision on indecency.

The Federal Communications Commission (FCC) recently amended its indecency policy to find fleeting expletives and fleeting nudity actionably indecent. In 2009, the US Supreme Court (the Court) in Fox v. FCC upheld the amended policy and remanded the challenge by Fox Television Stations Inc. (Fox) to the Second Circuit for further proceedings consistent with its holding (see IRIS 2009-6/32). On 21 June 2012, the Court resolved the case by invalidating penalties levied against Fox for airing fleeting expletives and invalidating fines levied against ABC Television (ABC) for airing fleeting nudity, while leaving the indecency policy unchanged. The Court held that the FCC was prohibited from penalizing Fox and ABC for the broadcasts by the Due Process Clause of the Fifth Amendment of the US Constitution ("Fifth Amendment") because Fox and ABC had not received Fair Notice or guidance of what was prohibited. The Court found that Fox and ABC were unable to know what was required of them, as required by the Fifth Amendment, because the FCC based its authority for the penalties on a policy it established after the broadcasts were aired, while it made clear at the time of the broadcasts that "deliberate and repetitive use in a patently offensive manner is a requisite to a finding of indecency."

Even though the FCC conceded that, "Fox did not have reasonable notice at the time of the broadcasts that the FCC would consider non-repeated expletives indecent," it argued that the issue of due process is moot because the FCC only threatened to fine Fox and agreed to refrain from imposing sanctions and considering a station's record of airing indecent broadcasts when considering whether to renew its license. The Court rejected that argument because it found that due process was established to ensure that regulated parties are not left "at the mercy of noblesse oblige". It also found the FCC's assurances were not persuasive because it had already taken actions contrary to those assurances, namely by finding it was "not inequitable to hold Fox responsible for [the 2003 broadcast]" and that, "it has the statutory authority to use its findings to increase any future penalties". The Court noted that even if the FCC forebears from levying fines, a finding of wrongdoing can also harm a broadcaster's reputation with viewers and advertisers because that finding will be widely publicized.

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The FCC argued that the fines it levied against ABC did not violate the Fifth Amendment because it provided ABC sufficient notice of the change in the policy via a 1960 FCC decision that had declared that, “televising of nudes might well raise a serious question of programming contrary to 18 U. S. C. §1464.” The Court rejected this argument because it found the statement ambiguous and inconsistent with the FCC’s prior decisions that isolated and brief moments of nudity are not actionably indecent. The Court also rejected the government’s assertion that the shower scene at issue “contains more shots or lengthier depictions of nudity” than other broadcasts the FCC deemed were not indecent, because such an assertion ran contrary to a prior FCC determination that a broadcast by ABC of 30 seconds of nude buttocks was “very brief” and not actionably indecent in the context of the broadcast.

Thus, even though the Court indicated when it remanded the case that it might resolve the First Amendment implications of the FCC’s indecency policy “perhaps in this very case”, it instead resolved the case on more limited, non-constitutional grounds and left the First Amendment implications unresolved.

Federal Communications Commission et al. v. Fox Television Stations, Inc., et al. - Certiorari to the United States Court of Appeals for the Second Circuit, No. 10-1293. Argued on 10 January 2012—Decided on 21 June 2012

http://www.supremecourt.gov/opinions/11pdf/10-1293f3e5.pdf

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