

Second Circuit Strikes Down FCC Indecency Policy

A panel of the United States Court of Appeals for the Second Circuit has struck down the FCC's current indecency rules as unconstitutionally vague.

The specific case involved fines for "fleeting expletives" (that is, single, isolated, unscripted uses of the "f-word," "s-word" or one of their variants).¹ The Court previously had struck down the policy for the FCC's failure to have justified a change in its long-standing tolerance of fleeting expletives. Until 2004, the FCC had examined the use of an indecent word in the context of a program, but then announced that nearly all uses of the "f" and "s" words would be presumed indecent. The Supreme Court upheld the FCC's rationale for its change but did not reach broadcasters' constitutional claims and invited the Second Circuit to do so. The current decision concludes that the FCC's changed policy violates the First Amendment, as it is too vague to alert broadcasters to its requirements and therefore has an unacceptable chilling effect upon legitimate free speech.

The Court found that the FCC's indecency test fails to provide a clear standard by which broadcasters can predict what speech is covered and therefore forces broadcasters to avoid potentially offensive programming rather than risk massive fines or license revocation. The Court noted that the Commission has been inconsistent in applying its rule even to the two key "f" and "s" words, permitting their repeated use in a fictional movie (*Saving Private Ryan*) but condemning as "shocking and gratuitous" a single utterance in a music awards show. The Court further noted that attempts to designate specific words as indecent (as the FCC had done in the 1971 *Pacific* "Seven Dirty Words" case) failed to take into account a wide realm of other creative means of depicting sexual or excretory organs or activities, which the FCC considers to be the determinants of indecent expression. The FCC's attempt to accommodate the First Amendment by suggesting that "artistic necessity" or "bona fide news" could warrant exemption under undefined circumstances was deemed too prone to subjective application and discriminatory enforcement.

The Court expressed great concern that the current indecency policy has chilled protected speech, and cited several examples of broadcasters declining to air valuable cultural and informational programming for fear of indecency complaints. Of particular concern was the difficulty of predicting departures from planned occurrences (such as Bono's apparently spontaneous "f-bomb" during the Billboard Music Awards), which has discouraged some stations from covering live events. The Court concluded by noting that "sex and the magnetic power of sexual attraction are surely among the most predominant themes in the study of humanity since the Trojan War" and suggesting the difficulty, and perhaps outright futility, of crafting a policy that defines what the FCC will find offensive while avoiding restriction of broadcasters' First Amendment rights.

¹ Although the Court opinion used the expletive words themselves, we are mindful of email filters and are using these surrogates in this memorandum.

At least until the Court's mandate is issued after 45 days, the FCC's current indecency policies remain in effect. By then, the FCC may have decided whether to take further appeals to the entire Second Circuit or to the Supreme Court. In the meantime, pending indecency complaints are likely to continue to be held in abeyance.

If you have any questions concerning this matter, please contact [Peter Gutmann](#) at (202) 857-4532 or pgutmann@wcsr.com, or one of our other Womble Carlyle [Telecommunications](#) professionals.

Womble Carlyle client alerts are intended to provide general information about significant legal developments and should not be construed as legal advice regarding any specific facts and circumstances, nor should they be construed as advertisements for legal services.

IRS CIRCULAR 230 NOTICE: To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. tax advice contained in this communication (or in any attachment) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed in this communication (or in any attachment).