

## Indecent Proposal: The FCC and Four-Letter Words

By **Debbie L. Berman and Wade A. Thomson**

On the same day our nation went to the polls to elect its next president, the U.S. Supreme Court heard oral argument on when the F-word is indecent as opposed to artistically integral. *FCC v. Fox Television Stations, Inc., et al.*, No. 07-582, centers on the Federal Communications Commission's policy of punishing broadcasters for so-called "fleeting expletives" during hours that children are expected to be in the audience. The case involves several nebulous issues and important societal concerns, including the increased sexual content on television, who should decide what is indecent and what guidelines should be used.

### History of FCC Indecency Policy and Fleeting Expletives

In *Fox*, the Supreme Court is reviewing the 2nd U.S. Circuit Court of Appeals' decision from 2007 that the FCC's changed policy — to punish broadcasters for the utterance of a single four-letter word under some circumstances — was arbitrary and capricious under the Administrative Procedure Act (APA).

The history of the FCC policy dates back more than 30 years to the Supreme Court's decision in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), which upheld the FCC's sanction of George Carlin's "seven dirty words" monologue as indecent. At the time, the FCC had articulated "indecent" as being "intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience." The FCC acknowledged that its decision was limited to the broadcast of Carlin's monologue and that its policy only applied to the "verbal shock treatment" administered by Carlin, and did not apply to isolated uses of an expletive.

For years after *Pacifica*, the FCC remained faithful to the narrowness of the ruling and its own promise to be restrained in punishing the broadcast of fleeting expletives. In 2003, however, the FCC held that NBC's live broadcast of Bono's acceptance speech (in which he said "this is really, really f\*\*\*ing brilliant") at the Golden Globe awards was indecent. See 19 F.C.C.R. 4975 (2004). The FCC acknowledged that it was reversing course on its previous policy against punishing fleeting expletives, explaining that any use of the F-word was inherently sexual in nature and therefore presumptively indecent. The broadcasters petitioned for reconsideration while the FCC applied its Golden Globes policy against other broadcasters.

In February 2006, the FCC issued an order resolving several complaints against various broadcasts. See 21 F.C.C.R. 2664 (2006). The broadcasts at issue included Cher's use of the F-word at the 2002 Billboard Music Awards, Nichole Richie's use of the F-word at the 2003 Awards, NYPD Blue's employment of several other expletives, and the use of "bullshitter" during *The Early Show*. The FCC found all of these fleeting expletives to be indecent, thereby adding "shit" to the presumptively indecent word list. The FCC later reversed its finding in regards to *The Early Show* because the fleeting expletive occurred during a news show, while the uses of the F-word during the award shows were seen as deliberate and gratuitous.

These orders were consolidated for purposes of review by the 2nd Circuit in *Fox v. FCC*, 489 F.3d 444 (2007). The broadcasters argued that the FCC's new policy with respect to fleeting expletives was arbitrary and capricious and therefore violated the rule that administrative agency policy changes must be based on a reasonable analysis. The broadcasters also made several First Amendment challenges to the FCC's policy, attacking it as vague, too subjective, and an unconstitutional content-based regulation.

The FCC argued that its fleeting-expletive policy was reasonable because it was meant to address the so-called "first blow" the audience would suffer from the mere exposure to a single expletive. The 2nd Circuit rejected this argument noting that even the FCC's policy did not punish every fleeting expletive, but instead looked to the context to decide if the fleeting expletive was "necessary for any journalistic or artistic purpose" or "integral" to the work.

The 2nd Circuit noted several contradictory FCC decisions, including its finding that numerous expletives during the airing of *Saving Private Ryan* were not indecent because they were necessary to the power and realism of the World War II film, while expletives used during Martin Scorsese's PBS documentary about Blues musicians were deemed indecent. The court also took issue with the various meanings of the F-word, pointing to Bono's use of it as a nonsexual adjective and Vice President Dick Cheney's different use of it in an exchange with Sen. Pat Leahy. Finally, the 2nd Circuit noted that the FCC failed to present any evidence that suggests fleeting expletives are harmful to children, and such evidence would seem to be particularly relevant "today when children likely hear this language far more often from other sources than they did in the 1970s."

While not ruling directly on the First Amendment challenges, the court noted that it did not think the FCC policy could withstand its scrutiny because it was vague and was similar to the indecency Internet regulation deemed

unconstitutional in *Reno v. ACLU*, 521 U.S. 844 (1997), and because the policy provided too much subjective discretion to the FCC. The 2nd Circuit also acknowledged the technology for blocking channels and parental rating systems, noting that these provided options for viewers to better control what was broadcast into their homes.

## More Sexual Content

It is beyond dispute that there is more sexual content on TV and the airwaves these days. One only has to compare two versions of the teen show, *Beverly Hills 90210*. When the show was a hit in the early 1990s, one storyline revolved around a few of the stars practicing abstinence through several years of high school. In the 2008 version of the show, *90210*, there was an oral sex scene in the first five minutes.

The impact of such content and which way it cuts in the FCC context is a more complicated matter. If indecency is measured "by contemporary community standards for the broadcast medium," the threshold of indecency is obviously moving toward the salacious side of the spectrum. But if there is a demonstrated harm, especially to children, courts will make the First Amendment bend. In *Fox*, however, the 2nd Circuit noted that the FCC failed to present any evidence of harm in justifying its changed policy.

Interestingly, the day before Supreme Court oral argument in *Fox*, RAND Corporation publicized its study showing that exposure to sex on TV may increase the chances of teen pregnancy. The study purports to have made adjustments for such contributing factors as living in a single-parent household and engaging in other problem behaviors, and concludes that the proportion of teens likely to become pregnant or be responsible for a pregnancy is two times greater among those who view high levels of sexual content.

However, when it comes to attributing actions of audience members to speech, the First Amendment has long sided with speakers. For example, several states have recently attempted to regulate violent video games based on arguments that they increase violent behavior. But courts have consistently found such regulations to violate the First Amendment because there are so many variables that influence behavior and the First Amendment requires more than correlations and inferences from a few studies.

Moreover, as the Seventh Circuit noted in regards to one such law, being overly paternalistic can be harmful in itself: "to shield children right up to the age of 18 from exposure to violent descriptions and images would not only be quixotic, but deforming; it would leave them unequipped to cope with the world as we know it." *American Amusement Machine Association v. Kendrick*, 244 F.3d 572, 576-78 (7th Cir. 2001).

## More Parenting Controls, Less Bleeping

Proponents of profanity-free TV argue that broadcasts can be bleeped and/or time-delayed. But bleeping language interferes with the artistic expression, and implementing delay systems for local broadcasters is expensive. On the other side, those seeking freer express argue that parent controls through cable television and parental rating systems aid parents in deciding what their children watch at home.

## Self-Censorship

The fundamental problem with the FCC policy is that it chills protected First Amendment speech because broadcasters are left to gamble on the whims of the FCC's notion of whether expletives are "integral" to the material. And in many cases, broadcasters have been unwilling to roll the dice, leaving the viewing public as the injured party.

As noted in the amicus brief submitted in *Fox* by the National-Association of Broadcasters and Radio-Television News Directors Association (NAB & RTNDA), approximately 66 of the 225 ABC affiliate stations declined to air the November 2004 broadcast of *Saving Private Ryan* due to uncertainty about whether it would be deemed indecent by the FCC. Additionally, because of the FCC's policy, broadcasters have flinched in airing documentaries on the September 11 attacks, the Iraq War, and Ken Burns' documentary *The War*, among other things.

This is particularly perverse in light of the relatively scant amount of complaints about indecent content on TV. Only two people made complaining phone calls to the CW network for its broadcast of the *90210* oral sex scene. And, as discussed in the amicus brief of the NAB & RTNDA, a single activist group, the Parents Television Council, submitted 99.8% of all indecency complaints filed with the FCC during 2003. So either the viewing public is not upset or is not upset enough to file complaints. Either way, this tends to support the notion that "contemporary community standards for the broadcast medium" are pretty tolerant of what is decent.

Finally, while many Americans can probably agree that certain phrases or expletives are things they do not want their children to hear, the FCC's decisions have smacked of certain biases that should be left to parents, not the government. In finding that the expletives in *Saving Private Ryan* were not indecent, the FCC seemed to gush over the film itself and the courageousness of Americans in WW II, the film's subject. But that is not a standard that broadcasters can predict.

It is difficult to say how the Supreme Court will rule in this matter. Hopefully it will recognize that the FCC's policy

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is too arbitrary to maintain, and place the judgment of broadcast content back into the hands of parents and critics. Based on the oral argument, however, it appears that at least some of the members of the court may not share the public's apparent desensitizing to the F-word. Moreover, the Supreme Court may resolve this case on narrow administrative law grounds, such as whether the FCC gave proper notice and explanation of its rule change, as opposed to addressing the constitutional issues raised by this case.

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