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Fox v. FCC: FCC Concentrates And Asks Again

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As we reported in last month's *Memo to Clients*, the U.S. Court of Appeals for the Second Circuit overturned the FCC's indecency enforcement regime as unconstitutional. That left the FCC with only three options if it wanted to fight to defend its indecency regime. It could either: (1) go back to the three judges who rejected the policy, trying to convince them that they got it wrong; or (2) ask the entire *en banc* Second Circuit (which includes ten active-service judges) to reverse the three-judge panel's decision; or (3) go for broke and ask the U.S. Supreme Court to review the case. (Obviously, abandoning the indecency regime was also a fourth option, albeit not one the FCC was likely to embrace).

Late in August, the FCC made up its mind: it's going for Options (1) and (2), leaving for another day (and maybe another case) the possibility of Supreme Court review of indecency enforcement.

According to the FCC's petition for rehearing, the Second Circuit panel's *Fox* decision went too far in overturning the entire indecency enforcement regime. The Commission asserts that the panel's conclusion – that the FCC's overall indecency policy is unconstitutionally vague – is inconsistent with earlier decisions by the Supreme Court, the D.C. Circuit, and even the Second Circuit itself. The Commission argues that the *Fox* decision rejects the “contextual approach” to indecency analysis the FCC has used in the past – and that, by so doing, leaves the Commission with no way to enforce the federal laws prohibiting indecent broadcasts.

As the FCC sees it, the Second Circuit panel should have focused narrowly on the particular facts of the case before it and should have assessed the FCC's analysis of those facts, nothing more and nothing less. Instead, at least according to the Commission, the panel considered other facts and circumstances involving other cases to reach its conclusion that the overall indecency policy – not merely that policy as applied to the *Fox* facts – was too vague. But, the Commission argues, there is nothing vague about the notion that “fuck” and “shit” – the words uttered by Cher and Nicole Richie in the *Fox* broadcasts at issue – are indecent; accordingly, even if there might be some question

about whether other material might or might not be deemed “indecent”, the same cannot be said of the particular material before the court.

The Commission gussies up this argument with a discussion of the standards for when a rule is “vague” as a constitutional matter, although that discussion includes, at most, only passing mention of the different “overbreadth” standard often used in First Amendment cases. Suffice it to say that, whatever the other merits of the Commission’s argument on this point, it presupposes that the language at issue here was, in fact, “indecent”. But since the Commission had determined in at least two cases more or less contemporaneous with its decision in the *Fox* case that similar language was *not* indecent, that assumption is obviously open to question.

The Commission also characterizes the panel’s decision as effectively rejecting the “contextual” approach which the FCC says it has taken to indecency enforcement. Other courts – including the Supremes in the Mother of All Indecency Cases, *Pacifica*, not to mention at least one other Second Circuit panel – have repeatedly emphasized the need for the Commission to consider “context”. Thus, the Commission argues, the *Fox* panel’s seeming rejection of that approach should be reviewed and reversed as inconsistent with precedent.

The problem with this aspect of the FCC’s argument is that it’s not entirely clear that the panel rejected the importance of “context” as the FCC claims. Rather, the panel appears to have been critical not of the need to consider “context”, but rather of the FCC’s less than clear – opaque, some might say – approach to *how* “context” is considered. While the Commission undeniably incants the term “context” in its indecency opinions, that incantation often appears to be little more than the legalistic equivalent of “abracadabra”, a rhetorical flourish with no apparent meaning or substance.

As one example – cited by the Second Circuit panel – the Commission’s contextual analysis enabled it to reach diametrically inconsistent conclusions about the use of the term “bullshitter” in a single instance, each time citing an identical contextual aspect. First, the fact that that word was aired during a news interview made it indecent; but on further thought, the Commission concluded that, because it was aired during a news interview, it *wasn’t* indecent. In the panel’s words, if the Commission does have any actual indecency standard, it is a standard that “even the FCC cannot articulate or apply consistently.”

The Commission’s final argument is one of apparent exasperation. As it reads the panel decision, the Commission can’t win because any changes to make its contextual analysis more predictable would raise further First Amendment concerns, subjecting the FCC to a Catch-22.

This argument is intriguing because, by making it, the Commission could be seen as conceding that, as a practical matter, indecency is not susceptible to regulation within constitutional limitations. To be sure, the Supreme Court in *Pacifica* held that the Constitution does permit *some* regulation of broadcast indecency. But the Supremes then left it to the Commission and the courts to develop, on a case-by-case basis, an appropriate analytical approach in which “context” would be all-important. If, after more than 30 years, the best that the FCC has been able to come up with is the “analysis” invoked in *Fox*, is it possible that the agency is incapable of regulating indecency – beyond the Carlin monologue at issue in *Pacifica* – constitutionally? The FCC’s rehearing petition seems to imply that.

The Second Circuit now must decide whether or not to grant rehearing, either by the original panel or *en banc*. While that may sound simple, it’s not. In particular, the *en banc* rehearing process in the federal courts ranks up there with papal elections when it comes to procedural quirks. The FCC’s petition will first be circulated to all ten active judges on the Circuit as well as Senior Judge Leval, who sat on the original panel. Any of those 11 can ask that his/her colleagues be polled as to whether or not to consider the petition. If nobody asks for such a polling, the petition is denied. If polling is requested, then the ten active judges – but *no* senior judges (*i.e.*, Judge Leval doesn’t participate) – are polled. Unless a majority of those polled vote for rehearing, the petition is denied. If a majority of the poll votes to grant rehearing, then the case is re-briefed and re-argued in front of all ten active judges *and* Senior Judge Leval. There is no guarantee that, even if the case gets that far, the FCC would prevail. A majority of the *en banc* court could just as easily affirm the panel’s decision.

In other words, the FCC has a long row to hoe.

Meanwhile, a couple of other indecency cases also continue to wend their way through the Courts.

A separate panel of three judges in the Second Circuit is currently considering an appeal of the FCC decision that the broadcast of “naked buttocks” during an episode of *NYPD Blue* was indecent. After the *Fox* decision came down in July, the *NYPD Blue* panel asked the parties for supplemental briefs discussing the impact of *Fox* on the *NYPD Blue* case. The FCC’s terse, four page, brief noted the Commission’s belief that the facts of the *NYPD Blue* broadcast, which involved the scripted display of adult nudity, were very different from those at issue in *Fox*, which involved the utterance of unscripted “fleeting expletives”. Nevertheless, the Commission conceded that the agency’s decisions in both *Fox* and *NYPD Blue* were based on the same “contextual framework” that the Court found unconstitutional in *Fox*. According to the Commission, the Court’s *Fox* opinion

therefore “appears to suggest” that the policy would be unconstitutional as applied to the *NYPD Blue* case as well.

As a result, the Commission suggests that the *NYPD Blue* appeal be put on hold until after resolution of any rehearing motion (the Commission’s *NYPD Blue* supplemental brief was filed several days before the *Fox* petition for rehearing went in). With both cases pending in the same court, it seems likely that there will not be any decision in the *NYPD Blue* case until the *Fox* rehearing request is disposed of.

And just down the road in Philadelphia, the Third Circuit is also dealing with indecency in CBS’s appeal of the Commission’s Janet Jackson/Super Bowl decision. As we reported in April, the Third Circuit, after hearing oral arguments early this year, asked for supplemental briefs on issues that could allow the court to resolve the case without addressing the constitutional questions regarding the FCC’s indecency policies. While the Third Circuit does not appear to have asked the parties to discuss the possible effect of *Fox* on the Janet Jackson case, CBS (the appellant) did notify the court of the issuance of *Fox* decision, thus suggesting that the Second Circuit’s decision was at least relevant to the Third Circuit’s deliberations. The FCC responded with a two-page letter in which it observed that the Third Circuit is not bound to follow Second Circuit decisions and that, anyway, the Second Circuit decision is flawed, and, by the way, the Third Circuit is still considering issues that might allow it to resolve the Janet Jackson case on non-constitutional grounds.

While the sparring before the various circuits is important and could prove decisive, the real question is whether – and if so, when – we’ll ever get to the Main Event. That would be review by the Supreme Court of the constitutionality of the FCC’s indecency enforcement policy as it has developed since *Pacifica*. Such review could have implications for the FCC’s authority far beyond the somewhat narrow issue of indecency. With the FCC’s election to seek rehearing of *Fox* at the Second Circuit (rather than ask the Supremes to take a look at the case), that Main Event has been deferred at least a year or two.