



FCC Gets To Reconsider Profanity Rulings

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The FCC will get a chance to review and potentially re-do four profanity findings it made in March, and its fleeting profanity crackdown on those cuss words in those four cases will no longer be enforceable while it does.

That is according to the U.S. Court of Appeals for the Second Circuit in New York, which Thursday granted the FCC's request to delay a broadcaster challenge to those rulings for 60 days while the FCC reconsiders them. The court stayed enforcement of its Golden Globes decision finding the f-word, and by extension the s-word, indecent, as applied to the four cases at issue.

It is unclear whether it applies to all fleeting profanities, but the decision says that the enforcement of the four decisions, "which applies the standards announced in the Golden Globes order, is hereby stayed." The FCC, for one, sees the stay as narrow, so broadcasters beware.

"We are pleased by the Court's decision," the FCC said in a statement. "It ensures that the Commission will have the opportunity to hear all of the broadcasters' arguments first. The Court stayed only a limited portion of the order which the Commission had requested to reconsider."

"Hollywood argues that they should be able to say the f-word on television whenever they want. The Commission continues to believe they are wrong, and there should be some limits on what can be shown on television." Translation: There is no free profanity pass for the duration of the stay. The FCC believes it still has the power to fine an f-word during the stay, just not that it can use one of those four decisions as precedent.

Media Access Project President Andrew J. Schwartzman, whose group represents one of the parties in the case, says it differently. He says that by staying, for the foreseeable future, the FCC's decision that uses of the s-word and f-word in an isolated way is presumptively profane--at least until the case is decided--"cuts the heart out of the FCC's crusade against potty-mouth speech."

What it doesn't address, he says, is the FCC's fine of CBS's *Without a Trace*, Janet Jackson or others for nudity or suggestive sex.

But Schwartzman does think that CBS has "all the ammunition it needs to carry the 9/11 program as scheduled." A number of affiliates, including those of Sinclair, are going to preempt or delay the documentary because of its unedited profanities by first responders in the maelstrom of 9/11.

"I don't see how it can be anything other than a general stay," says first amendment attorney John Crigler of Garvey Schubert Barer, something the FCC was trying to avoid.

Does this mean broadcasters are free to swear with impunity in prime time, at least for the next several months? Crigler thinks not. "I don't think this strips the FCC of its power, it just suspends its ability to use that power."

From one attorney advising clients on the 9/11 documentary: "This appears to leave the matter still in doubt," which is the advice he is giving his clients until he finds out a more definitive answer.

Which means that broadcasters still may not know exactly what they can and can't say without risking future censure, though as a practical matter don't look for the FCC to issue any fleeting profanity fines or findings until the case is resolved.

Even so, as a practical matter, it means the FCC will almost certainly steer clear of fleeting profanity fines for the near future. One industry source saw the court's invocation of the Golden Globes decision, albeit parenthetically as a clear sign it was broadening the stay beyond those four findings to the whole of fleeting profanity enforcement, which was a reversal by the Powell FCC of previous FCC policy.

The source also pointed out that, to grant the stay, the court had to find that there was a likelihood broadcasters could win on the merits of their challenge, and that there would be irreparable harm if enforcement was not suspended.

"The 2nd Circuit, in granting our stay request, has recognized the serious First Amendment issues that are raised in this appeal," said Fox in a statement, "and the chilling effect of the FCC's indecency enforcement scheme."

Paul Levinson, chairman of the communications and media studies department at Fordham University, was unhappy the court stopped at just a stay: "The Court should have struck down the rules right now, as the blatant violation of the First Amendment that they are. Other than deciding in the two months that its rules are dead wrong - highly unlikely - giving the FCC more time only serves to prolong a state of affairs in which the First Amendment is being increasingly trampled."

After the FCC's 60-day review, and only 60 days the three-judge panel of the court makes clear, the court will expedite hearing on the merits.

The court heard oral argument last week in which the networks--except ABC--pushed for a hearing on the merits, saying if the court decided to delay the start of the case so the FCC could rethink the decisions, it should only be if while granting a stay of any findings based on "fleeting profanities."

The judges had expected to have a decision last week, but it took longer than they thought, somewhat frustrating the clerk's office, which was being peppered with phone calls looking for an outcome.

The FCC also said it could live with a stay, but only one that applied to the four cusses in question, not the general policy which extends back before March to its finding in the case of Bono's fleeting f-word on NBC's Golden Globes broadcast.

The commission has promised to give stations a chance to respond to the findings and defend themselves--a step the FCC bypassed the first time--then decide what if any modifications to make, all within 60 days.

If the court says no, the same court will proceed to hear the broadcaster challenge to the rulings on their merits.

The FCC, joined by ABC, NBC and CBS affiliate associations, asked a New York Court to delay its scheduled hearing of a challenge to four indecency findings against fleeting expletives--like "bullshit"--that were part of the FCC's March indecency findings.

The incidents at issue occurred during a 2004 airing of CBS' The Early Show, Fox's 2002 and 2003 broadcasts of The Billboard Music Awards and a 2003 episode of ABC's NYPD Blue. NBC did not have a program involved, but intervened nonetheless given the still-unresolved Bono f-word decision that signaled the beginning of the tougher profanity policy.

The four findings had no fine attached and the FCC promised it would not hold them against stations at renewal time, thus the FCC decided there was no need to give stations a chance to respond. The networks, their affiliate associations, and Hearst-Argyle TV took those decisions directly to court, since the FCC had bypassed the

normal appeals process in what it said was an effort to provide guidance--which broadcasters have clamored for--without adverse consequences.

In essence the FCC was saying: These are the words we believe we can fine going forward. ABC did not oppose the FCC request for remand, while the other networks and the Fox affiliate association wanted the court to proceed directly to a trial on the merits unless a blanket stay was granted on all fleeting profanity enforcement until the case was settled.

The FCC's initial decision in Bono was that a fleeting, adjectival f-word was not indecent, but that was later reversed by the commissioners after Congress pushed the FCC to reexamine the case.

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