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FCC Profanity Crackdown in Limbo

Supreme Court Not Likely to Hear Oral Argument Until April

By John Eggerton -- *Broadcasting & Cable*, 9/29/2007 5:00:00 PM



The Federal Communications Commission's crackdown on fleeting profanities will likely remain in limbo until sometime next year, or even into 2009.

The solicitor general, the Justice Department attorney who heads up appeals to the high court, last week [informed the Supreme Court](#) that it would team up with the FCC to challenge a lower court's reversal of the profanity finding against Fox for expletives on the *Billboard Music Awards* back in 2002 and 2003.

Ever since that reversal, the FCC's policy has been unclear, and any profanity fines or findings are highly unlikely until the legal issues are resolved.

Now, several veteran First Amendment attorneys said, the Supreme Court won't even decide whether to take the case until December or January. If it doesn't take the appeal -- and it is likely not to, said the same attorneys -- the FCC is under orders, but no timetable, to defend its initial policy to the Second Circuit Court of Appeals, the lower court that found that decision arbitrary and capricious.

If the court does take the case, oral argument would be no sooner than April, or it could even be pushed to the fall term if the court's dance card were already filled for spring. Then the court would have to decide the case by June 2009.

But several lawyers *B&C* talked to said the court was not likely to take the case anyway. So why seek the appeal?

[Andrew J. Schwartzman](#), president of Media Access Project, said he was puzzled by the government's decision to seek the review of a case that was decided narrowly on procedural grounds and concerning the application of established law. He said the court was not likely to take the case.

"We will oppose the Supreme Court review because it only prolongs the uncertainty for our clients," said Schwartzman, who represents Hollywood's interest (technically, the [Center for Creative Voices in Media](#)) in the case.

John Crigler, an attorney with Garvey Schubert Barer who has argued indecency appeals for broadcast clients, agreed with Schwartzman that the high court is unlikely to take the case. So why did the solicitor general's office seek cert?

One reason, he suggested, was to take the political pressure off the FCC: "They probably struggled with that issue, but I suspect that the commission persuaded them that they needed to do it. I think the commission wants to go back to Congress and say: 'What more could we do? We took it as far as we possibly could. And if the Supreme Court says no to the case, the blood is not on our hands.'"

Congress could then step in with bills already teed up to give the FCC the express authority to fine fleeting words and images, although they would have a hard time making it into law.

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