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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

No End In Sight For FCC Indecency Fights

By **Ryan Davis**

Law360, New York (June 21, 2012, 9:27 PM ET) -- By refusing to rule on whether the Federal Communications Commission's indecency policy violates the First Amendment, the U.S. Supreme Court has invited many more years of litigation by broadcasters frustrated by what they see as the vagueness of the policy, experts said.

Citing due process concerns, the high court on Thursday threw out FCC rulings that programs on Fox and ABC ran afoul of the agency's policy against airing "fleeting expletives," but declined to weigh in on whether the policy is constitutional or whether the FCC has the authority to regulate indecency on broadcast television and radio.

Broadcasters remain concerned that the FCC policy provides no meaningful guidance on exactly what type of words or images are subjects to fines, and any changes made by the FCC will likely be challenged in court, said Lawrence Iser of Kinsella Weitzman Iser Kump & Aldisert LLP.

"The FCC needs to ask themselves, do they want to continue this fight? Do they want to be censors? Do they need to be?" he said. "If they do try to continue to regulate, they're going to litigate this forever."

The FCC changed its policy in 2004 allow for fines on passing, rather than repeated, uses of swear words or nudity on television, then applied the new rule to Fox and ABC broadcasts from 2002 and 2003. The Supreme Court's unanimous ruling held only that the FCC decisions on those shows had to be set aside because the networks did not have fair notice of the new policy.

The decision clearly leaves open the possibility that the next case involving an FCC indecency fine imposed after the new policy was introduced could be used as a vehicle to address the free speech implications of the policy that the networks sought to raise, according to Paul Smith of Jenner & Block LLP.

"There's a pretty good reason to think that another case will be brought if they don't change the policy, and sooner or later the court will have to address these questions," he said.

There are likely to be ample opportunities for further review of the policy. The FCC noted in a statement Thursday that it has a backlog of 1.5 million indecency complaints involving 9,700 television broadcasts dating back to 2003. There are also several other cases pending in which networks have been found liable for violating the policy, but in some, the FCC has not yet issued final rulings.

The television networks asked the Supreme Court to overrule its 1978 decision in FCC v. Pacifica Foundation, which established the FCC's authority to regulate indecency on broadcast television

and radio. While that issue was discussed at oral arguments in January, the justices chose not to rule on it.

According to Iser, it no longer makes sense for the FCC to be able to fine broadcast television networks. Most entertainment content is now viewed on cable or the Internet, neither of which is subject to decency regulations, and "it hasn't resulted in the destruction of society," he said.

"Maybe the time has come for them to ease up," he said of the FCC. "They'll have to think about the litigation and the cost to taxpayers and decide whether it's beneficial to the country to continue to regulate."

Each of the five FCC commissioners issued statements in response to the Supreme Court's ruling on Thursday, and none of them indicated that they are considering giving up on decency regulation. Several of the commissioners said that they plan to work to clarify the policy and that the end of the litigation will allow the agency to address the backlog of indecency complaints.

"Consistent with vital First Amendment principles, the FCC will carry out Congress' directive to protect young TV viewers," FCC Chairman Julius Genachowski said.

Short of deciding to no longer regulate broadcast television and radio at all, one option the FCC could take would be to revert to the pre-2004 policy, which required offensive content to be repeated or prolonged in order to merit a fine, Smith said.

"There would be a lot fewer cases under the old policy," he said. "That would minimize the friction between government regulators and speech rights."

As long as the fleeting expletives policy remains in effect in some form, television networks that want to avoid being subject to FCC actions must take steps to avoid broadcasting anything that might run afoul of the agency's rules, attorneys said.

"Because the policy wasn't deemed unconstitutional, broadcasters are left in the position of facing fines and having to fight them, and free speech is as chilled today as it was yesterday," Nicholas Rozansky of Ezra Brutzkus Gubner LLP said.

While the FCC has not been enforcing the fleeting expletives policy as rigorously as it had been when it was first introduced in 2004, "that could change tomorrow," he said.

"If I were advising a broadcaster, I'd tell them to use a delay to make sure those words don't get aired, unless they want to take a test case to the Supreme Court," he said.

Any future Supreme Court case over the policy wouldn't necessarily resolve the broader issue, said Abner Greene, a professor at Fordham University School of Law. The court could rule on whether the fleeting expletives policy is permissible, or whether it has been uniformly applied, rather than deciding whether the government has the authority to regulate broadcast television.

"The broader issue that everyone hopes the court will revisit is the Pacifica decision," he said. "It's anyone's guess as to whether the court would reaffirm that ruling."

If that key issue is ever squarely addressed by the Supreme Court, it is likely to result in an unusually fractured ruling, Greene said.

The same FCC action against Fox has been before the Supreme Court once before, in 2009, when the justices vacated a lower court's finding that it was arbitrary and capricious. In that ruling,

Justice Clarence Thomas issued a concurring opinion discussing what he called the questionable viability of Pacifica and stating that he was open to reconsidering it.

Justice Ruth Bader Ginsburg, his colleague on the opposite end of the political spectrum, issued a similar concurrence with Thursday's opinion.

"If the court ever gets to the First Amendment issues, it's not going to be a traditional 5-4 split," Greene said. "There's an assortment of justices on both sides."

Eugene Volokh, a professor at UCLA School of Law, speculated that because Justice Sonia Sotomayor recused herself from Thursday's decision, there could have been a 4-4 split on the question of overruling Pacifica.

Since that would have let stand the Second Circuit's ruling that the FCC's policy is unconstitutional but established no precedent, the court may have opted to rule on the narrower due process issue instead, he said.

"The ruling came five months after oral argument, so something must have kept them from writing this short, unanimous decision," he said. "It might mean the court was split."

--Editing by Sarah Golin and Andrew Park.