What FCC v. Fox Television Means for Non-Broadcasters

June 25, 2012

In *FCC v. Fox Television Stations, Inc.*, the US Supreme Court reversed FCC indecency fines against two TV broadcast networks. The decision has garnered a lot of attention in the broadcast industry and conventional media (and rightly so). News stories describe the decision as a clear victory for broadcasters. Many commentators also noted the apparently shaky ground of the 1978 *Pacifica* decision finding George Carlin's "Filthy Words" monologue indecent. (Including this decidedly non-legal discussion.) These are topics of great interest to the broadcast industry.

For all its significance in the broadcast world, the decision is equally significant for non-broadcasters. In *Fox Television*, the Supreme Court sets a high bar for FCC enforcement of general obligations under the Communications Act, not just the FCC's indecency standard. As a result, *Fox Television* will constrain the FCC's enforcement abilities in several prominent areas of common carrier regulation as well. Most significantly, we believe that *Fox Television* limits the FCC's ability to impose fines for violations of Section 201(b)'s prohibition on unjust and unreasonable practices. Unless the FCC has provided fair notice to common carriers of the conduct required under Section 201(b), it may not impose sanctions in the enforcement context.

FCC v. Fox Television. These cases arise from three well-publicized incidents in broadcast television. Two incidents involve Fox's live broadcasts of awards shows in which Cher and Nicole Richie, respectively, uttered fleeting expletives during unscripted portions of the shows. In the third incident, an ABC broadcast of NYPD Blue included brief female nudity. The history of the FCC's actions with respect to these incidents is complicated, but in each instance, the FCC found the broadcasts indecent. After the Supreme Court held that the FCC's so-called "fleeting expletive" rule was not arbitrary and capricious, the 3rd Circuit reviewed the constitutionality of the FCC action. The court reversed the FCC's action, and the FCC sought review before the Supreme Court.

The Court upheld the 3rd Circuit's outcome. The Court ruled (8-0) that the FCC failed to give Fox or ABC fair notice prior to the broadcasts in question that fleeting expletives or brief nudity could be the basis for enforcement of the indecency prohibition. The Court found that the FCC enforcement actions therefore violated the Due Process Clause of the Fifth Amendment. Importantly, the Court did not reach the First Amendment implications of the FCC's enforcement action. The Court also was careful to note that it was not addressing the constitutionality of the FCC's current indecency policy (i.e., as adopted after the Fox and ABC broadcasts, but before enforcement action was taken against the networks)., nor was it limiting the FCC's ability to modify that policy in light of the public interest and applicable legal requirements.

Implications for non-broadcast cases. Although the factual context involves television broadcasts and the FCC's "fleeting expletives" policy, the Court's decision is much broader in its impact. The Court's "fair notice" holding is not limited to broadcast indecency. As the Court explained, A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.

The Court held that this principle results from two related due process concerns: (1) regulated parties “should know what is required of them so they may act accordingly,” and (2) the rules must be precise enough “so that those enforcing the law do not act in an arbitrary or discriminatory way.”

These principles will have an impact on a wide range of FCC enforcement activities. In particular, we’ve noted in this blog the recent trend of FCC cases relying upon Section 201(b) to impose fines for cramming, prepaid card marketing and other carrier practices found to violate the requirement that all practices for and in connection with telecommunications service be “just and reasonable.” *Fox Television* will significantly constrain the FCC’s ability to impose fines in 201(b) cases, at least in the absence of clear FCC rules defining the conduct required or prohibited. This decision will place over $35 million in forfeitures proposed in 2011 in doubt.

Second, *Fox Television* takes a broad view of what FCC enforcement actions implicate this principle. The Court rejected an FCC claim that it did not impose a sanction where, in one of the incidents, the FCC found the broadcast indecent but declined to impose a fine for the broadcast. The Court found the possibility of increased penalties for future violations to render the FCC’s action sufficiently punitive to implicate the Due Process clause. The FCC has a similar authority in non-broadcast cases to consider a carrier’s “history of compliance” in setting a penalty. As a result, non-broadcast enforcement actions will be impacted, even if they do not impose monetary forfeitures.