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Broadcasters Win Appeal Of FCC's Profanity Ruling

By Frank Ahrens
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A federal appeals court tossed out an indecency ruling against [Rupert Murdoch's](#) Fox television network yesterday and broadly questioned whether the [Federal Communications Commission](#) has the right to police the airwaves for offensive language.

In a 2 to 1 decision, the [U.S. Court of Appeals](#) for the 2nd Circuit in [New York](#) ruled that the FCC went too far in issuing a 2006 decision against [Fox Broadcasting](#) for separate incidents in 2002 and 2003 after singer [Cher](#) and celebrity [Nicole Richie](#) each uttered an expletive on live television.

The ruling is a rebuke to the FCC and a victory for television networks, which in recent years have pushed back against the FCC's crackdown on indecency. In 2004, the agency reversed years of policy and effectively branded even "fleeting," or one-time, use of an expletive off-limits on broadcast television and radio, angering [Hollywood](#), which warned of a chilling effect on programming.

The court ruled yesterday that the FCC had not adequately, or constitutionally, explained why it changed its mind on the fleeting use of profanity and ordered the agency to retool its regulations.

The court decision could bolster the networks' argument that parents need better tools, such as the V-chip and channel-blocking technology, rather than more government regulation to protect children from offensive material.

Because the Fox incidents occurred before the FCC's 2004 ruling on fleeting profanity, the agency did not fine the network, though it did rule that the broadcasts were indecent. Fox appealed the FCC ruling to the 2nd Circuit, saying the new rule set a dangerous precedent for clamping down on free speech.

The court yesterday sided with Fox, which is owned by Murdoch's [News Corp.](#), writing that the FCC's "new policy sanctioning 'fleeting expletives' is arbitrary and capricious."

During a December 2002 [Billboard Music Awards](#) show on Fox, Cher dismissed her critics, saying, "[f-word] 'em." During the following December's Billboard show on Fox, Richie said: "Have you ever tried to get cow [excrement] out of a [Prada](#) purse? It's not so [f-word] simple."

The court, in its ruling, said "we are doubtful that by merely proffering a reasoned analysis for its new approach to indecency and profanity, the [FCC] can adequately respond to the constitutional and statutory challenges raised by the networks."

"I'm disappointed in the court's ruling," FCC Chairman Kevin J. Martin said in an interview. "I think the commission had done the right thing in trying to protect families from that kind of language, and I think it's unfortunate that the court in New York has said that this kind of language is appropriate on TV."

FCC lawyers were reviewing the agency's options and may appeal the decision to the Supreme Court, Martin said. Such an appeal could possibly setting up a test case to determine whether the federal government still has the right and responsibility to police the public airwaves, said lawyers who specialize in the First Amendment.

FCC Commissioner Michael J. Copps warned in a statement, "any broadcaster who sees this decision as a green light to send more gratuitous sex and violence into our homes would be making a huge mistake."

Critics of the FCC crackdown applauded yesterday's ruling.

"We are very pleased with the court's decision and continue to believe that government regulation of content serves no purpose other than to chill artistic expression in violation of the First Amendment," Fox spokesman Scott Grogan said in a statement. "Viewers should be allowed to determine for themselves and their families, through the many parental control technologies available, what is appropriate viewing for their home."

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In a statement, Andrew Jay Schwartzman, president of the Media Access Project, a public-interest group specializing in the media, said: "It's a shame that citizens and broadcasters had to seek protection from the courts, but it is very reassuring to know that one branch of the government can rise above demagoguery."

The Parents Television Council, which has sent hundreds of thousands of indecency complaints to the FCC in recent years, criticized the ruling. The group's president, Tim Winter, said in a statement that "a court in [New York City](#) has cleared the way for television networks to use the f-word and s-word in front of children at any time of the day."

The FCC forbids radio and television broadcast material that is sexual or excretory in nature from 6 a.m. to 10 p.m., when children are most likely to be in the audience.

In 2006, Congress answered the FCC's request to up the maximum indecency fine, raising it to \$325,000 from \$32,500. The rules apply only to AM- and FM-band radio programs and over-the-air broadcast television. Cable and satellite television and radio channels are outside the FCC's jurisdiction, but the agency recently sent a report to Congress saying it could pass laws enabling the FCC to regulate violent content on cable and satellite television.

The culture war over indecency on television began to simmer in 2003 after [U2's](#) lead singer, Bono, uttered the f-word during a live awards show on [NBC](#). The FCC initially ruled that the incident was not indecent because Bono did not use the word to describe sexual intercourse.



Lawmakers and parents groups responded quickly, saying the FCC had tacitly approved use of the f-word on television. Michael K. Powell, who then was chairman of the FCC, urged the agency to reverse its decision, and it did, effectively putting the expletive off-limits.

The debate boiled over in February 2004, during the Super Bowl halftime show on [CBS](#), after singer [Janet Jackson's](#) right breast was briefly exposed, causing a brief national tempest.

Powell launched an indecency investigation the next day. The agency quickly found that the broadcast violated the FCC's statutes and fined 20 CBS stations \$550,000. CBS has appealed the decision in the U.S. Court of Appeals for the 3rd Circuit in [Philadelphia](#). The court has scheduled oral arguments in the case for September.

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