



April 2009

Updates on the News

Fleeting expletives update – Stop the presses!! Just as we were putting this issue of the *Memo to Clients* to bed, the Supreme Court issued its long-awaited decision in the *Fox* indecency case. We have not yet had a chance to digest the the 70+ pages of opinions (majority, concurrences, dissents), but from a quick skim it appears that this is *still* not the final round in the slugfest.

As you will recall, this case involves two live broadcasts of awards shows. In one, Cher used the expression “fuck ‘em” to express her disdain for certain of her critics, and in the other, Nicole Richie used “fuck” and “shit” once each. In its post-Janet Jackson hypersensitivity to this kind of thing, the FCC declared both broadcasts to be violations of its indecency policy. Fox (which broadcast both shows) appealed to the U.S. Court of Appeals for the Second Circuit in New York, which resoundingly reversed the FCC’s decision in 2008. The FCC then asked the Supremes to review the Second Circuit’s decision, and the Supremes have obliged.

The Second Circuit’s opinion was interesting because it threw out the FCC’s actions based on principles of administrative law, not constitutional law. That is, the court concluded that the FCC’s actions were arbitrary and capricious. Since Federal agencies are required by statute (not to mention common sense) *not* to act arbitrarily or capriciously, the court tossed the actions. ***But*** the Second Circuit then tacked on an extended discussion of constitutional law in which the court made clear that it believes that the actions were unconstitutional as well – but, since the court didn’t have to reach issues of constitutionality (the FCC’s actions having fallen short of the statutory “arbitrary and capricious” standard), that discussion was “dicta”, *i.e.*, interesting but essentially irrelevant to the final decision.

When the Supremes agreed to review the Second Circuit’s decision, it was not clear whether the Supremes would be looking only at the statutory argument or whether they would also consider the constitutional points. We now know: the majority has chosen to look at only the statutory ground, and has concluded that the FCC’s actions were not arbitrary and capricious. Four justices disagreed with that conclusion. Since the majority opinion addressed only the statutory arguments, though, the path has presumably been cleared for Fox to go back to the Second Circuit to present its constitutional arguments – and the Second Circuit’s earlier decision provides a strong suggestion of how the Second Circuit is likely to rule on those arguments. If the Second Circuit does again toss the

FCC's actions – but on constitutional, rather than statutory, grounds, we can probably look for yet another trip to the Supremes for this case.

We will be posting a blog (at www.commlawblog.com) analyzing the opinions in more detail, and will include more comprehensive coverage in next month's *Memo to Clients*.

Ask not for how long the FCC tolls -- Long-time readers will recall that, a couple of years ago, the FCC started entering into “tolling agreements” with broadcasters subject to complaints (particularly indecency complaints). A broadcaster entering into such an agreement effectively waived the statute of limitations during which the FCC could issue a notice of apparent liability (NAL) for the alleged violation, and the FCC in turn usually agreed to lift any “enforcement hold” on the licensee. (An “enforcement hold” means that, because of the pending allegation, the Media Bureau will not grant the any renewal or long-form assignment/transfer applications, so lifting the hold meant that business could go forward – a win-win situation.) In the early days of tolling agreements, the Commission was agreeable to limiting the extent of the tolling to two-three years. That is, the licensee/alleged wrong-doer would be extending its potential liability only for two or three years, after which (if the FCC didn't issue an NAL), the licensee would be free as a bird. But soon the Commission realized that, given the slowness of the FCC's processes, two-three years might not do the FCC any good. As a result, the Commission started insisting on indefinite tolling, meaning that the sword of a potential fine would forever be dangling over the licensee/alleged wrong-doer. Recently, however, we have heard that the Commission's staff may have had yet another change of heart. As a result, word is that the staff may now be agreeable to two-three year tolling terms. None of this is official and etched in stone, but if you are negotiating a tolling agreement, you might want to keep it in mind. They may really mean it this time, but you never can tell.

Application fees increased, finally – Last September the Commission announced that it would be adjusting its schedules of applications fees upwards consistently with the cost of living. The new fees would be effective 90 days after the Commission notified Congress of the increase, which would have made the new fees effective on December 30. But time always flies when you're having fun, and despite a couple of false starts (chronicled on our blog — go to www.commlawblog.com and search for “pursestrings”), it wasn't until March that the Commission announced that the new fees would finally become effective as of April 28.