

Memorandum to Clients



A chance to weigh in

The Public Inspection File Rule: FCC Asks If It's Really Necessary

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Here's a surprise! The FCC has invited comments on whether or not the local public inspection file requirement is really necessary. Since the Commission has assiduously ignored – for more than five years – a petition for rule-making seeking the abolition of those requirements, this invitation should puzzle some and thrill others.

As it turns out, the obligations imposed by the public file rules constitute “information collections” (in the parlance of our old friend, the Paperwork Reduction Act), and we all know what that means: periodically (like every three years) the FCC must justify such requirements to the Office of Management and Budget. The current OMB approval is set to expire on September 30, 2011, which means that, if the Commission plans to keep those rules on the books, it's got to re-justify the rules to OMB's satisfaction. That process entails two opportunities for public comment stretching over at least 90 days. With less than 180 days to go before expiration, the FCC has now started that process.

Unlike other Commission proceedings that get kicked off with much fanfare – public notices, Commissioners hailing “vibrancy”, “robustness”, “transparency” and the like, maybe even a webcast or blog – this one is more like a stealth item wrapped in an invisibility cloak flying under the radar. So far all we've seen is a blander-than-bland Federal Register announcement.

But that doesn't mean that the party hasn't started, so come on down.

The public file rule for commercial broadcast stations may be found in Section 73.3526; for noncommercial stations, it's in Section 73.3527. (Two other sections relating to political files – 76.1701 (cable operators) and 73.1943 (broadcasters) – are also included in the Commission's inquiry.) As the FCC sees it, public files provide members of the local audience a quick and direct way of monitoring broadcaster performance.

According to many broadcasters, though, such files are largely if not totally ineffective and unnecessary, since (in the reported experience of many of those broadcasters) the public seldom if ever inspects the files. From that perspective, the requirement to maintain the files is an empty make-work exercise that serves no purpose . . . other than to provide the FCC with a way to collect tens (if not hundreds) of thousands of dollars in fines from folks who happen not to have dotted all their public file I's and crossed all their public file T's. Related gripe: the broadcast renewal application form requires licensees to rat themselves out with respect to such miscues, dramatically reducing any enforcement burden the FCC might otherwise encounter.

Among the questions on which the Commission is now inviting comment are:

- (a) whether the public file rules are “necessary for the proper performance of the functions of the Commission, including whether the [collected] information shall have practical utility”; and
- (b) the accuracy of the Commission's burden estimate.

As to the first question, the FCC already has an inkling. In January, 2006, our old friend, communications attorney David Tillotson, filed a petition for reconsideration urging that the public file rules be eliminated. After four months (and, we understand, some pushing by Tillotson), the Commission assigned his petition a file number (RM-11332) and issued a public notice. Don't remember that notice? That's not a surprise, as it was another one of those stealth/invisible/under-the-radar items, tersely describing Tillotson's proposal only as involving some unspecified “amendment” of the rules. (We've included a link to it on our blog at www.CommLawBlog.com.)

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Congress looking to weigh in?

FCC Process Reform: Change In The Air?

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Have any thoughts on how the FCC could better operate? Increasingly, a number of influential members of Congress seem to believe they do. Momentum continues to build on Capitol Hill for reform of the Federal Communications Commission with recent statements – and hints of action – from key members of the House Energy and Commerce Committee.

Speaking at the American Cable Association's annual summit on April 13, House Communications Subcommittee Chairman Greg Walden suggested there would be a hearing and movement on legislation on FCC reform in the near future. Expectations are that the five FCC commissioners will be called to testify before the subcommittee within a few weeks of Congress' return from recess.

Walden made a strong pitch for Congress to actively oversee the agency, stating: "Failure to do that only gives them license to do other things they don't have the authority to do." Walden, of course, introduced a House-passed resolution to invalidate, as an overreach of FCC authority, the Commission's recent net neutrality rules.

Walden expressed his belief that both the Democrat and Republican FCC commissioners agree on the basic need to improve how the agency functions (*see, e.g.*, "Copps, Commissioner, sunshine rules" and "Baker, Commissioner, merger review") and that such reform can be done in a "positive and constructive way."

And Walden is not alone in his interest in Commission process reform. He and Communications Subcommittee Ranking Member Anna Eshoo have had discussions on this issue. And, of course, in March, Rep. Eshoo introduced H.R. 1009, the Federal Communications Commission Collaboration Act, to change the FCC's sunshine rules to allow three or more commissioners to meet outside of their regular public meeting as long as both parties are represented and no agency action is taken.

Rep. Cliff Stearns, chairman of the Oversight Subcommittee of the House Energy and Commerce Committee, also has reform on his mind. At the April 12 Free State Foundation event "Regulatory Reform at the FCC: Why Not Now?", Chairman Stearns made the case for a lighter regulatory touch by the Commission. He spoke about the increased convergence in the marketplace where technology outpaces regulations and where most any attempt to fit present day services into past rules "stifles innovation and simply creates uncertainty in the marketplace."

Stearns cited the potential lack of respect for, and confidence in, an agency that adopts orders after a comment period and issues press releases with a summary of orders but then waits weeks or months before releasing the full text of the order itself. He suggested the Commission should let the public see proposed rules before adoption and provide a realistic amount of time to comment.

Stearns went on to address the need for reform of the sunshine laws intended to create openness but which instead lead to an opaque process in which drafts simply are circulated to get around the public meeting requirement. Result: more secrecy, not less. He pointed to the Eshoo-proposed legislation to allow more than two commissioners to meet privately as a possible solution. Also, he spoke of the necessity of functional shot clocks to reduce regulatory uncertainty that can hinder investment and long-term business planning.

Will these possible procedural reforms be the only small bite Congress takes out of the FCC regulatory authority, or can we expect more, and more aggressive, consumption if Congress develops a taste for that particular delicacy? By defining its mission and purview broadly (as seems to be the case to many observers), does the FCC make itself a more tempting tar-

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Not too many broadcast-related enforcement activities this past month, but the Enforcement Bureau did cast a wide net across several industries to bring schools, casinos and – of course – broadcasters into compliance.

In any language, compliance is the name of the game - An AM station in Decatur, Georgia, entered into a consent decree in which it “voluntarily” agreed to pay \$22,000 to have the FCC stop an investigation that it was conducting. Although the FCC does not identify complainants in these cases, it is safe to speculate that a disgruntled employee, or possibly a knowledgeable competitor, may have been the tipster that got the investigatory ball rolling in this case.

According to the complainant, the station may have been the subject of an unauthorized transfer of control. In addition, the complainant told the Feds that the station’s licensee failed to file reports and documents with FCC and that station policies regarding public file inspection were faulty. (Note that these are not the kinds of issues that Joe or Loretta Average-Listener would be likely to raise – particularly because the allegations included reference to certain contracts that, supposedly, had been withheld from both the public and the FCC.)

Apparently unable to deny the allegations – in fact, it admitted that it violated the rules – the licensee sought to mitigate its downside by claiming that (a) it has been in “financial distress” and (b) its principal owner and president doesn’t speak English well. Both those factors “greatly hindered” the licensee’s ability to comply with the Commission’s rules, according to the licensee.

After reviewing financial data supplied by the licensee, the Enforcement Bureau determined that the station was under some financial distress . . . but that didn’t stop the Bureau from slapping the licensee with a \$22,000 fine. Presumably to ease the sting a bit, the Bureau did agree to accept five \$4,400 payments spread out over the next 16 months. Additionally, the licensee will be required to set up and maintain a “Compliance Plan” involving, at a minimum: (a) training station employees in the intricacies of ownership, public file, and reporting rules, and (b) appointment of a “Compliance Officer” to be responsible for the Plan. The Compliance Officer will also have to submit annual Compliance Reports to the Commission for the next three years.

The consent decree is silent about any need for the licensee’s honcho to improve his English language skills.

“You’ve got to know when to renew ’em, know when to ID ’em” - The FCC targeted casinos in Las Vegas and Atlantic City this month. G-men were wandering about the Boardwalk and the Strip with direction finding equipment, performing “routine monitoring” of certain paging frequencies involving, it appears, channels used by casinos’ walkie-talkies.

In Atlantic City, the Feds identified operation on a channel that was did not show up as authorized in the FCC’s databases. The culprit turned out to be Harrah’s Resort Atlantic City. Harrah’s had had a license for the gear in question, but that license had expired back in 2000.

Harrah’s responded that its failure to renew that particular license had been inadvertent, but the Enforcement folks weren’t impressed. Concluding that Harrah’s had failed to file required forms (*i.e.*, the license renewal application) and had operated its gear without a license, the Bureau did the addition of the base fines (\$3K for the former violation, \$10K for the latter) and came up with \$13K. But then it tossed in an extra \$2,000 because the unlicensed operation had continued for ten years, for cryin’ out loud. Total whack: \$15,000.

The Tropicana in Las Vegas saw an FCC agent poking around there, too, in response to a complaint. Unlike Harrah’s back east, the Tropicana had a valid license to operate its radios. But the frequency in question is shared, and Tropicana apparently wasn’t sharing nicely. Instead of operating minimally, so as not to cause interference, it was

operating pretty much continuously – and without the required station IDs. The Trop has 20 days to tell the Feds its side of the story.

FCC teaches a school a lesson - The halls of academia are no strangers to cellphones, texting and other communication which (at least in the eyes of many) distract from truly academic pursuits. It looks like a California high school was trying to discourage the use of such gadgets by installing a radio frequency jammer in one of its buildings. Unfortunately for the school, the FCC has specifically forbidden the use of cell jammers. Much of the FCC’s attention in that area has tended to be focused on the use of jammers by prison officials looking to discourage inmates looking to communicate with their compatriots on the outside, but let’s face it, cell jamming is cell jamming. (We refrain from drawing parallels between schools and prisons, though.) In any event, Commission inspectors found the jammer and sent the school a notice advising it that jamming is a no-no.

Focus on FCC Fines

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get for broader substantive reform? With a forward-leaning FCC Chairman from one party and a House controlled by the other, can we expect more?

And if Congress does set its sights on bigger prey, what are the chances that it will sooner or later find itself (like the crew of the Orca) in need of a bigger boat?



Proposed changes, consequent delays, may stick in some craws

FCC Revising Tower Registration Rules, Routine

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Looking to build a new tower, or maybe make changes to an existing tower? If your proposal involves an antenna structure that requires an Antenna Structure Registration (ASR), you can expect delays ahead if new procedures recently proposed by the Commission are adopted.

This latest development is just one more wrinkle in the years-long effort by a number of bird-loving groups to force the Commission to consider the impact of its ASR program on birds. We have written about that effort – which the birders appear to be winning – previously. (See, for instance, articles in the May, 2010 and November, 2010 *Memos to Clients*.) The Commission is already in the middle of its own (court-ordered) Programmatic Environmental Assessment (PEA) relative to the ASR program. And while the Commission wades through the PEA process, it is now proposing new processing rules and interim procedures designed to give the public an opportunity to comment on proposed ASR-dependent towers (and proposed changes to existing towers) even before they're formally proposed!

All of this is set out in a public notice recently published in the Federal Register.

The new rules and procedures are designed: (a) to address the Court's finding that the Commission's existing ASR approval process fails to provide an opportunity for public comment; and (b) to implement certain provisions of a private compromise agreement reached last year by a number of tower-related and environmental groups. (We reported on that agreement in the May, 2010 *Memo to Clients*.) Comments on the proposed rules are due by **May 5, 2011**. (There will be no opportunity to file reply comments.)

Under the proposed rules, obtaining approval to construct any new tower subject to registration in the ASR system would become more complicated, particularly for towers over 450 feet. (Most towers up to 200 feet tall and not in the glide slope of an airport can be built without an ASR. While the public notice does not say so expressly, we understand from folks close to the FCC process that the new rules are **not** intended to change this important exception. Let's hope that holds true.)

The proposed new rules would require a period for public comment on *any* new tower construction or major modification requiring ASR *before* a formal proposal for the construction/modification is filed with the FCC. After the comment period, the FCC would determine whether an Environmental Assessment (EA) is required before approving the tower. At least until the Commission completes its own

PEA of the entire ASR program, individual EAs will automatically be required for any proposed tower or modification over 450 feet.

According to the public notice, anyone intending to register a new or substantially changed tower subject to ASR requirements would commence the process by providing the Commission with the details of the construction which the proponent intends to propose. The public notice doesn't say exactly how the information is to be submitted – by letter, electronically, some other way. It does suggest that proponents might file a “*partially completed*” Form 854 ASR form. Not *fully* completed, mind you – just *partially*.

The information to be submitted must include, “at a minimum”, all of the information required by Form 854 relative to ownership and contact information, geographic location, height, type of structure, and anticipated lighting. (You may want to take a look at Form 854. Since you're going to end up having to file a full Form 854 eventually, we're not sure why it wouldn't be easier to just require applicants to file the form to begin with. But that's what the public notice says.)

So prospective tower proponents *don't* file a complete Form 854 ASR application. Instead, they're supposed to file the information they would have filed on Form 854 if they could have filed such a form. They must also provide local public notice of the to-be-proposed tower construction, either in a local newspaper or through “other appropriate means.” This local notice must provide the details of the to-be-proposed construction as well as instructions on how to file comments about it with the Commission.

Meanwhile, using the information submitted to it, the Commission will post on its website a national notice of the to-be-proposed tower construction. That national notice will include the information filed by the prospective proponent, together with the date of the local public notice. If the prospective proponent has already determined that the tower requires an EA (based on the Commission's existing rules, or the presumption associated with 450-foot-plus towers), that EA is also to be submitted to the FCC at this time.

The proposed rules don't make any promises about when the national notice will appear on the FCC's website – only that it will be “on or after” the date of the local public notice. Once the national notice does appear, interested parties will have 30 days to file a “Request for Environmental Processing” asking the Commission to require the prospec-

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Under the proposed rules, obtaining approval to construct any new tower subject to ASR registration would become more complicated.

The job's not over 'til the paperwork's done

FCC Tweaks Follow-up Notice Requirements For *Ex Parte* Contacts

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The FCC has adopted new rules clarifying, and expanding, the disclosure requirements for parties lobbying the FCC. Although the Commission announced the new rules back in February, they aren't scheduled to take effect until June 1.

Companies, associations and individuals are, broadly speaking, permitted to seek to influence FCC staff on agency decision-making and policies through one-on-one, face-to-face meetings with the Commissioners and/or staff. However, if you indulge in such in-person discussions – known in Washington parlance as “*ex parte*” (Latin for “one-sided”) meetings – you are required to promptly file a notice in the docket of whatever proceeding(s) you happened to discuss with the staff. Such “*ex parte* notices” must summarize the meat of the meetings and include copies of any reports or handouts provided to the FCC.

The purpose behind the notice requirement, of course, is to encourage transparent governance. Unfortunately, the notice process has not always yielded true transparency. Historically, parties were not required to list all the participants in the meetings, and if the presentation simply reiterated arguments or information previously presented in filed comments or another document, the rules didn't specifically require any notice at all. It hasn't been unusual for a party to meet with members of the FCC staff multiple times over the course of a single proceeding or matter – and often only a few of those meetings would be recorded in an *ex parte* notice, since the material covered was supposedly the same.

No more. The FCC is expanding the notice requirement to include written notices of *all* lobbying meetings – regardless of whether any new arguments or information are presented. Where similar positions have been advocated to the Commission in prior filings, parties must file written *ex parte* notices that, at minimum, summarize the arguments made in the meeting or cite to the pages or paragraphs of such prior filings where the information can be found. Of course, as before, any *new* arguments and data presented orally must also be summarized in the written *ex parte* notice.

Notices for all *ex parte* presentations must now include the name of the person(s) who made the *ex parte* presentation as well as a list of all persons attending (both FCC staff *and* outside attendees). The rules are modified to require parties send copies of *ex parte* notices to each

meeting participant (copies sent to FCC staff and Commissioners present at the meeting must be sent electronically).

Other changes: the FCC has now made *electronic* filing of *ex parte* notices mandatory (except in special hardship cases). These notices must be in machine-readable PDF format (no scanned images!). Confidential material can be submitted on paper, but a redacted version must be uploaded to ECFS. Folks have also been given an extra day to file most notices (two business days following the meeting instead of one), but expedited filing is still the rule in cases where presentations are made in or close to the “sunshine period” (*i.e.*, the period immediately before a Commission decision).

The new rules are designed to bring additional clarity and order to procedures for *ex partes* around the sunshine period. The changes are:

The purpose behind the notice requirement is to encourage transparent governance.

- The sunshine period will now commence on the day *after* the FCC announces it – not the moment it is announced. Rather than one business day, this one day rule is literal – weekends and holidays are included.
- Parties making an *ex parte* presentation on the day the sunshine period is announced will have until close of business the next day to file the written notice, instead of the usual two business days.
- During the sunshine period, the FCC will permit the filing of written *ex parte* comments (but not meetings) in response to notices of meetings that occurred on the day the sunshine period was announced. Those comments must be filed one business day after the meeting notice is filed, and may not raise issues beyond those in the notice.
- Notices of *ex parte* meetings that occur during the sunshine period must be summarized and filed before 11:59 p.m. of the day of the meeting. Written replies will also be permitted to such notices, and must be filed no later than one business day after the meeting notice.

While these changes are noteworthy, it's also important to focus on several aspects of the rules that have *not* been changed:

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D.C. court puts out the welcome mat

Trolls On A Roll

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Score one for the trolls . . . the copyright trolls, that is. A recent preliminary decision by U.S. District Judge Beryl Howell may lead those trolls to funnel much if not most of their litigation through the U.S. District Court in Washington, D.C. Judge Howell's decision will almost certainly make it easier for the trolls to pressure their defendants – including even purely blameless defendants – into pre-trial settlements favorable to the trolls.

Disclosure: I know Judge Howell. It's not like we're friends or anything, but I did meet her when she was working on FOIA legislation with the Senate Judiciary Committee. She's extremely smart, well-intentioned and easy to work with.

But as the newest addition to the U.S. District Court in D.C., she has certainly not endeared herself to those interested in First Amendment rights – which clearly includes me – with her recent ruling in *Call of the Wild Movie, LLC, v. Does 1-1,062*.

As you might guess from, say, the case title which identifies a gazillion defendants only as "John Does", this case (actually, Howell's decision involves three separate consolidated cases) was brought by copyright trolls. I described the general troll MO in the November, 2010 *Memo to Clients*.

As I described there, the drill starts when the copyright holder of, say, a movie determines that the work has been shared on-line (through a service like BitTorrent). Normally, all that is known about the sharers is their IP addresses. But that's enough to file a complaint, identifying the defendants as John Does. Once the complaint has been filed, the plaintiff (a/k/a the copyright troll) asks the court for a subpoena directed to all the Internet service providers (ISPs) associated with the known IP addresses. The purpose of the subpoena is to get the ISPs to cough up the names and addresses associated with the IP addresses. Once the troll can thus identify individual defendants, it can start to pressure them into settling in order to avoid the time, cost, hassle and potential embarrassment of a trial.

The ISP can move to quash the subpoena. More often than not, however, the ISP will simply notify its subscribers (*i.e.*, the ones associated with the IP addresses listed in the complaint) that he or she will be identified to the plaintiffs unless the subscriber notifies the ISP that he or she has filed a motion to quash the subpoena. (Time Warner is a notable exception, having fought back in several cases.) At this point, many subscribers surrender. They contact the plaintiff's attorneys seeking simply to make the matter go away . . . in return, of course, for an appropriate payment to

the plaintiff. This plays right into the entire business model of the trolls – use the efficiency of mass litigation to grab as much low-hanging fruit as you can.

My knowledge of this issue has grown exponentially in recent months. At first, I noted (and tracked) the troll trend as an interesting, if irritating, development affecting two interests in my wheelhouse: First Amendment and intellectual property. But the troll lawsuits began to replicate like a virus. And I found myself in the middle of the fray, moving from interested observer to active counselor. I have advised some ISP clients on dealing with trolls' subpoenas (move to quash? respond?). And I have represented individuals who were notified (by their ISPs) of subpoenas the individuals would need to move to quash. You could say we are now fully engaged in the copyright troll wars.

So I'm thankful to groups like the Electronic Frontier Foundation, Public Citizen and the American Civil Liberties Union. They have filed amicus briefs in many troll cases, arguing (among other things):

*Once the troll
can identify
individual defendants,
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them into settling.*

- jurisdictional issues (with many John Doe defendants scattered around the country, it's effectively impossible to determine that any particular court has personal jurisdiction over any of the defendants);
- joinder issues (is it legally permissible to combine all defendants in a single action?);
- First Amendment issues that should be resolved before the identification of John Does can be compelled.

The efforts of these groups have rebuffed many of the trolls. We recently pointed out on our Twitter account (@CommLawBlog) that EFF was reporting that over 40,000 John Doe defendants were dismissed in a span of just a few weeks from cases brought in California, D.C., Illinois, Texas and West Virginia. Such victories are immensely helpful – any disruption in the smooth progression from mass filing to large scale settlement deters future litigation.

That brings us back to Judge Howell's order, which does defendants no favors and, thus, will likely encourage the trolls.

The case itself isn't unusual. The plaintiffs are movie studios whose works were downloaded and shared via BitTorrent programs. Per the usual drill, subpoenas were issued to various ISPs. Time Warner moved to quash the subpoena

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Copyright, Content Distribution And Technological Innovation: The Need To Re-Think The Compulsory Licensing System

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Not to go all Chicken Little on you, but the world may be coming to an end – the world of copyright and compulsory licensing as we have known it for the past several decades, that is. I've been following the evolution of content delivery across all platforms (including the legal systems which underlie content delivery), and have in recent months noted a recurring theme: the legal rules governing delivery of content – and audiovisual programming, especially – are falling farther and farther behind the state of the technological art. Traffic rules developed during the horse-and-buggy days don't really help anybody in an age of superhighways and high-performance cars. So maybe it's time for legislators and regulators to roll up their sleeves and get to work developing a copyright licensing system for the 21st Century.

Examples? How about online streaming providers ivi, Inc. and Filmon.com, who have been trying to cram the square peg notion of an "on-line cable system" into the round hole system of traditional compulsory licensing. They're clearly outliers making long shot attempts to revolutionize television viewing. From a legal standpoint they're still on the outside looking in, as both have been told by federal courts that they are not acting within the boundaries of the Copyright Act. Yet, as we reported on these cases, we prophesied that ivi, Inc and Filmon.com may simply be ahead of their time.

Our predictions weren't far off the mark.

As we reported in last month's *Memo to Clients*, at Congress's direction the Copyright Office has instituted a proceeding that could dramatically alter the copyright compulsory licenses applicable to cable television and satellite television. In particular, the Copyright Office is looking at the possible elimination of such licenses (which are currently found in Sections 111, 119 and 122 of the Copyright Act).

Our call for legal reform – or at least a very thorough review of this area of law – is further buttressed by two separate, but related, developments involving one of the more popular content delivery systems going today: the Apple iPad.

In one instance, News Corporation (let's call them Fox for short) has told Time Warner Cable (TWC) to stop streaming the various Fox channels to the iPads of TWC subscribers. (Scripps Network Services Interactive (Scripps) has reportedly joined Fox in this effort.) TWC is apparently the first cable company to create an "app" that al-

lows its subscribers to view programming via an iPad (Cablevision has since released a similar app with similar pushback). Seems pretty simple right? You're a TWC subscriber, you pay TWC to provide you access to programming in your home, you would like to use your iPad to watch TV in and around your home, TWC can make that happen – where's the problem? After all, you're already paying to get those channels, and TWC is also paying for the right to get you those channels – so why should it matter whether you're watching on a full TV screen or an iPad? (This would be especially true if TWC's app happens to include some form of geographic restriction to prevent video viewing "out of market". Note that I don't know whether the app does feature such a restriction.)

But that's not how Fox and Scripps see it – and I suspect that they're not alone.

Traffic rules developed during the horse-and-buggy days don't really help in an age of superhighways.

And there's another instance involving an iPad App – this time the Zite news reader, which describes itself as "a personalized iPad magazine that gets smarter as you use it". The Washington Post, AP, Gannett, Getty Images, Time, Dow Jones and many other media organizations have sent Zite a cease-and-desist letter telling it to stop providing their content. This is admittedly different from the Fox/TWC situation, as you're now talking about aggregation of news content regardless of subscription, which is a *big* problem for news entities. But, again, if there is some way to ensure that subscribers have greater access to the content they've paid for, you'd think that the actual manner of delivery is a minor concern, right?

And that's the common thread here: new, highly popular content delivery systems that don't fit comfortably into any existing licensing scheme. And that lack of fit is not because the folks who designed the existing licensing schemes considered but rejected inclusion of the new delivery systems. *Au contraire*, the folks who drafted the existing copyright laws had no idea that such delivery systems would ever exist.

Now let's be clear: I am **not** against – in fact I'm very much in favor of – protection of the rights of copyright owners. But I think that these cases demonstrate that the current compulsory licensing system is failing to keep up with the times. The result is resistance, induced by outdated laws, to innovation of new products, services and technology. The results of such innovation can deliver content from a copyright owner to the consumer and – in

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Swami G puts up another W

Snyder v. Phelps: The Swami Breaks It Down

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[Editor's Note: The Swami strikes again. Last November, our resident appellate oracle, Kevin Goldberg (a/k/a The Swami) predicted on www.CommLawBlog.com that the Supreme Court would side with the Westboro Baptist Church in the First Amendment face-off that was *Snyder v. Phelps*. (Disclosure: Swami G signed an amicus brief in the case on behalf of the American Society of News Editors.) And sure enough, in March that prognostication proved to be right on the money, as the Supremes held their noses and voted for Westboro, 8-1. Of course, the Swami had called it closer (5-4, maybe 6-3), but what the heck – he beat the spread, didn't he? While no explanation is really necessary here, Kevin wants his loyal readers to understand (in the words of Mike LaFontaine), *wha' happened?*]

As a top prognosticator, I'm used to getting it all the way right. So I was somewhat humbled when my prediction in *Snyder v. Phelps* was off by a couple of votes. Oh sure, I had the result right, but I misread three Justices – Kennedy, Thomas and, most blatantly, Chief Justice Roberts. (About Roberts, there was “no question in my mind” that he would be voting for Snyder. Oops.)

What went wrong? In retrospect, I probably got caught up in the inflammatory facts of the case. (You can read more about the background and facts in my earlier prediction). Maybe I was distracted by one of the most striking combinations of “compelling plaintiff” (Snyder, a grieving father of a slain U.S. Marine) and “deplorable defendant” (Westboro, a church that protests at funerals with obnoxious signs proclaiming, e.g., “God Hates Fags”) that I've ever seen. If sympathy can ever trump the First Amendment, this would be the case, and from their questions at oral argument and previous opinions, Kennedy, Thomas and Roberts were the most likely to succumb to that temptation.

Or so I thought.

In the end, the Court – including the three members I doubted – did the right First Amendment thing, as difficult and distasteful as that may have been given the facts of the case. The Court's ruling (written by Roberts) is eminently predictable and not earth-shattering in the least.

So now that I've had a month or so to mull over the case (and to re-calibrate my crystal ball), here are some thoughts about what the Court's decision means.

Turns out the Chief Justice is a First Amendment stud; Justice Alito not so much. Conservative judges some-

times get a lot of flak for their First Amendment credentials (or lack thereof). That's mainly due to the perception that they tend to favor considerations like “national security” and “morality” over free speech. During Roberts's 2005 confirmation hearings, the Reporters Committee for Freedom of the Press published a review of his First Amendment views observing that “Roberts' collected works leave cause for concern among free press advocates”.

But looks can be deceiving. As Chief, Roberts may have started slow, voting against student speech rights in the famous “Bong Hits for Jesus” case. But his opinions in last term's *United States v. Stevens* and now in this case alleviate many concerns First Amendment advocates might have had. Indeed, I can't remember as clear an endorsement of free speech as the conclusion of his opinion in *Snyder v. Phelps*:

Turns out the Chief Justice is a First Amendment stud; Justice Alito not so much.

Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and – as it did here – inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course – to protect even hurtful speech on public issues to ensure that we do not stifle public debate. That choice requires that we shield Westboro from tort liability for its picketing in this case.

By contrast, Justice Alito – the lone dissenter – took a very different First Amendment tack: “Our profound national commitment to free and open debate is not a license for the vicious verbal assault that occurred in this case.” Context and emotion obviously mattered a lot to Justice Alito, who peppered his dissent with words like “malevolent”, “brutalize”, and “tumultuous” – and that was just the first full paragraph. He seemed to be attempting to shoehorn Westboro's actions into the “fighting words” pigeon-hole of unprotected speech, likening those actions to a direct, face-to-face confrontation designed to provoke a violent reaction. (Think *Chaplinsky v. New Hampshire*, which Alito cited, but just once). This is the second time in two years that Justice Alito has been the sole dissenter in a major First Amendment case. Assessing his dissent in *United States v. Stevens*, I observed that he has generally seemed to be paternalistic and protective of “society's morals” in similar cases. Perhaps not surprisingly, he was very willing to side with the First Amendment in the *Citizens United* case involving campaign finance reform.

***Snyder v. Phelps* breaks no new legal ground.** For all the controversy, the decision sets no new precedent.

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FCC wants to go double-or-nothing on indecency in the Supremes

Shut Up And Deal

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Like a hard-core poker player on a losing streak, the Commission isn't going to let a recent string of defeats on the indecency front discourage it. *Au contraire*, the FCC's going double-or-nothing, putting all its chips in and looking to Lady Luck for a change in fortune: it has asked the Supreme Court to review *both* of the Second Circuit's 2010-2011 indecency decisions. But there's no guarantee that the Commission will even be dealt a hand in the next round . . . and if it does get dealt in, the odds may be against the FCC in what could turn out to be a very high stakes game.

The two cases involve (1) Fox's broadcasts of the 2002 and 2003 Billboard Music Awards and (2) an episode of ABC's *NYPD Blue*. We'll spare you the historical details here – you can read about them on our blog (www.CommLawBlog.com – search the term “indecency”). The U.S. Court of Appeals concluded in the *Fox* case that the FCC's indecency policy, as it has evolved in recent years, is unconstitutionally vague and fails to give broadcasters a clear enough idea of precisely what types of material may or may not be deemed “indecent”. In the *NYPD Blue* case the same court held that its *Fox* ruling applied equally not only to language (which had been at issue in *Fox*) but also to visual images.

The one-two punch delivered by the Second Circuit effectively scuttled the FCC's efforts to enforce its quasi-ban on indecency.

Had the Commission chosen not to take the cases up to the Supremes, the Commission would have been unable to continue those efforts without first radically revising its regulatory approach. (The alternative, of course, would have been simply to walk away from indecency enforcement entirely – an alternative that was, obviously, not the Commission's first choice.) Such a radical revision would have sucked the Commission back into the regulatory and constitutional quagmire of indecency regulation that has existed for nearly four decades since the Supreme Court's seminal decision in *Pacifica* (often referred to as “the seven dirty words” case).

So the Commission is going with a Hail Mary to the Supreme Court, apparently hoping that the Supremes will tell the Second Circuit that its *Fox* and *NYPD Blue* rulings were wrong.

We won't get deeply into the specifics of the FCC's arguments to the Supreme Court here. Since the next act of the indecency soap opera could play out over the next

year or so, there should be plenty of time for that down the line. But here are a few things to know that might help you appreciate the drama as it unfolds.

First, even though the FCC has asked the Supremes to review the Second Circuit decisions, there's no guarantee that that request will be granted. Unlike the federal circuit courts of appeal, the Supreme Court is not (except in very, very rare instances, and this isn't one of them) *required* to take cases just because one of the litigants asks it to.

A party wanting the Supremes to consider its case files a petition explaining why the issues in the case are important enough to warrant the Court's attention. (Want to impress your lawyer friends? The technical name for such a petition is “petition for certiorari” – that last word generally, but not invariably, being pronounced “sur-she-or-RARE-eye”, or maybe “sur-she-or-ARE-ree”. You can also short-hand it as “cert petition”, where “cert” is pronounced like the candy/breath mint.) The Supreme Court rules describe the types of issues that might get you in the door. Essentially, they're looking for cases involving some “important federal question”, particularly if the lower court has decided that question in a way that conflicts with decisions by the Supreme Court or other courts of appeals.

In its petition (which was co-signed by the Solicitor General, as is customary but not mandatory in such cases), the Commission argues that the Second Circuit's decisions conflict with the Supreme Court's 1978 *Pacifica* decision and a couple of 1990s-era indecency decisions out of the D.C. Circuit. The Commission also claims that the Second Circuit's “vagueness” analysis was inconsistent with a 2010 Supreme Court decision. And finally, the Commission asserts that, if the Second Circuit rulings remain in effect, the Commission will be unable to do what Congress has told it to do, *i.e.*, enforce the statutory prohibition against the broadcast of indecent material.

The next step in the process will be the filing of oppositions to, and/or statements in support of, the FCC's cert petition. Oppositions are due within 30 days of the FCC's filing (*i.e.*, by May 23), unless the time gets extended. Once oppositions are filed, the Court will hunker down, read through the pleadings, and decide whether to take the case. Since the Supreme Court's annual term traditionally wraps up by the end of June or early July, it's obviously too late to get the case briefed and argued this

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The one-two punch delivered by the Second Circuit effectively scuttled the FCC's quasi-ban on indecency.



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nas, arguing that having to turn over all the requested identifying information would impose an undue burden and expense; alternatively, Time Warner asked for up to three years to respond. EFF, Public Citizen, the ACLU Foundation and the ACLU of the Nation's Capitol filed an amicus brief in support of the defendants, arguing the jurisdiction, joinder and First Amendment issues.

Disagreeing with Time Warner's arguments, Judge Howell found that the subpoenas aren't unspecified, undefined or unduly broad. While there are a large number (1,028 total) of subpoenas, they all seek basic information, which Time Warner appears to be able to provide, if slowly. (Time Warner contends it can produce only 28 IP addresses a month, which seems somewhat low when compared to the lookup/production rates of other ISPs that were entered into the record.) In addition, plaintiffs offered to pay for extra staff to assist in the process. In view of these and other factors, Judge Howell simply wasn't convinced that Time Warner would be unduly burdened if forced to comply with the subpoena.

Unfortunately, the Judge similarly had no problems rejecting the amici's arguments:

Joinder: Claims against a number of separate and distinct defendants can generally be joined if either (a) the claims arise from the same transaction or occurrence (or series of transactions or occurrences), or (b) a question of law or fact exists that is common to all the claims. The amici argued that the 1,000+ defendants were engaged in similar, but technically separate, conduct: they were at separate locations, using separate computers and not always interacting with each others.

Judge Howell disagreed. The nature of BitTorrent necessarily requires that every defendant is interacting with every other defendant. (Later users are really pulling little pieces from every prior user to speed up the download process – that's my attempt at oversimplifying a BitTorrent explanation.) In addition, the plaintiff must establish the same legal claims against every defendant. Judge Howell ruled that there would be no prejudice to any individual defendant because, at least at this point in the litigation, they will only be identified; they will not be required to respond or assert a defense until later (if at all). By contrast, this identification is essential to the plaintiffs' ability to move their case forward.

Jurisdiction: The amici argued that each defendant must be sued in the jurisdiction in which he or she resides, as due process principles require. Judge Howell didn't disagree, but instead held that this concern is better raised later in the process: each defendant will have ample opportunity to assert jurisdictional defects down the line.

First Amendment: The amici argued that the defendants' use of BitTorrent constituted conduct protected by the First Amendment, assuring the defendants anonymity. Judge Howell acknowledged that BitTorrent users' conduct is protected "expressive activity". But she also found it entitled only to minimal protection because "the [defendants'] ultimate aim 'is not to communicate a thought or convey an idea' but to obtain movies and music for free". The plaintiffs were able to overcome this minimal protection for a number of reasons: plaintiffs had made a prima facie claim of copyright infringement; they are (at this point in the litigation) making requests for specific information they can't obtain otherwise; there is an overriding need for the information to resolve the case; and the defendants do not have a significant privacy interest, since Time Warner's terms of service specifically preclude illegal infringing activity.

While other courts have declined to be completely persuaded by similar joinder/jurisdiction/First Amendment arguments, most have at least questioned the plaintiffs' need for widespread discovery leading to the identification of these defendants. Judge Howell's order is probably the strongest I've seen in favor of keeping all defendants as part of the same case through discovery.

Judge Howell's decision has a number of important implications:

First, it plays right into the copyright trolls' hands. Their business model is built upon efficiency and designed to force quick settlement. The sooner the troll can tie a particular, identified defendant to a particular instance of alleged infringement, the quicker the troll can squeeze that defendant for a pre-trial deal. (Selling points: avoid litigation hassles/costs, avoid embarrassment from having your name connected, rightly or wrongly, with unlawful downloading – especially if the material allegedly downloaded is (how do we say this politely?) unseemly.)

Any bump in the litigation road costs money and devalues the lawsuit, as far as the troll is concerned. Requiring the plaintiffs to sue individual defendants, or at least file lawsuits involving the same movie in every jurisdiction where a defendant is located, is a serious disincentive to these mass lawsuits.

I want to be clear on one thing: if an individual actually engages in copyright infringement, he or she needs to be held accountable. Copyright infringement is *not* a "victimless crime". It is a real, and increasingly common, violation of law that has a considerable economic impact. But there is no reason to allow the legal process – and especially First Amendment and Due Process values – to be hijacked to redress these injuries.

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The trolls' business model is built upon efficiency and designed to force quick settlement.



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term, but there's at least a chance that the Court might rule, before it closes up shop this summer, on whether or not it will hear the case next term.

If the Court denies the Commission's petition, that's just about all she wrote – the Second Circuit decisions will then stand and, if the FCC's petition is accurate, the Commission will be “preclude[d] . . . from effectively implementing statutory restrictions on broadcast indecency”. If the Court grants the petition, it will set a briefing and argument schedule that would probably call for arguments sometime this Fall. In that case we'd be looking for a decision on the merits from the Court by the end of the term, *i.e.*, by July, 2012.

Odds makers usually don't give cert petitions much chance. The Court gets lots of them, but ends up granting only a tiny percentage. This case may be different, though. The *Fox* case has already been to the Supremes once, which suggests that the Court may have an interest in taking a look at the constitutionality of indecency regulations. That is, after all, a question which the Court has not revisited in more than 30 years. (On its first trip to the high court in 2009, the *Fox* case was resolved on non-constitutional grounds, which set the table for the Second Circuit to issue a ruling on constitutional grounds, leading to the current state of affairs.)

That's the good news for the Commission.

The bad news is that, if the Court does take the case, the

Commission may find the Court interested in significantly more than mere indecency. As one of my colleagues observed last year in a post on our blog,

in his separate opinion in the Supreme Court's 2009 *Fox* decision, Justice Thomas specifically invited reconsideration not only of *Pacifica*, but also of *Red Lion*. *Red Lion* is the 1969 Supreme Court decision upholding the Fairness Doctrine (and, by implication, special regulatory treatment for broadcasting) because of the supposed “scarcity” of broadcast spectrum. Thomas referred in particular to the “questionable viability” of both *Red Lion* and *Pacifica*. If four of his colleagues were to agree with Thomas that the scarcity rationale is no longer valid, that could cause massive upheaval in virtually every aspect of the FCC's operation.

So there is at least some basis for thinking that the Court could see this case as an opportunity to review the continued viability of the “scarcity rationale” which forms the historical foundation of much of the FCC's regulation of broadcasting. If that were to happen, it's at least conceivable that the Commission could lose not only its ability to regulate indecency, but its ability to regulate broadcasting as it has for decades.

So the stakes could definitely be high for all concerned. We'll keep you updated on the action as it goes down.



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But that's what's happening when Judge Howell says the amicus' arguments can be deferred. The result will be nearly irresistible pressure on a significant number of defendants to settle their cases before they are formally identified in court – even though they may have legitimate defenses to raise, including complete innocence.

Want an example? Imagine that you're accused of downloading a pornographic title. You know you did *not* download this movie. You have a wireless router that may not have been properly secured, or maybe it was hacked while you were out of the country. You can prove all of this. So you're as sympathetic a defendant as possible. Prior to Judge Howell's ruling, you would ordinarily not be subject to identification through ISP-directed subpoenas unless you were sued in your home court. But now you're stripped of any of the pre-identification procedural defenses. Under no circumstance do you want your name publicly associated with a pornographic movie, even if the allegation can eventually be disproven – particularly because disproving it will require expensive and time-consuming litigation.

Given those circumstances, a defendant could easily conclude that the only acceptable alternative would be to settle

(even if the plaintiff's cash demand were inflated as a result of Judge Howell's ruling). Again, I don't want to exonerate the guilty, but I also don't want to allow the threat of a kind of “outing” to serve as an undue pressure point on innocent people. Yet that's what is really occurring here.

The second result of Judge Howell's decision? She and her colleagues will likely feel the full brunt of this decision in their own workloads. As noted earlier, tens of thousands of John Doe defendants have already been dismissed on procedural grounds in jurisdictions other than D.C. I'm guessing that all of those cases, and lots more, will be funneled to the District Court here in the Nation's Capital from here on out. Indeed, we've already seen one current case apparently involving a pornographic film (*West Coast Productions v. Does 1-5,829*) that followed that arc: initially a large portion of the defendants were severed from the case when it was filed in West Virginia because the defendants didn't live there; the plaintiffs refiled against all non-West Virginia defendants in D.C., without regard to whether the remaining defendants all live in D.C. If that's not evidence future plaintiffs will forum-shop to D.C., what is?

So Judge Howell (and her D.C. colleagues) may soon reap what she has sown.



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tive applicant to prepare an EA. Any party making such a request would have to explain why the to-be-proposed construction would have such a significant environmental impact that an EA should be required (or, if an EA has already been submitted, why that EA doesn't do the trick). The prospective tower proponent would then have ten days to oppose the Request, and the requestor an additional five days to reply.

Once the pleading cycle has ended, the FCC will determine whether an EA is required; if an EA was submitted initially, the Commission will evaluate it and determine whether the to-be-proposed tower will have a significant environmental impact. If the Commission determines that it will not have such an impact (either after evaluating an EA or determining that none is required), it will advise the prospective proponent, who can then finally file the ASR Form 854.

Let's review the bidding.

You decide that you want to build or modify a tower structure that would require registration. Before you can file for that registration, you have to tell the FCC, and the rest of the world, what you have in mind. And you invite the rest of the world to chip in their two cents' worth on your idea. Then you wait for the FCC to give everything the once-over. And only if, after all that, the FCC decides that your idea won't be a problem, you can proceed to file the necessary applications.

To be sure, the proposed rules do provide for filing service-specific applications before antenna registration has been granted (as has historically been the case). But under the proposed rules, service-specific applications could be filed *only after* the local and national public notices have been provided *and* the full Form 854 ASR has been filed. And the full Form 854 can't be filed until *after* the Commission has determined whether an EA will be required and, if an EA is required, after the FCC has considered it – and we have no idea how long that will take. So it's not at all clear when exactly a service-specific application can be filed. This could wreak havoc on applications that are time-sensitive or that would attempt to take advantage of the Commission's first-in-time interference protection and processing rules.

Of course, the creation of delay in the FCC's processes is not an accident here – rather, it's one of the goals of the birders.

The creation of delay in the FCC's processes is not an accident here – rather, it's one of the goals of the birders.

For years the avian advocates have complained that the FCC's processes do not afford them adequate opportunity to review new/modified tower proposals and interpose objections before those proposals are realized. The 2008 court decision largely agreed with those complaints, so we shouldn't be surprised that delay is woven deeply into the Commission's new approach. Unfortunately, the new process affords plenty of opportunity for non-birders (for example, competitors, NIMBYs) to slow things down as well.

While the Commission is awaiting comment on these new procedures, it also continues to conduct its own PEA assessing the entire ASR program. The FCC held a workshop in early April to discuss its approach to the PEA – and in the course of the workshop, some interesting information about birds and towers came out. For instance, while communications towers – especially taller towers, towers using guy wires, and towers using steady, non-flashing, lighting – do contribute to bird deaths, their impact is “incremental.” At least one study cited by the Commission found that less than 1% of bird deaths could be attributed to communications towers, compared to more than 10% attributed to cats, and almost 60% attributed to buildings and windows. (Hey, given those numbers, if we're regulating towers, shouldn't we also be regulating cats?)

The Commission expects to wrap up the first phase of the PEA in June, when it will likely release a draft PEA addressing three alternative courses of action. One possible choice: a “no action” alternative which would effectively etch in stone the interim procedures outlined in the public notice. (To call this a “no action” alternative here is a bit misleading, since this option would clearly involve a reasonably significant change in existing rules and policies.) The second and third alternatives would both entail further changes to the ASR program. One alternative would require EAs from all ASR applicants; the other would require EAs from some ASR-dependent proponents (*e.g.*, applicants proposing tall towers, use of guy wires or steady, non-flashing lighting, and/or location in an “environmentally sensitive” area).

The public will have an opportunity (at least 30 days, maybe more) to comment on the draft PEA once it's released. In the meantime, the proposed rules and procedures outlined in the Public Notice are open for comment now, so if you have concerns about those proposals, you may want to let the FCC know by May 5.



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Settlement discussion meetings requested by Commission staff in adjudicatory proceedings or rulemaking proceedings will remain outside the *ex parte* notice filing requirement.

While the Commission had considered revising the *ex parte* treatment of comments posted to the FCC's various social media outlets (its blogs, Twitter, and Facebook page), no *ex parte* notice requirements have been adopted for such communications, at least for now.

Finally, the Commission asked for further comments on whether they should require disclosure of real parties-in-interest in connection with *ex parte* notices. Among the questions raised: should advocacy groups have to reveal who is funding their FCC lobbying efforts? Should companies be required to identify their parent companies and affiliated interests, especially communications interests? Comments are due by June 16, 2011; reply comments are due by July 18. If you want to comment on the Paperwork Reduction Act aspects of the proposals, you have until July 1.



FHH - On the Job, On the Go

Mitchell Lazarus will address the National Spectrum Management Association at their annual meeting in Arlington, Virginia in late May.

Frank Jazzo appeared on an NAB-produced video presentation (along with FCC Audio Division Chief **Peter Doyle**) on April 26 all about the upcoming renewal process. And next month **Frank J** be a travelin' kinda guy: on May 5 he'll be on the Washington Update panel, along with the NAB's **Ann Bobeck** and the FCC's **Roy Stewart** (retired), at the joint convention of the Louisiana Association of Broadcasters and the Mississippi Association of Broadcasters at the Beau Rivage in Biloxi, Mississippi, and then on May 17 he'll be moderating the FCC regulatory session at the Media Financial Managers conference in Atlanta.

Not to be outdone, **Kevin Goldberg's** got three gigs coming up in May. On May 5 **Kevin** will be speaking on a panel entitled "The State of the First Amendment: Thoughts About the Supreme Court and the FCC" at the FCBA's "Focus on the First Amendment" event at the Newseum in Washington, D.C. Then on May 13 he'll make a presentation on "Legal Aspects of Social Media" at the Alabama Broadcasters Association Annual Convention. And the following week (May 17, to be precise), **Kevin** will make a presentation on the First Amendment, Newsgathering and Publication for the International Center for Journalists.

Joining **Kevin** at the Alabama Convention will be **Scott Johnson**, who will be presenting a program on the license renewal process for radio stations (as well as a general regulatory update).

Meanwhile, **Frank Montero** will be giving a presentation on FCC license renewals at the Puerto Rico Broadcasters Conference in Rincon, Puerto Rico on May 13.

And last but not least, **Peter Tannenwald** will be speaking at the National Translator Association annual meeting in Denver. On May 13 **Peter** will participate on a panel addressing "New Technologies and New Challenges", and the next day he'll be on the "Legal Panel".

Media Darling? Obviously, **Frank J's** on-screen performance in the NAB's renewal tell-all puts him in the running. But what about **Kevin's** appearance on WJFK (FM) on April 26, going all Alan Dershowitz (but much classier, and at least arguably better looking) on us about the Dan Snyder/City Paper lawsuit? Bigger audience, but still a bit local in scope, and hey, the Swami already got props here back in February for pretty much the same shtick. No, for sheer media awesomeness, there was only one real choice this month, and that would be (drum roll, please) – CommLawBlog, which was recognized for its April Fool's Day post by no less a media monitor than AdWeek.com. AdWeek? That's the kind of Main Stream Media attention that separates the Darlings from the Don't-Got-Its – and CommLawBlog is without question not only a Darling, but also *THE Media Darling of the Month*. (Didn't read our 4/1/11 post? Not to worry – it's available in the blog archives.)



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theory at least – the concept of compulsory licenses is designed to facilitate the legal delivery of that content to the consuming public. But the existing legal scheme was not designed to, and thus cannot easily accommodate, this fastest growing area of content delivery. As a result, whenever a good product is created, the content owners move quickly to restrict its easy implementation. It's not just the iPad, but other popular products as well: think, for example, of Apple TV, GoogleTV and Roku, all of which have been hamstrung in terms of available content.

One might wonder, of course, whether content owners fully appreciate the long-term effects of their heavy-handedness. But I won't go there. I recognize that they have to do everything they can to protect their most valuable asset.

Instead, I think the finger should be pointed elsewhere – at the legislators and regulators who need to take notice of these developments and figure out a way to bring all parties

together to discuss this . . . especially before the tension between antiquated laws and unstoppable technological innovation throws everything so far out of whack that it can't be righted. (Though I and my colleagues represent many different media entities on all sides of the equation, we are particularly concerned for broadcast television stations, since they don't create much of their content, relying instead on networks or syndicated programming producers; I strongly believe that broadcasters would be the most likely to be cut out of any individual side deals.)

I don't know what the future holds for television delivery. But I am increasingly sure that TV delivery will – and should – look vastly different tomorrow than it did yesterday or than it does today. It's in everybody's interest – the content creators', the content distributors' and the content consumers' – that the copyright laws that underlie and provide structure to the delivery process be designed to accommodate and facilitate technological innovation.



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One key legal issue that attracted considerable attention was whether the Court would extend the protections given to defendants in cases involving claims of intentional infliction of emotional distress. The last time the Court visited this issue – and gave a resounding victory to the First Amendment – was the famous *Hustler, Inc. v. Falwell* decision, arising from a lawsuit brought by Jerry Falwell. Falwell was a public figure, seeking damages from *Hustler Magazine* because it exercised First Amendment rights. The Court concluded that, because of his “public figure” status, Falwell had a greater burden to meet – a pro-free speech factor which benefited the defendant, *Hustler*.

The *Snyders*, on the other hand, were anything but public figures before this entire mess began. Would that – should that – alter the First Amendment analysis?

Media groups said the “who” was actually less important than the “what”. That is, the fact that the Westboro Baptist Church was speaking about matters of public concern required full First Amendment protection regardless of who the plaintiff happened to be. The Chief Justice (and seven of his colleagues) agreed. As a result, a larger universe of speech will receive full First Amendment protection in such cases.

The Chief Justice also affirmed the considerable breadth of what constitutes speech involving matters of public concern. In his view, such speech can “be fairly considered as relating to any matter of political, social, or other concern to the community”. So Westboro’s signs and chants – inarticulate, offensive and hateful though they may be – fell within that definition. In other words, the Court rejected the argument that the defendants’ claims about the political nature of their speech were just a smokescreen to cover the fact that that speech was nothing but offensive.

This is entirely consistent with previous First Amendment cases which instruct courts not to judge the value or good/bad taste of the speech at issue. One example: *Texas v. Johnson* where flag desecration was held to be protected speech, despite the dissent’s view that such conduct isn’t speech at all, but rather “the equivalent of an inarticulate grunt or roar . . . most likely to be indulged in not to express any particular idea, but to antagonize others.”

The effect is likely to resonate through all areas of controversial speech. Like it or not (and many people won’t), this is a strong victory for all offensive statements, including “hate speech”. It may also augment protections in other areas, like defamation and invasion of privacy, if the courts choose to minimize the impact of the plaintiff’s identity and focus instead on the need to protect the right of free speech.

The Westboro Baptist Church will protest more funerals as a result of this decision but will still be acting from afar. Westboro Church elders Fred and Shirley Phelps and lawyer/daughter Margie Phelps now believe they have the blessing of both church and state for their protests – and, to an extent, they do. Not surprisingly, they have indicated they will “quadruple” their protests. They are committed and they are savvy – and they understand the limits of First Amendment law. They have always abided by any “time/place/manner” restrictions that local jurisdictions may have imposed on demonstrations. Indeed, that was a contributing factor to their victory: Justice Breyer concurred with Roberts largely because Westboro had complied with all relevant laws and had had no effective interaction with anyone actually attending the funeral. The Chief Justice noted this as well, writing: “simply put, the church members had the right to be where they were”.

Perhaps bolstered by its victory, though, the Church has indicated it plans to challenge the restrictions with which it has thus far complied. I think this reflects classic hubris on the Church’s part. Laws limiting protests near a funeral exist in 44 states. Such restrictions are routinely upheld as content-neutral restrictions *not* on the speech itself, but rather on the time, place and manner in which the speech is delivered. To get such restrictions tossed out, a challenger must ordinarily show that the restrictions are based on, and in fact intended to limit, the content of the speech itself.

If the Church does plan to attack such time/place/manner laws, I think it will be biting off more than it can chew. It won’t be able to rely on just a single case. Rather, it will have to challenge every state’s law individually. That means at least 44 separate cases (one in each state). In each case it would face high hurdles – such as demonstrating that the state-imposed limits are completely arbitrary or clearly overbroad. Those are hard standards to meet, since courts tend to defer broadly to legislative determinations relative to the need for, and precise limits imposed by, such laws. And even if any particular state’s laws don’t appear now to have an adequate legislative foundation, I can imagine state lawmakers are already reviewing those laws with an eye toward taking any action – from revising existing laws to enactment of whole new laws – necessary to protect them from successful court challenge.

Bottom line: I may have misread Kennedy, Thomas and Roberts, but this is one case where I’m happy to have been wrong. Make no mistake: this was a strong victory for the First Amendment, no matter how unsympathetic the successful litigant (in this case, Westboro Baptist Church) might be. And the Justices’ near-unanimity, especially in view of the facts presented to them, gives rise to cautious optimism on the free speech front. Let’s keep our fingers crossed.

Like it or not (and many people won't), this is a strong victory for all offensive statements.



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But even with that lack of official drum-beating, the petition attracted more than 30 comments.

Only three of those indicated any support at all for the existing rules (and one of those supporting commenters referred to the requirement as “a pathetic vestige”). With friends like that . . .). The commenters who weighed in against the public file requirement were broadcasters – many with decades of experience in the industry – attesting to the fact that the public has historically shown virtually no interest in the public file.

As to the question of the FCC’s “burden estimate”, get set for a chuckle.

According to the Federal Register notice, the Commission calculates the “Estimated Time per Response” – which we understand to mean the total time that each broadcaster spends to assure compliance with the public file requirement – to be “2.5-109 hours”. The notice provides no breakdown of those numbers; indeed, it doesn’t even indicate whether the time estimate involves weekly, monthly or annual increments. But back in 2008, the FCC provided OMB with a relatively detailed set of estimated annual burdens. (We’ve included a copy of those estimates on our blog.)

From the FCC’s 2008 figures, it looks like the “2.5 hour” low-end estimate presumably relates only to cable systems. In the 2008 estimates full power broadcast stations all clocked in at least 110.25 hours per year – exceeding the FCC’s current stated high-end estimate of 109 hours. And that’s just for radio stations. If our math is right, the estimated burden for commercial TV stations in 2008 was 191.25 hours.

The PRA rules provide that an agency’s burden estimate must be “specific” and “objectively supported”. Since the 2011 notice provides no real detail about the provenance of its estimates, we can’t say whether it meets those criteria. But the public file requirements haven’t changed substantially since 2008, and our guess is that FCC’s 2011 time estimates are based on the same calculations as the 2008 estimates above. (That guess is bolstered, at least in our minds, by the fact that the Commission’s 2011 estimate of “total annual burden” is 1,831,706, which just so happens to be the identical seven-digit figure it came up with in 2008. Coincidence? We think not. By the way, while the 2011 notice does not indicate what unit the FCC might be talking about there – 1,831,706 days? pieces of paper? monkeys with typewriters? holes to fill the Albert Hall? – the 2008 report to OMB makes clear that that refers to hours.)

This, of course, is not the first time we have seen such an extravagant – and risible – time estimate from the Commission. For example, in March the Commission pub-

lished an item in the Federal Register indicating that, at least in the Commission’s view, it would take an applicant for a low power FM construction permit anywhere from one-seventh of a second to 12 hours to fill out Form 318.

But the real punch line is the Commission’s estimate of the “Total Annual Cost”, which we understand to mean how much it should cost *the regulated party* to comply with the rule. According to the FCC, that would be (get ready for it): “None”. (Note that the Commission’s notice is not a model of clarity, so it’s possible that the “Total Annual Cost” here does not refer to the cost to the regulated party – but, if not, then who does it refer to?)

As with its time estimates, the current Federal Register announcement gives us no breakdown or explanation for this cost estimate. But again, the FCC’s 2008 submission to OMB is instructive. There, using the “hourly burden” estimates indicated above, the Commission calculated that the “Total Annual ‘In-house’ Cost” comes to \$37,469,148. Yet even then, the Commission still concluded that the “Annual Cost Burden” would be “none”.

We’ve only seen a blander-than-bland public notice, but that doesn’t mean that the party hasn’t started.

There is obviously considerable room for clarification by the FCC on all this.

The public file rule might serve some valid purpose – but, since the Commission has never done anything to investigate the validity of that proposition, nobody can say for sure. Given the fact that the Tillotson petition has been stuck in (or perhaps behind) some bureaucratic drawer

for five years already, we can probably assume that the FCC is not enthusiastic about launching such an investigation on its own.

But the Paperwork Reduction Act requires the Commission to justify these rules, so like it or not, the FCC has got to invite and, theoretically, consider comments about them: do they serve a useful purpose, are the FCC’s burden estimates valid and, if so, does the supposedly useful purpose justify the supposedly valid burdens? More importantly, the Commission must satisfy the OMB that the FCC’s assessment is correct.

In other words, anyone who has any thoughts about the public file should take advantage of this opportunity to articulate them to the FCC. The Commission will be accepting comments through **June 17, 2011**. After that, the Commission will bundle up any and all comments submitted and send them over to OMB, along with a statement in support of the rules (assuming that the Commission is not persuaded by the comments to drop the rules entirely). OMB will then provide an additional 30-day comment period. If OMB declines to approve the rules, the FCC will be unable to enforce them.

June 1, 2011

License Renewal Applications - Radio stations located in the **District of Columbia, Maryland, Virginia, and West Virginia** must file their license renewal applications. These applications must be accompanied by FCC Form 396, the Broadcast EEO Program Report, regardless of the number of full-time employees.

License Renewal Pre-Filing Announcements - Radio stations located in **North Carolina and South Carolina** must begin their pre-filing announcements with regard to their applications for renewal of license. These announcements must be continued on June 16, July 1, and July 16.

EEO Public File Reports - All radio and television stations with five (5) or more full-time employees located in **Arizona, the District of Columbia, Idaho, Maryland, Michigan, Nevada, New Mexico, Ohio, Virginia, West Virginia, and Wyoming** must place EEO Public File Reports in their public inspection files. For all stations with websites, the report must be posted there as well. Per announced FCC policy, the reporting period may end ten days before the report is due, and the reporting period for the next year will begin on the following day.

Noncommercial Television Ownership Reports - All noncommercial television stations located in **Ohio and Michigan** must file a biennial Ownership Report (FCC Form 323-E). All reports must be filed electronically.

Noncommercial Radio Ownership Reports - All noncommercial radio stations located in **Arizona, the District of Columbia, Idaho, Maryland, Nevada, New Mexico, Virginia, West Virginia, and Wyoming** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323-E.

July 10, 2011

Children's Television Programming Reports - Analog and Digital - For all commercial television and Class A television stations, the second quarter reports on FCC Form 398 must be filed electronically with the Commission, and a copy must be placed in each station's local public inspection file. Please note that the FCC now requires the use of FRN's and passwords in order to file the reports. We suggest that you have that information handy before you start the process.

Commercial Compliance Certifications - For all commercial television and Class A television stations, a certification of compliance with the limits on commercials during programming for children ages 12 and under, or other evidence to substantiate compliance with those limits, must be placed in the public inspection file.

Website Compliance Information - Television station licensees must place and retain in their public inspection files records sufficient to substantiate a certification of compliance with the restrictions on display of website addresses during programming directed to children ages 12 and under.

Issues/Programs Lists - For all radio, television, and Class A television stations, a listing of each station's most significant treatment of community issues must be placed in the station's local public inspection file. The list should include a brief narrative describing the issues covered and the programs which provided the coverage, with information concerning the time, date, duration, and title of each program.

