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US Media Law Update

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Recent developments in US media law

The United States media industries (like those everywhere) are in a state of flux, their fate shaped by new technological developments, new business plans and new regulatory attempts to cope with the changing landscape. This update is written in the northern summer of 1999, looking back on the developments of the past six months. During that period, the Federal Communications Commission (FCC) has set out a proposal to democratise over-the-air radio broadcasting; Congress has prepared to pass new legislation governing direct broadcast satellites; the Supreme Court has elaborated its views on the regulation of commercial speech on the airwaves; and courts and the industry have continued the story of an eternal American preoccupation — regulation of smut on television and (now) the internet. ❖

Low power radio

More than 7000 FM radio stations operate across the US today. Owning and operating such a station is not cheap; even a 100 watt station (the lowest power permitted under current rules) is well beyond the purchasing power of an ordinary person or community group.

Some persons, known to friendly observers as 'microbroadcasters' and to unfriendly ones as 'pirate broadcasters,' have responded by setting up their own low-power FM stations, without benefit of FCC license. Those broadcasters may run Christian sermons, alternative music, call-in shows, poetry readings, rants about the evils of income tax and government regulation, or any other programming they find attractive. The FCC estimates that between 300 to 1000 such stations exist, and has been aggressive in enforcing the laws requiring that they be shut down.

The FCC, however, has now proposed the creation of three new classes of legal low power FM stations.[1] One class would operate at 1000 watts; one would operate at 100 watts, and a third — the most intriguing — would operate at levels of between one and ten watts. Stations in the third category might have construction costs of as little as a few hundred dollars, and would have a signal contour of only one to two miles. The Commission opined that new licensees in this category could provide true community-oriented broadcasting. In an era of increasing broadcast consolidation, it continued, the new services could bring new voices, and greater diversity, into radio programming.

The FCC tentatively concluded that no person with an interest in a full power station would be allowed to have an ownership interest in a low power station, and that no

1 *Creation of a Low Power Radio Service*, 14 FCC Rcd 2471 (1999).

person would be allowed to own more than one low power station in a given community. Multiple ownership, it explained, would defeat its purpose in creating the new services. It requested comment on whether low power stations should be limited to non-commercial programming, and on whether low power licensees should automatically be ousted at the end of a single five or eight year licence term, so as to allow others to take their turns at the microphone.

The National Association of Broadcasters is vehemently opposing the proposal. The new services, it urges, would create serious interference problems, with little countervailing benefit. Community members, incumbent broadcasters continue, have ample opportunity to communicate with each other through public access cable television, ham radio, handbills, and the internet: there is no need to give them radio voices as well.

The FCC has made no final decision. ❖

Direct broadcast satellites

Under current law, direct broadcast satellites are prohibited from including (terrestrial) network television stations in their programming packages. There is one exception: satellites can provide users with a network station's signal if the user is outside the local market of any of the network's affiliates. Such rural 'white areas', though, are few and far between. Networks urged that without such a prohibition, satellite operators would provide their subscribers with the signals of stations located outside of the subscribers' communities, threatening the local affiliates' advertising revenues and, they said, disrupting the network-affiliate relationship.

This law placed a major roadblock in the path of satellite television's growth; it is one reason why satellite television remains an insignificant competitor to cable in the US multichannel video programming service market. Viewers want to purchase all of the signals they watch on their televisions as part of a single package, rather than (say) switching back and forth between rooftop antenna and satellite dish. Cable can offer that; satellite television cannot. Satellite carriers responded in part by ignoring the law. One major carrier, for example, concluded that it would fulfil its obligations by informing potential subscribers that they would not be eligible to receive network signals unless they attested that they did not receive acceptable over-the-air pictures when receiving network signals with a rooftop antenna; the subscribers duly so attested. When the networks filed lawsuits to enforce compliance with the law, courts ordered satellite carriers to terminate their provision of network programming to more than two million customers nationwide.

Customers protested violently to Congress, which found itself unified by the need to do something (although its members disagreed on exactly what). The House passed a Bill to deal with the situation in April; the Senate, in May.[2]

Both the House and Senate Bills impose a set of rules for satellite broadcasting roughly parallel to the current cable regulatory model. They allow satellite carriers to carry signals broadcast by stations in a subscribers' community with the permission of those stations; if a satellite carrier carries the signal of one terrestrial station located in a given community, it must carry all others on demand. The House Bill, in a hotly contested provision, prohibits broadcast stations from allowing cable systems to retransmit their signals while 'engaging in discriminatory practices' aimed at charging substantially higher prices to satellite operators for retransmission, or denying permission for satellite retransmission entirely. The Bills also allow satellite operators to provide other network signals to at least some subscribers in the outer portion of a network affiliate's market.

A final version will likely be passed by both Houses, and signed by the President, later this summer. ❖

2 See HR 1554, 145 Cong Rec S5883-86 (daily ed, 24 May 1999), 145 Cong Rec H2312-16 (27 April 1999).

Commercial speech

In *Greater New Orleans Broadcasting Association v US*,[3] the Supreme Court elaborated its views on the government's legitimate role in regulating commercial advertising. Federal law prohibits the broadcast of advertisements for lotteries and casino gambling. The prohibition is one of long standing; its roots lie in an 1868 statute banning the distribution of lottery information through the mails. However, the law is riddled with exceptions. In 1975, Congress exempted a broadcaster's advertising of a state-run lottery in its own state. In 1988, Congress exempted casinos lawfully operated by Indian tribes. It further exempted lotteries and casinos operated by state and local governments and nonprofit organizations. It exempted lotteries or casinos run by commercial organizations as a promotional activity 'clearly occasional and ancillary to the primary business of that organization'. And the FCC has interpreted the law to allow private commercial casinos to run advertisements that don't expressly refer to gambling; casinos can, however, advertise their amenities with phrases such as 'Vegas-style excitement'.

An association of Louisiana broadcasters, seeking the opportunity to run advertisements promoting gambling at Louisiana and Mississippi casinos, challenged the prohibition as unconstitutional. In response, the Government stressed two federal government interests assertedly served by the statute. The first was the interest in reducing the social costs associated with casino gambling, and in particular with compulsive gambling. The second was the Federal Government's interest in supporting those states that do have more stringent anti-gambling laws; the Government noted that 'under appropriate conditions' the plaintiffs' broadcasts might reach into Texas and Arkansas, where private casino gambling is barred.

Applying the test of *Central Hudson Gas & Electric Corp v Public Service Commission of New York*,[4] under which a government restriction on commercial advertising must directly advance a substantial government interest and be reasonably narrowly tailored to serve that interest, the Court rejected both arguments. It first noted its doubts that the government could claim either interest as 'substantial' at all. Congressional policy — sanctioning casino gambling for Indian tribes and exempting state-run lotteries and casinos from federal gambling regulation — hardly bespoke a government single-mindedly oriented towards rooting out the evils of gambling. Indeed, the Court noted, some form of gambling, if only a state-sponsored lottery, is legal in nearly every state. More importantly, the statutory scheme as a whole did not directly advance the Government's claimed interests. The statute permitted a wide range of casino advertisements, including advertisements for the fast growing category of tribal casinos. While there might be adequate grounds for imposing different commercial regulations on tribal and private casinos, the Court continued, it did not follow that government could impose an advertising ban on one group and not the other: 'the power to prohibit or to regulate particular conduct does not necessarily include the power to prohibit or regulate speech about that conduct'.

The Supreme Court here finally came full circle from *Posadas de Puerto Rico Associates v Tourism Company of Puerto Rico*,[5] in which the majority had upheld Puerto Rico's ban on casino advertising. The widely criticized *Posadas* decision had urged that 'the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling'. This year's decision, with only the most cursory reference to the earlier case, interred that approach. ❖

3 119 SCt 1923 (1999).

4 447 US 557 (1980).

5 478 US 328 (1986).

Sexually explicit speech

The equivocal American battle against sexually explicit speech continues. The FCC and the Consumer Electronics Manufacturers Association recently announced that all major manufacturers will meet the agency's deadline for incorporating 'V-chips' in television sets: By 1 January 2000, all new television sets with screens of 13 inches or greater produced by those manufacturers will include the chip. Under guidelines approved by the FCC last year, program producers rate their programming as TV-Y (all children), TV-Y7 (directed to older children), TV-G (general audience), TV-PG (parental guidance suggested), TV-14 (parents strongly cautioned), and TV-MA (mature audiences only). Programs rated as TV-PG, TV-14 or TV-MA also include one or more of these content indicators: S (sexual situations), L (coarse language), D (suggestive dialogue), V (violence). Using the V-chip technology, parents can program their televisions to block out programs with specified ratings and content indicators.

The Supreme Court announced in June that it will hear the government's appeal in *Playboy Entertainment Group v United States*.[6] In that case, a federal trial court had struck down 47 USC § 561, which requires cable operators offering channels primarily dedicated to sexually oriented programming to fully scramble those channels between 6 am and 10 pm, in a way that avoids 'signal bleed' (that is, the occasional transmission of discernable images or sounds on the scrambled channel). The trial court found that the complete scrambling contemplated by the statute was economically prohibitive, so that the statute effectively banned the transmission of the affected channels during daytime hours. It found, further, that the statutory prohibition was not the least restrictive means of achieving the government's goals: a separate statutory provision, after all, requires cable companies to provide any subscriber with channel blocking devices on request. Any parent concerned about signal bleed could take advantage of that provision, the trial court concluded; s 561's sweeping bar was thus gratuitous. The Supreme Court will render its decision on the government's appeal by July 2000.

Finally, a federal District Court in February issued a preliminary injunction barring enforcement of the *Child Online Protection Act* (COPA).[7] COPA made it illegal for a person, 'knowingly ... by means of the World Wide Web, [to make] any communications for commercial purposes that is available to any minor and that includes any material that is harmful to minors'. It was a slimmed-down and less ambitious version of the *Communications Decency Act*, which the Supreme Court declared unconstitutional in 1997.[8]

The District Court found that COPA was a content-based regulation of speech, and thus subject to strict scrutiny. It ruled that the statute chilled the speech of a wide range of commercial web site operators, who found themselves at risk that some prosecutor, somewhere, might deem the material on their sites to be 'harmful to minors'. The court indicated that the means available to website operators to screen off minors from questionable material — such as credit card verification, adult access codes and personal identification numbers — would impose significant economic burdens on them, and, more importantly, would deter some (adult) potential visitors to their sites. And it found itself unable to conclude that the statute was the least restrictive means of achieving the government's goals. Blocking and filtering technology might be even more effective at protecting minors than COPA's ban, and — the court added — would surely intrude less on First Amendment interests. Moreover, the court noted, the approach Congress selected did nothing to stop minors' access to websites not located in the US, to noncommercial sites, and to sites accessible using protocols other than HTTP.

The District Court's final decision will not come until after trial. However it rules, Supreme Court review is likely. ✣

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6 30 F Supp 2d 702 (D Del, 1998).

7 *American Civil Liberties Union v Reno*, 31 F Supp 2d 473 (ED Pa, 1999).

8 *Reno v American Civil Liberties Union*, 521 US 844 (1997).