

Media Law Update

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Protecting advisers



- ***Journalism Teacher Protection Act (2008)***: applies to both high school and college advisers
 - Amendment to Sections 48950, 66301, and 48907 of the Education Code:
 - “An **employee** shall not be dismissed, suspended, disciplined, reassigned, transferred, or otherwise retaliated against for acting to protect a pupil engaged in the conduct authorized under this section, or conduct that is protected by the First Amendment to the United States Constitution or Section 2 of Article I of the California Constitution”
 - Reaction to an increased number of instances in California where administrators pressure, and in some cases retaliate against, advisers over student speech
 - Students also do not lose their right to sue for censorship/retaliation when they graduate

Student free speech



- ***Lowry v. Watson Chapel School District (8CA 2008)***: AR student Chris Lowry and others wore black armbands to protest school dress code and were disciplined
 - Facts similar to famous *Tinker* case, but administrators tried to distinguish by saying that the issue was not the Vietnam war but a dress code
 - The circuit court was not convinced: "In both cases, a school district punished students based on their non-disruptive protest of a government policy"
 - School district has appealed to Supreme Court, alleging that there are differences among some circuits in how *Tinker* should be applied to dress codes

Freedom of information



- ***Taylor v. Sturgell (2008)***: Supreme Court rejected the doctrine of virtual representation
 - Lower court had said that the Federal Aviation Administration could dismiss a FOIA request from Brent Taylor because a friend of Taylor's had previously requested the same info from the same federal agency and had been denied
 - Court said no: Taylor, a non-party to a previous case filed by "close associate" Greg Herrick, was not bound by the judgment in Herrick's FOIA case
 - Justice Ruth Bader Ginsberg: there is a "deep-rooted historic tradition that everyone should have his own day in court" – remanded for a new trial

Commercial speech



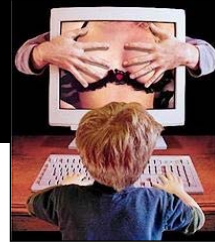
- ***Altria Group v. Good (2008)***: at issue was whether the Federal Cigarette Labeling and Advertising Act preempts state law deceptive practice claims in connection with the advertising of cigarettes as “light” or containing “lower tar and nicotine”
 - Supreme Court said no: Neither the Labeling Act’s preemption provision nor the Federal Trade Commission’s actions in this field preempt a state-law fraud claim
 - A class action suit filed by ME consumers claiming they were deceived by ads for “light” and “low tar” cigarettes may go forward

Indecency I

- ***FCC v. Fox*** at the Supreme Court: technically at issue is whether the FCC acted “arbitrarily and capriciously” in changing its policy to permit isolated uses of expletives on broadcast television to be considered “indecent” under federal law
 - “The big elephant in the room,” though, is whether the FCC indecency policy itself is flawed
 - At least some justices do not want to consider that issue
- In ***CBS v. FCC (3CA 2008)***, the Third Circuit threw out the \$550k fine for the 2004 SuperBowl breast-baring



Indecency II



- ***ACLU v. Mukasey (3CA 2008)***: Third Circuit again struck down the Child Online Protection Act (COPA), affirming a lower court's permanent injunction
 - The court called COPA overbroad, vague and not narrowly tailored, and noted that less restrictive alternatives, such as filtering software, achieve the same goals of protecting children from objectionable content
- Jan. 2009: Supreme Court declined to hear the government's appeal, ending many years of litigation over the constitutionality of the statute

Obscenity

- ***U.S. v. Whorley (4CA 2008)***: Fourth Circuit said that the PROTECT Act does apply to cartoon depictions of child pornography that are deemed to be obscene, and that mere words can indeed be obscene
 - Dwight Whorley was arrested for using a state computer to download Japanese *anime* cartoons depicting children in sexual situations
 - PROTECT makes it illegal to possess, sell, distribute, sexually explicit drawings, cartoons, sculptures, or paintings that depict minors engaging in sexually explicit conduct **and** are obscene: "It is not a required element of any offense under this section that the minor depicted actually exist"
 - Non-obscene portrayals of cartoon children remain protected



Prior restraint



- ***Freedom Communications Inc. v. Superior Ct. of Orange Co. (Cal App 4th 2008)***: appeals court quickly overturned gag order leveled against *Orange Co. Register*, which would have enjoined it from reporting on the trial testimony of any witness in a case in which it is the defendant
 - Trial judge said that the order would prevent witnesses from being influenced by others' testimony – but because the gag order only applied to the *Register* and to no other media, it would not achieve that goal
 - Appeals court suggested that other ways would achieve that goal, such as admonishing witnesses not to read other testimony
 - Case dealt with whether newspaper carriers are employees or independent contractors; settled separately for \$22 mill.

Intellectual property



- ***Mattel v. MGA Entertainment (Cent. Dist CA EDiv 2008)***: Barbie v. Bratz
 - Carter Bryant, the original Bratz designer, was a Mattel employee when he came up with the idea for Bratz; when it was rejected by Mattel, an ex-Mattel employee took his sketches to MGA
 - Judge ordered MGA to hand over the trademarks, stop making the dolls immediately and stop selling them after the holiday shopping season
 - On Dec. 30, 2008, the judge allowed retailers to sell Bratz dolls and accessories through the end of 2009

The FCC



- Down to three commissioners: Michael Copps, Jonathan Adelstein and Robert McDowell, with Copps as acting chair
- Obama's chair nominee: **Julius Genachowski**, Harvard Law School grad, alum of both the FCC and the Supreme Court (clerked for Brennan and Souter)
 - Issues: DTV transition, Net neutrality, national broadband initiatives



Digital television I



- **February 17, 2009:** all full-power TV stations in the U.S. will stop broadcasting in analog and switch to 100% digital broadcasting
 - The government coupon program for converter boxes is out of funds, and new applicants must wait for coupons to expire
 - Obama has called for delay in transition, and FCC commissioners Copps and Adelstein have also written to Congressional leaders urging delay

Digital television II

- **"Short-term Analog Flash and Emergency Readiness Act" (SAFER) or "Analog Nightlight Act:"** passed on December 23, 2008, required FCC to develop and implement a program by January 15, 2009, to permit continued analog TV service from 826 stations for 30 days after the transition to provide public safety and DTV transition info for viewers without equipment to receive digital broadcasts
 - Wilmington, NC is already digital (Sept. 2008) as well as all of Hawaii (Jan. 15, 2009)
 - <http://www.dtv2009.gov>



Libel

- Lobbyist **Vicki Iseman** filed a \$27 mill. defamation suit in December 2008 against the *New York Times* for a story suggesting an improper romantic relationship with Republican presidential candidate John McCain
 - No direct statement that there had been an affair but the *Times* reported that McCain staffers were worried about the relationship and tried to block her access to him
 - Story played large in the public eye, adding to the damage, Iseman alleged: "Thousands of e-mail messages to *The New York Times* and exponentially more e-mail messages, blogs, and Internet postings interpreted the article as implying the existence of an illicit romance and unethical professional relationship between Ms. Iseman and Sen. McCain"



Social networks



- “MySpace bully” Lori Drew escaped conviction in November 2008 on charges that could have put her in prison for 20 years; she was charged under the federal Computer Fraud and Abuse Act, which has been used in hacking and trademark theft cases
 - Drew created a false identity of “Josh Evans” on MySpace and had him flirt with 13-year-old Megan Meier after Megan and her daughter had fallen out; after “Josh” told Megan the world would be better off without her, Megan hung herself in her closet
- Drew was convicted of only three misdemeanors of accessing a computer without authorization, each punishable by up to a year in prison and a \$100,000 fine
 - Among other things, she was charged with conspiring to violate MySpace’s terms-of-service agreement, which prohibits the use of fake names and harassment of other MySpace members
 - Drew was tried in L.A. because MySpace has its HQ in Beverly Hills; MO passed a state law against cyber-harassment after Megan Meier’s suicide

thanks for your attention!

Questions?

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