

Media Law Update

Morro Bay 2011



Genelle Belmas, Ph.D.

Cal State Fullerton

Another new justice!



Calif. supreme court changes



Werdegar



Kennard



Baxter



Chin



CJ Cantil-Sakauye



Corrigan

Biggest story of last year: WikiLeaks

- Three major releases of data:
 - April 2010: “Afghan War Diary” (75,000+ dox)
 - October 2010: “Iraq War Logs” (40,000 dox)
 - November 2010: State Dept. diplomatic cables
- Suffered denial-of-service attacks and other public reprisals (Paypal, Amazon)
- Founder **Julian Assange** under a criminal investigation – arrested in London for alleged sex crimes and awaiting extradition
 - Told *Forbes* he has a data megarelease for this year about private banks – bombshell?



Result: SHIELD Act

- “Securing Human Intelligence and Enforcing Lawful Dissemination Act” sponsored by Sens. Lieberman, Brown and Ensign
 - “Anti-WikiLeaks legislation”
- Amends 1917 Espionage Act to make it a crime for any person knowingly and willfully to disseminate, “in any manner prejudicial to the safety or interest of the United States” any classified info about “the human intelligence activities of the United States”
 - Could it be used to punish the media for publishing lawfully gotten info?
 - SCOTUS would suggest no...

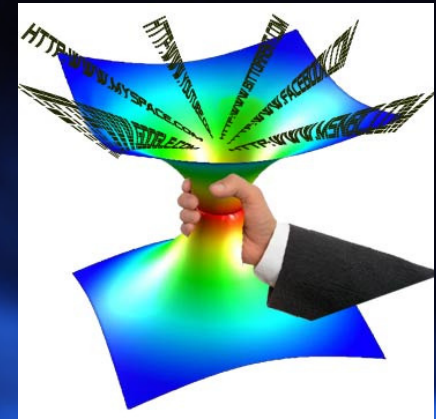
The end of indecency soon?

- ***Fox Television v. FCC (2CA, July 2010)***: Second Circuit strikes down entire indecency regime as impermissibly vague on remand!
 - Could have ruled narrowly on admin grounds but went far beyond: “the FCC’s policy violates the First Amendment because it is unconstitutionally vague, creating a chilling effect that goes far beyond the fleeting expletives at issue here”
 - Concern is not whether broadcasters will push the envelope but the need to provide standards, which the FCC has not done: “The observation that people will always find a way to subvert censorship laws may expose a certain futility in the FCC’s crusade against indecent speech, but it does not provide a justification for implementing a vague, indiscernible standard”



Net neutrality

- The idea that all Internet traffic should be treated the same
- Some ISPs want to charge more for selectively faster service, like providing tiers of service, or provide slower or no service to some sites (like BitTorrents)
- FCC thought it had authority to regulate net neutrality, but in *Comcast Corp. v. FCC* (DCCA 2010) the D.C. Circuit said that there was nothing in the Communications Act of 1934 that gave them that authority



FCC net neutrality rules

December 2010

- Apply to “broadband Internet access service,” a “mass market retail service” that access to “substantially all Internet endpoints” (not dial-up but anything resembling broadband)
 - Requires ISP transparency in management practices
 - Bans blocking by fixed ISPs; mobile ISPs cannot block websites or apps that compete with its own services
 - Fixed ISPs may not unreasonably discriminate among lawful network traffic, but differential (i.e., higher) end-user pricing for heavy use is permitted, and differential treatment of traffic that does not discriminate among specific uses would probably be OK (mobile ISPs are not bound by this requirement)

Verizon says **HOLD ON!**

- Asked a federal appeals court last week to enjoin the enforcement of the new FCC net neutrality rules, saying that they are too broad, and moreover, the FCC lacks authority to regulate
 - “We are deeply concerned by the FCC’s assertion of broad authority for sweeping new regulation of broadband networks and the Internet itself. We believe this assertion of authority goes well beyond any authority provided by Congress, and creates uncertainty for the communications industry, innovators, investors and consumers.”
- Filed in the same court and by the same counsel as Comcast’s in 2010!



Filesharing losses

- Boston U. grad student **Joel Tenenbaum** lost in Massachusetts federal court for downloading 30 songs
 - Jury awarded recording companies a total of \$675,000 (\$22,500 per song)
 - Tenenbaum is appealing
- **Jammie Thomas-Rasset** lost (three times!) in Minnesota federal courts for downloading 24 songs
 - The first jury awarded recording companies \$222,000 in 2007 (\$9,250 per song); in the second trial, in 2009, a jury awarded recording companies \$1,920,000 (\$80,000 per song!); in the third trial in Nov. 2010, she was fined \$1,500,000 (\$62,500 per song)!!
 - Thomas-Rasset is appealing



Julia Cheng / AP

Decided:

***U.S. v. Stevens* (2010)**

- **Court struck down as overbroad an animal cruelty law as applied to sales of videotapes of pit bulls fighting**
 - Targeted at “crush videos” where women in high heels abuse small animals
 - The law covered too much speech; Roberts said “an ad hoc balancing of relative social costs and benefits” should not determine 1A protection



Decided: *Christian Legal Soc. v. Martinez* (2010)



- 9CA said that all UC-Hastings Law groups “must accept all comers as voting members even if those individuals disagree with the mission of the group”
 - Court agreed: A public college does NOT violate the First Amendment by refusing to officially recognize a student organization unless it allows all students to join the group, even if that “all comers” policy requires a religious organization to admit gay students who do not adhere to the group’s core beliefs

Decided:

City of Ontario v. Quon (2010)

- 9CA said that City of Ontario Police Department violated a SWAT officer's reasonable expectation of privacy by reviewing his sexually explicit text messages ("sexts"), even though the messages were sent with a department-issued phone, and the department's formal policy warned of review
 - Relied on official's statement that the department would not review Quon's texts if he voluntarily paid overage charges
 - Court overturned: the search of the texts sent over a government pager to private parties was reasonable, and therefore Quon's Fourth Amendment rights were not violated



Decided:

***Doe v. Reed* (2010)**



- 9CA ordered publication of more than 138,500 names of signatories to a Washington state petition to overturn a state law giving same-sex partners the same rights as married partners
 - 9CA ruled that names should be released, but Supreme Court issued a temporary stay in October until after the Nov. elections (when the referendum failed)
- Court said that disclosure of the identity of persons who sign petitions for ballot referenda does not normally violate the First Amendment but left unanswered whether the First Amendment might prohibit disclosure if it can be shown that disclosure could expose those who signed a petition to serious harm

Decided (sort of): *Costco v. OMEGA* (2010)

- *Per curiam* decision of an equally divided Court (Kagan did not participate)
 - ***First sale doctrine***: purchaser can transfer (sell or give away) a particular lawfully made copy of the copyrighted work without permission once it has been obtained (e.g., used-book stores)
- Affirmed 9CA decision that the first sale doctrine doesn't apply to imported goods manufactured abroad but that haven't already been sold in the U.S. with the copyright holder's permission



9CA and IP ownership



- ***MDY Industries v. Blizzard Entertainment (9CA 2010):*** Blizzard, makers of World of Warcraft (WoW) won at the district level against MDY, maker of a “bot” program that lets users play WoW unattended; 9CA reversed
 - 9CA ruled that “for a licensee’s violation of a contract to constitute copyright infringement, there must be a nexus between the condition and the licensor’s exclusive rights of copyright” – and here there was no nexus, so no infringement
- ***Vernor v. Autodesk Inc. (9CA 2010):*** Timothy Vernor sold used but legitimate versions of software on eBay; software company said he was infringing copyright—9CA agreed
 - Overturned lower court opinion and said that if license agreement contains usage conditions that are more restrictive than under normal sale of a copyrighted work, then it’s a license, not a sale, and therefore cannot be resold

Decided:

***NASA v. Nelson* (2011)**

- 9CA said government employment background check questionnaires violated constitutional right to “informational privacy”
- Court reversed 8-0: NASA’s background checks on employees in contracted companies were constitutional
 - Narrow opinion confined to the present case that didn’t eliminate the constitutional right to informational privacy, although Scalia and Thomas would have eliminated it



Before the Court: *Snyder v. Phelps*

- 4CA said that Westboro Baptist Church's picketing of soldiers' funerals was protected by the First Amendment
 - Albert Snyder's son was killed in Iraq; members of the WBC complied with regulations and police directions, and Snyder did not see protest until it was on local TV
 - “As utterly distasteful as these signs are, they involve matters of public concern,” and thus protected
- Question before the Court: Does the First Amendment protect protesters at a funeral from liability for intentionally inflicting emotional distress on the family of the deceased?



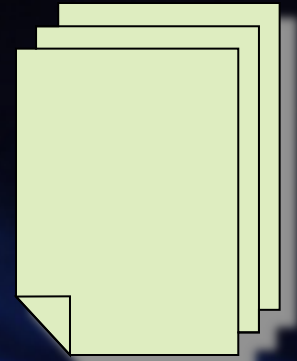
Before the Court: *Schwarzenegger v. EMA*

- California law at issue that requires labeling and forbade the sale of “violent” video games to minors
- Questions before the Court: (1) Whether the First Amendment permits any limits on offensive content in violent video games sold to minors; and (2) whether a state regulation for displaying offensive, harmful images to children is invalid if it fails to satisfy the exacting “strict scrutiny” standard of review



Before the Court:

Milner v. Dept. of the Navy



- FOIA Exemption 2 is divided into “High 2” (materials whose “disclosure may risk circumvention of agency regulation”) and “Low 2” (materials that are not of “genuine and significant public interest”) by some circuits but not all – 9CA signed on to the distinction
- Question before the Court: May the government withhold information under FOIA Exemption 2 when the release of internal information could allow circumvention of federal statutes or regulations?

Before the Court: *FCC v. AT&T*



- AT&T in 2004 may have been overcharging the federal gov' t for the E-Rate program to bring technology into classrooms; FCC investigated, collecting AT&T' s corporate information
 - CompTel, a trade association of AT&T competitors, filed a FOIA request to obtain the investigation files
- Question before the Court: Whether FOIA Exemption 7(C) — which exempts from mandatory disclosure records or info compiled for law enforcement purposes when such disclosure could reasonably be expected to constitute an unwarranted invasion of “personal privacy” – protects the “privacy” of corporate entities

Before the Court: *Nevada Comm'n on Ethics v. Carrigan*

- Commission censured Michael Carrigan, a Sparks, Nev., city council member, for failing to recuse himself from a vote for a casino project whose developer retained a close friend of Carrigan's
 - Carrigan appealed, and a state trial court upheld under a test from a 1968 Supreme Court decision about public employee speech, *Pickering v. Bd. Of Educ.*; Nev. Sup. Court said it was inappropriate to apply *Pickering* and that “voting by an elected public officer on public issues is protected speech under the First Amendment”
- Question before the Court: Under the First Amendment, how strictly should courts scrutinize state statutes that require state officials to recuse themselves from voting on matters in which they have an alleged conflict in interest?



Before the Court:

Sorrell v. IMS Health



- Vermont passed a 2007 law that banned the sale, transmission or use of prescriber-identifiable (PI) data for marketing or promoting a prescription drug without the prescriber's consent and prohibited the sale, license or exchange for value of PI data for marketing or promoting a prescription drug
 - 2CA struck down the law on First Amendment grounds
- Question before the Court: Does a law that restricts access to info in non-public prescription drug records and affords prescribers the right to consent before their identifying info in prescription drug records is sold or used in marketing violates the First Amendment?

Before the Court: *General Dynamics v. United States*

- With *Boeing v. United States*
- “State secrets” doctrine prevents disclosure of important state secrets in litigation
- Contractors had their contract canceled and tried to sue to recover costs but the government asserted state secrets and said they couldn’t do so
- Question before the Court: Can the government can maintain its claim against a party when it invokes the state secrets privilege to completely deny that party a defense to the claim?





California developments

- **SB 438 (Yee):** chaptered
 - California charter schools are required to obey existing law that protects student speech and press activities in all public and private high schools
- **SB 218 (Yee):** vetoed
 - Reintroduced this month as SB 8
 - Would require quasi-public organizations operating on community college, CSU or UC campuses to comply with the California Public Records Act; anonymous donors and volunteers could request that their info not be publicly disclosed so long as they do not receive anything in exchange for their gift that has a value of \$500 or more



California developments

- **SB 1411 (Simitian):** chaptered
 - Makes it unlawful to knowingly and without consent credibly impersonate another person through or on a website or by other electronic means with intent to harm, intimidate, threaten or defraud another person
- **AB 224 (Portantino):** chaptered
 - Requires the Board of Governors of the California Community Colleges, the CSU Board of Trustees, CSAC, and the Board of Directors of EdFund to broadcast their board meetings over the Internet and to provide public notice of the availability of these proceedings (UC Regents requested to do so)



California developments

- **AB 2479 (Bass):** chaptered
 - Makes it a misdemeanor instead of an infraction to violate any of three existing Vehicle Code Sections – tailgating, reckless driving and interfering with the operation of a vehicle – “with the intent to capture any type of visual image, sound recording, or other physical impression of another person for a commercial purpose” and creates enhanced punishments



California developments

- **SCA 7 (Yee):** Senate Constitutional Amendment introduced to establish once and for all the public's right under the Brown Act to reasonable notice of meetings and reporting out of closed session decisions
- Would amend language placed in the state constitution by Prop 59 – the Constitutional Sunshine Act – in 2004, to add: “Each public body shall provide public notice of its meetings and shall publicly disclose any action taken”





Proposition 8 developments

- **Overtaken by Judge Vaughn Walker on equal protection grounds in August 2010 in *Perry v. Schwarzenegger***
 - **Ruling stayed for appeal and extended indefinitely by 9CA (Cal. officials declined to defend the law)**
 - **Oral arguments heard by 9CA panel in December 2010**
- **9CA certified a question to the Calif. Supreme Court in January 2011: to decide whether under CA law, the backers of a challenged initiative had a “particularized interest in the initiative’s validity” (i.e., standing) that would permit them to defend the law when state officials refuse to do so**

thanks for your attention!

Questions?

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