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March 31, 2004

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2004 MAR 31 A 11:54

Commission Secretary
Federal Election Commission
999 E Street NW
Washington, DC 20463

Re: Comment on draft Advisory Opinion 2004-07 (MTV/Viacom).

I submit this comment to the Federal Election Commission (FEC) in response to its draft Advisory Opinion 2004-07, regarding the MTV's internet based service named "Prelection" and related activities. MTV seeks an opinion that it qualifies for exemption under the press entity and news media provisions of the Federal Election Campaign Act (FECA) and the FEC's regulations thereunder.

I. Summary of Argument.

I do not oppose or support an opinion that the MTV Prelection and other activities described by MTV is lawful under the FECA. Rather, I comment upon the grounds that the FEC relies upon in its opinion.

First, I have commented previously on the press entity and news media provisions. I submitted a comment to the FEC on June 20, 2000 in the Ampex/iNEXTV matter. See, Advisory Opinion 2000-13. I failed to persuade the FEC as to the merits of my arguments. I have no basis to expect the FEC to change course in the present proceeding. I merely restate, and incorporate herein, the concerns that I expressed in 2000. I attach a photocopy of the comment that I filed then. As I argued in 2000, the FEC can provide the relief sought by the requester by applying First Amendment analysis, rather than press entity and new media analysis.

Second, the main reason that I submit a comment today in this matter is that there is a crucial set of additional facts that call for the FEC to consider another statute. I refer to the interactive computer service immunity section of the Communications Decency Act. This is codified at 47 U.S.C. § 230.

Subsection 230(c)(1) provides that "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."

I submit for the FEC's consideration that while MTV has not raised this argument, MTV nevertheless stated facts in its request for an advisory opinion that describe a plan to operate an interactive computer service.

MTV plans to operates the service, but it is the people who casts their mock votes who are providing the content. MTV's server(s) will merely obtain, process, store, and provide access to, this content. These young participants are the information content providers.

Yet, the FEC's analysis in its draft advisory opinion treats MTV as if it were the provider of these communications. I argue in this comment that the FEC is barred from doing so by Section 230.

Of course, while the core activity of operating this interactive computer service is protected by Section 230, MTV also describes in its request numerous other activities that do not constitute the operation of an interactive computer service. Section 230 should have no effect upon the FEC's analysis of the application of the FECA to these other activities.

MTV did not raise Section 230 immunity. The draft advisory opinion does not raise Section 230 immunity. But, since the opinion, as currently written, applies limitations imposed by the FECA upon an activity that is an interactive computer service, it would serve as a precedent for the proposition that Section 230 does not provide any immunity from imposition of the provisions of the FECA upon interactive computer services. This consequence could deter persons, companies and other entities from providing useful interactive computer services, and thereby lower the quality of public discourse, decrease the availability of information, and inhibit free speech.

I respectfully request that the FEC revise its draft advisory opinion in a manner that either recognizes that an interactive computer service, such as MTV's, is entitled to Section 230 immunity in the context of enforcement of the FECA, or, in the alternative, states that the advisory opinion does not address Section 230 immunity, and will not preclude assertion of Section 230 immunity in similar factual situations in the future.

I do not now operate any interactive computer services, but I hope to do so in the future. My interest in this proceeding is that the FEC not issue an advisory opinion that would affect my future operations.

II. Statutory Analysis.

Section 230(c)(1) provides that "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."

Section 230(f)(2), in turn, provides that "The term ``interactive computer service'' means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions."

Section 230(f)(3) provides that "The term ``information content provider'' means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service."

Finally, Section 230(e) provides several exceptions to Section 230(c)(1).

I submit that this statute requires the FEC to apply a four part analysis to determine whether a particular activity is subject to the prohibitions of the FECA, or is immunized there from by Section 230.

First, is the activity under examination by the FEC an interactive computer service? Second, if so, is the interactive computer service provided with information by other persons or entities? Third, would application of the FECA treat the interactive computer service as the speaker, publisher or provider of this information provided by others? Fourth, is the activity under review by the FEC covered by one of the exceptions to the immunity clause? I follow this four part analysis below.

A. MTV Plans to Operate An Interactive Computer Service.

While MTV does not assert Section 230 immunity, or even use the term "interactive computer service", its recitation of facts makes clear that some of the activities that it plans do in fact include the operation of an interactive computer service.[1] MTV states that this "Prelection" is an "online vote", using an "online tool". It states that it will be conducted through two websites. It further states that people will "register to vote" online, and then "vote" online.

What MTV is describing is a database backend accessed by a web interface that enables anyone with internet access to input data. By registering online, people will use their PCs, laptops, or other computing devices, combined with internet access, to interact with MTV's service. These people will likely use a web form in an MTV web site to provide information that will be added to a database on a server controlled by MTV. The information that people will provide to the server includes not only their personal information (address, date of birth, name, e-mail address), but also, eventually, their "vote".

MTV states that people will provide it with personally identifying information online. Then, MTV will obtain "third-party verification of their identity and registered address". That is, MTV will take the data that it obtains, and compare parts of it, electronically, against data in another computer database, provided by another company. One might speculate that this would involve a company such as Acxiom.

This is not a green eyeshades and No. 2 pencils operation. This is a computer server based, web accessed, interactive operation. It fits squarely with the statutory definition of "interactive computer service". Section 230(f)(2) defines this as "any information service,

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[1] There are reasons why a corporation that qualifies for immunity would not seek Section 230 protection. First, even if the FEC were to opine that Section 230 does apply to MTV's interactive computer service, this immunity would only cover a small subset of all of the activities described by MTV in its request for an advisory opinion. Hence, prevailing on a Section 230 claim would accomplish little for MTV. Second, while classification as an interactive computer service confers statutory benefits, it also imposes statutory obligations, which service providers may seek to avoid. Moreover, these obligations are likely to further expand over time. One reason for this is that interactive computer services can enable anonymous and remote communications, and can be used by criminals and terrorists.

system, or access software provider that provides or enables computer access by multiple users to a computer server ..."

Of course, while MTV describes an interactive computer service, it also describes many activities that are not interactive computer services.

Moreover, the words used by both MTV in its request, and by the FEC in its draft advisory opinion, to describe this interactive computer service miss the point. The draft calls this a "survey", and states that "participants" must "sign-up". The MTV request calls this a "Prelection", which is a derivative use of the word "election", and states that "voters" must "register to vote" before they "vote".

The term "survey" is not descriptive of MTV's planned activity to the extent that a survey is generally understand to be a sampling of a larger population, picked randomly, by the surveyor, and then analyzed for the purpose of making inferences about the larger population. But, MTV will not pick the respondents; they will self select themselves. This will not be a random or representative sample -- it will be mostly youthful MTV watchers who are hardly representative of the entire electorate. MTV will not use this to draw inferences about the candidate preferences of the whole electorate.

Likewise, the terms "vote" and "election" are not descriptive. Voting and elections are a process by which preferences of citizens are aggregated to attain social choices. Officials are elected. Referenda are approved or rejected. And so forth. Nothing will be decided by MTV's activity. Moreover, elections are a fundamental governmental function, not a private sector activity.[2]

The appropriate term is neither "survey" nor "election". What MTV plans is the operation of an interactive computer service that will collect, maintain, aggregate, and make available in aggregate form, the candidate preferences of the users of the service.

It is the case that MTV's planned interactive computer service will provide limited opportunity for interaction. The only information that users will provide that will be made available to other users is their candidate preferences (and this will only be available only

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[2] There are other significant differences between what MTV is planning, and voting and elections. Another difference is that in elections extraordinary measures are undertaken to assure that the voter's votes are confidential. Nowhere is the right to privacy more zealously protected than behind the curtain of the voting booth. In contrast, MTV, or any entity operating an interactive computer service that aggregates candidate preferences, has the capacity to retain in a computer database the identity and candidate preferences of each participant. Moreover, while voter registration data is maintained by a vast multitude of state and local governmental entities, MTV's personally identifying information, and candidate preference data, will likely be maintained in one comprehensive database.

in aggregated form). MTV could have designed an interactive computer service that provides far other avenues for expression and interaction.[3] But this is all beside the point. Section 230 applies to all interactive computer services, not just those that are particularly meritorious. For example, in two cases that apply Section 230, Zeran and Noah, the online discussions that became the subject of litigation would have shocked the conscience of Howard Stern. But, the Courts applied Section 230 nevertheless.

B. Information Will Be Provided to MTV by Other Information Content Providers.

MTV plans to report results of its "Prelection". This may include reporting, such as that Candidate A received 53% of the vote of 13-18 year olds.

But, if MTV makes this information available, it is merely providing a mathematical aggregation, calculated by computer, of information provided to it by the users of the service. These are third parties. Under the language of the statute, they are "information content providers".

This sort of mathematical computation is a fundamental feature of interactive computer services. When one goes to a book review website, one might not only find the reviews written by users, but also summary data, such as that 15 persons reviewed this book, and the average rating was three and one half stars. When one goes to a product review website, one might find summary data such as that 18 out of 32 users recommended this product.

With MTV, as with these other examples, it is third party users who are offering opinions, expression, and content. The interactive computer service provides no opinion, expression or content. It merely obtains, stores, aggregates, and makes available in aggregate form the content provided by others. Under the statute, MTV is not the "information content provider".

C. The Draft Advisory Opinion Treats MTV As The Speaker, Publisher or Provider of Information.

So, MTV will act as an interactive computer service, and it will receive and make available information provided by other information content providers. The third part of any analysis of Section 230 immunity is more complex. The statute provides that "No

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[3] While an interactive computer service such as that described by MTV would provide only limited opportunity for interaction, hypothetically, an operator of such an interactive computer service might obtain and retain a large electronic database of names, addresses, dates of birth, e-mail addresses and candidate preferences. Such databases can be integrated with pre-existing data to provide fuller profiles of individuals. And, if the interactive computer service incorporates cookie technology, it could associate individual computers with individuals' profiles in subsequent web interactions. This could be a marketer's dream (as well as a parent's or privacy advocate's nightmare). It could facilitate the marketing of softdrinks, shoes, or whatever advertisers on MTV, or other Viacom properties, sell. And since the data includes candidate preferences, there are potential uses in delivering targeted and customized political advertisements. Of course, MTV may plan to destroy the data that it collects.

provider or user of an interactive computer service shall be treated as the publisher or speaker ..." Thus, for Section 230 immunity to apply, the application of the FECA provisions under consideration must treat MTV in the capacity of a speaker or publisher.

First, the FEC may be tempted to conclude that "speaker" and "publisher" are terms most often used in the law of defamation. The FEC may be tempted to conclude that Section 230 therefore applies only in state law defamation actions, and not in federal question proceedings unrelated to defamation.

Indeed, some of the leading cases applying Section 230 are defamation cases. See, for example, Blumenthal v. Drudge, 992 F.Supp. 44 (D.D.C.1998).

However, the Courts have expressly rejected this argument. For example, in Zeran v. America Online, Inc., 129 F.3d 327 (4th Cir.1997), cert denied, 524 U.S. 937, 118 S.Ct. 2341, 141 L.Ed.2d 712 (1998), the Court extended the application of Section 230 to negligence.

The key case on this point, however, is Noah v. AOL Time Warner and America Online, Inc., 261 F.Supp.2d 532 (E.D, Va, May 15, 2003), affirmed March 24, 2004 in a non-precedential per curiam opinion of the 4th Circuit. See, App Ct. No. 03-1770, and slip opinion at http://pacer.ca4.uscourts.gov/opinion.pdf/031770.U.pdf. In this case the Court extended the application of Section 230 to an action brought under the federal Civil Rights Act of 1964.

The question is whether the underlying claim would require treating the defendant (or in this case, MTV) in some way as a speaker or publisher of the communications that are central to the case.

In applying this body of statutory and case law to the issues before the FEC, one must first recognize that there are two separate FECA (and regulations thereunder) provisions -- (1) electioneering communications and (2) contributions or expenditures by corporations.

The analysis regarding electioneering communications is easy. By applying rules affecting "communications" to MTV, the FEC would necessarily be treating MTV as the communicator. This is just another way of saying "speaker" or "publisher". Hence, the application of the FECA to MTV's interactive computer service would be treating MTV as the speaker, publisher or provider of this information.

The analysis regarding contributions or expenditures by corporations requires closer examination, but leads to the same conclusion. On the surface, these provisions regulate the flow of money, and not the expression or publication of information or ideas. But, in the MTV case, the FEC's draft advisory opinion reveals that there is no delivery of cash, writing of checks, or transfer of funds. The FEC is relying upon the concept of in kind contributions and expenditures. And, on the subject of the online Prelection, the in kind contributions and expenditures are the operation of an interactive computer service, and

the publication of the Prelection results. That is, to find that the corporate contributions and expenditures provisions of the FECA regulate MTV, the FEC must attribute the publication of election results to MTV. This is treating MTV as the speaker or publisher of this information. And this invokes the immunity of Section 230.

D. The FECA is Not an Enumerated Exception in Section 230.

Finally, the fourth part of an analysis of Section 230 immunity is whether the activities at issue fall within any of the enumerated exceptions. These are listed at Section 230(e)(1)-(4). Simply put, the FECA is not there.

In conclusion, there is a core body of activity planned by MTV for which Section 230 immunity precludes the FEC from applying the requirements of the FECA.

III. FEC Failure to Recognize Section 230 Would Diminish Political Discourse and Participation.

This is not just a matter of statutory construction. There are strong policy arguments that weigh in favor not holding the providers of interactive computer services responsible for the statements of people who use their services.

The first place to turn for a statement of the policy implications is the recitation of purposes contained in the statute itself.

Section 230(a)(1) states that "The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens."

Section 230(a)(3) provides that "The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity." By lauding the capacity of "interactive computer services" to provide "political discourse", the Congress and President all but stated that the FEC should extend interactive computer service immunity in FEC proceedings.

Finally, Section 230(a)(5) states that "Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services."

The 4th Circuit elaborated on the purpose of Section 230 in the Zeran case. It wrote that "The purpose of this statutory immunity is not difficult to discern. Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium. The imposition of tort liability on service providers for the communications of others represented, for Congress, simply another form of intrusive government regulation of speech. Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in

the medium to a minimum. In specific statutory findings, Congress recognized the Internet and interactive computer services as offering ``a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.'' Id. § 230(a)(3)."

The Court continued that "Interactive computer services have millions of users. ... The amount of information communicated via interactive computer services is therefore staggering. The specter of tort liability in an area of such prolific speech would have an obvious chilling effect. It would be impossible for service providers to screen each of their millions of postings for possible problems. Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted. Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect.

In the Zeran case, AOL was threatened by a tort based lawsuit. But a statement of the purpose of the statute could just as easily, and correctly, recite the threat of administrative actions by federal agencies.

But, the underlying point is that without Section 230 protection, people and entities are less likely to provide interactive computer services, and speech, public discourse, and the exchange of information will thereby suffer.

IV. FEC Notice of Inquiry on Use of the Internet for Campaign Activity.

I would also respectfully submit that the FEC has already carefully examined the relationship of Section 230 to the FECA. The FEC might benefit from reviewing its prior examination of this issue. That is, the FEC issued a detailed Notice of Inquiry (NOI) on the "Use of the Internet for Campaign Activity" in 1999. This NOI addressed interactive computer services, as well as many other issues. The FEC published this NOI in the Federal Register (November 5, 1999, Vol. 64, No. 214, at Pages 60360-60368).

Specifically, the FEC asked in this NOI the following: "Another area of campaign-related activity on the Internet is the use of ``chat rooms'' and other fora for interactive discussions of issues and candidates. Are there circumstances under which the sponsor of such a forum should be responsible for statements made by persons participating in the discussion? Does the sponsor make an expenditure by providing a venue for individuals to expressly advocate on behalf of a candidate?"

Chat rooms, of course, are just one of many uses of interactive computer services.

The public reaction to this NOI was immense. The number of comments received was among the largest for any FEC proceeding. Second, the comments were overwhelmingly opposed to applying FECA regulation to internet based activity.

The FEC received detailed and thoughtful comments in response to its question regarding interactive computer services. I would draw the FEC's attention to America Online's comment, which reviewed the statute, as well as the 4th Circuit's discussion in the Zeran case.

Also, the Center for Democracy and Technology (CDT), which was joined by numerous other public interest groups, commented on this subject. These public interest groups wrote that "The Commission should take note of section 23(c)(1) of the Communications Act, 47 U.S.C. 230(c)(1), in which Congress limited the liability of those who provide opportunities for others to speak on the Internet. A service provider is not liable for the content created by their subscribers or users." The cited the Zeran case also.

The CDT comment continued that "The Commission's rulings in the DNet Advisory Opinion (1999-25) and the EZone Advisory Opinion are in line with this approach and should be extended. In the DNet opinion, the Commission found that, because DNet would serve merely as a conduit for the communications of others, that any statements made by "persons supporting the candidates c[ould] not be imputed to DNet. Similarly, in the EZone opinion the Commission found that allowing site visitors to submit questions to political candidates, even though EZone might restrict questions that were redundant, off topic, or asked a candidate to state an opinion about another candidate, would not cause the statements made by individuals to be imputed to EZone."

The CDT concluded that "Service providers and conduits should not be held responsible or liable for statements made by subscribers. Furthermore, service providers and conduits should not be under any obligation to monitor the activities of their subscribers."

I would encourage the FEC to consider these and other comments received in response to its NOI.

V. About Your Commenter.

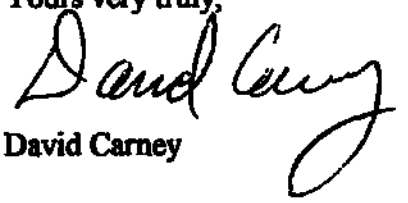
I own no stock in Viacom International, Inc. or Viacom, Inc. I am not employed by, and have no contractual relationship with, Viacom International, Inc. or Viacom, Inc., or any of their divisions, subsidiaries or affiliates. I have no connection to the requestors of this advisory opinion, or any of their competitors.

My interest in this matter arises out of my operation of a business that consists of the publication of a daily newsletter (which is sold to paying subscribers) and web site (most of which is free access) that could be adversely affected by the FEC's rules and opinions on this topic. The website is located at http://www.techlawjournal.com/.

I do not now operate any interactive computer services. However, I hope to do so in the future. I do not wish to do so in a regulatory environment in which interactive computer services are deprived of Section 230 immunity by the FEC (or any other regulatory agency or court).

If I can be of further assistance, please let me know. My phone number is 202-364-8882. My email address is dcarney@techlawjournal.com. My mail address is P.O. Box 4851, Washington DC, 20008

Yours very truly,



David Carney

attachment

June 20, 2000

Commission Secretary
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JUN 20 2 30 PM '00
FEDERAL ELECTION COMMISSION

Re: Comment on Draft AO 2000-13.

I submit this comment on the Federal Election Commission's Draft Advisory Opinion 2000-13. The draft pertains to the request for an advisory opinion submitted on May 25, 2000 by the Ampex Corporation and iNEXTV Corporation.

Introduction.

To the extent that the draft advisory opinion reaches the result that the FEC should take no adverse action against Ampex or iNEXTV, it is commendable. Ampex and iNEXTV should be allowed to engage in the activities discussed in their request for an advisory opinion unfettered by the FEC. I submit this comment for the purpose of urging the FEC to reach this result on a different legal basis.

The draft advisory opinion states that "The Commission concludes that, both as to their purpose and function, iNEXTV and EXBTV are press entities ..." Moreover, the draft concludes that two employees of iNEXTV are "journalists". It is inappropriate for the government to decide who is, and who is not, a press entity or journalist. The FEC is headed down a path of de facto licensing of the press and speech. This will have the effect of lowering the quality and diversity of political speech. It will have an effect contrary to the purpose underlying the FECA.

Instead, the FEC ought to base its opinion on the "freedom of speech or of the press" clause of the Constitution. iNEXTV is engaging in expressive conduct that is protected by this clause. It is unnecessary, and indeed unconstitutional, for the FEC to reach a determination as to whether or not iNEXTV is a "press entity".

There are many reasons why the FEC should not issue an advisory opinion in this matter that makes a determination regarding who is, and who is not, a press entity or journalist:

1. The draft opinion evidences a de facto FEC licensing scheme that is antithetical to the most basic notions of freedom of expression in a democratic society.

2. The draft opinion is unconstitutional.

3. The draft opinion evidences that the FEC is constructing an administrative framework that will enable malicious parties to use the FEC's complaint process and press entity rules to suppress speech -- particularly speech by small publishing businesses and individuals with web sites.

4. The draft opinion evidences that the FEC is developing a legal framework for regulating speech that lacks simplicity, affordability, and predictability, and that will deter individuals and small publishing businesses from engaging in political speech.

5. The draft opinion does not set forth a method (nor is there any rational method) for applying the FEC's dichotomy between "any corporation whatever" and "press entities".

1. The draft opinion evidences a de facto FEC licensing scheme that is antithetical to the most basic notions of freedom of expression in a democratic society.

By submitting its request for an advisory opinion, iNEXTV comes to the FEC to ask for permission to engage in speech regarding the national conventions of the two leading political parties. The FEC proposes to grant it permission to do so, on the grounds that it is a "press entity". Implicit in this process is the notion that not every applicant will be granted such permission. Some parties will be permitted by the FEC to engage in certain types of political speech, while others will be denied such permission. Parties without permission will be subject to fines, injunctions, and perhaps criminal prosecution.

The FEC is the government agency which writes the rules for granting such permissions, reviews the applications, grants or denies permission, and prosecutes those acting without its requisite permission.

This is a licensing process in all but name. The activity that is licensed is speech.

Democratic governments do not license speech, presses, or journalists, especially when it comes to political speech. However, many kings, dictators, and communists do.

The practice of government licensing of presses ended in England in 1695. It died out in the American colonies in 1725. The FEC would revive it today.

2. The draft opinion is unconstitutional.

The First Amendment requires that "Congress shall make no law ... abridging the freedom of speech, or of the press ..." One thing is clear about the original understanding

of the drafters of the Bill of Rights: they intended to prevent the licensing of printing presses, which at that time were the principle method of disseminating speech about politics and elections.

Former Chief Justice of the United States Warren Burger addressed this very issue in his concurring opinion in FNB v. Bellotti, 435 U.S. 765, at 801 (1978). He wrote:

> "The very task of including some entities within the "institutional press" while excluding others, whether undertaken by legislature, court, or administrative agency, is reminiscent of the abhorred licensing system of Tudor and Stuart England - a system the First Amendment was intended to ban ..."

The draft advisory opinion, by determining that iNEXTV is a "press entity", is doing just what the First Amendment was intended to prevent.[1]

3. The FEC is constructing an administrative framework that will enable malicious parties to use the FEC's complaint process and press entity rules to suppress speech, particularly by small publishing businesses and individuals with web sites.

King James II's henchmen ruthlessly enforced the licensing statute against the political opponents of the King. In contrast, the FEC is made up of a group of professionals who will not use the licensing power in a malicious or biased manner. But this does not mean that the FEC's framework will not cause significant harm.

The most significant harm of the FEC's licensing of "press entities" will result from malicious actions taken by third parties. People who want to stop other people from engaging in expressive conduct will use the FEC complaint process. Many will succeed.

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[1] The FEC may be tempted to assert that the Supreme Court's decision in Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990), stands as authority for the proposition that it can license political speech, or at least, determine who is a "press entity." Any reliance on this case would be misplaced. The Court rejected a First (Speech) and Fourteenth (Equal Protection) Amendment challenge to a Michigan state statute regulating political expenditures by corporations. The case concerned a Michigan statute, not the FECA. The language of the statute in question differed from the language of the FECA. The Michigan statute that was challenged affected only corporations, while the FEC's "press entity" determinations apply to corporations and non-corporations alike. The "expenditures" at issue were the purchase of ads by the respondent, not the operation of web sites, newspapers, broadcast facilities, or other media published by the respondent. Finally, that case did not involve a claim by the respondent that is was a "press entity", or any determination by the state regarding "press entity" status; rather, the Court merely rejected an equal protection clause challenge to Michigan's statute that treated media corporations differently from other corporations.

The matter of Zach Exley must still be fresh in the memory of the FEC. Benjamin Ginsburg did not act out of an innate sense that the sanctity of the FEC rules had been violated. He wanted to silence Exley, close down his web site, and thereby further the electoral chances of George W. Bush. He used the FEC complaint process to attempt to do this. But Exley was largely invulnerable, because he had nothing to loose: he had no company, no subscriber base, no advertising income, and certainly no reputation, to defend. This case should demonstrate to the FEC that people will use the FEC's complaint process to suppress political speech.

Another case is more illustrative of how a government licensing scheme can be used to try to suppress political speech -- Richard Nixon's attempt to shut down the Washington Post during the Watergate controversy. Newspapers were not subject to licensing at that time. However, the Washington Post Company also owns broadcast stations in Florida. Over the years the Post's broadcasting operations have been highly profitable.

Broadcast stations are licensed by the Federal Communications Commission (FCC). Friends of Richard Nixon filed four challenges to these licenses when the Post took the lead in reporting on the Watergate scandal. Katherine Graham recounts these events in her book, Personal History (Vintage Books, 1998):

> "Colson sent a memo to another White House staffer: "Please check for me when any of The Washington Post television licenses are up for renewal. I would like to know what the upcoming schedule is." Coincidentally, but luckily for the administration, renewals for stations in Florida were due in early January 1973, and these licenses, as Colson knew well, were a sure way the government could hurt us. Of all the threats to the company during Watergate--the attempts to undermine our credibility, the petty slights, and the favoring of the competition--the most effective were the challenges to the licenses of our two Florida television stations." [At page 479.]

She continued that these license challenges were "entirely politically motivated by people sympathetic to Nixon or even associated with the CRP." [At page 479.] She elaborated on the financial harm done to the Washington Post:

> "Among the worst effects of the was the sharp decline in our stock price that naturally ensued, from $38 a share to $28 in the first two weeks after the challenges, and continuing on down to $16 or $17, decreasing the value of the company by more than half. As for the direct effect on our finances, the legal costs of defending the licenses added up to well over a million dollars in the two and a half years the entire process took . . ." [At page 482.]

She also added that "Colson was talking around Washington about going to our national advertisers or our investors." [At page 483.]

Graham concluded that "the very existence of the Post was at stake" [page 483] and that "I was frightened for the future of The Washington Post Company . . ." [page 507].

The FEC is now licensing all forms of political speakers, not just broadcasters. The FEC may take issue with the use of the term "licensing". However, it cannot dispute that it allows third parties to challenge a publisher's status as "press entity". They need only file a complaint with the FEC.

The FEC's procedure is more threatening to publishers than the FCC's, for four reasons:

1. One can only challenge an FCC license of the holder of the license, while one can file a complaint with the FEC against any third party (including advertisers) who gives "anything of value" to a political speaker.
2. The FCC's license challenge procedures are transparent, open to the pubic, and afford due process rights to the affected parties, while the FEC's complaint proceedings are not transparent, not open to the public, and in the case of complaints against third parties, do not afford the real party in interest notice and a right to be heard.
3. One can only challenge an FCC license when it comes up for renewal, while one can file a complaint with the FEC at any time against a political speaker.
4. Most FCC issued broadcast licenses are held by large and wealthy corporations that can afford to fight license challenges, while many entities that will be the targets of FEC complaints will be small publishers and individuals with web sites who cannot afford the cost of fighting the complaints.

First, in addition to filing complaints with the FEC directly against publishers, malicious entities may file complaints against companies that do business with publishers. The FECA states that "anything of value" can constitute a contribution or expenditure. The FEC is giving an extraordinarily broad interpretation to this clause.

Researching and writing original articles, commentary, or other content, is a time consuming endeavor. Any Internet publisher who seeks to regularly publish original content needs revenue to support the people who produce the content. The most prevalent business model is to sell advertising space. This means that companies that advertise, and the ad companies that represent them, make payments to the publishers. Advertising payments may be construed as "anything of value". A malicious person seeking to stop a publisher may file complaints with the FEC against the advertisers or ad companies alleging that payments made by them constitute contributions or expenditures in violation of the FECA.

The complaints are all likely to be meritless. But it does not matter. Many advertisers and ad companies would simply drop their contract with the publisher, rather than hirer a lawyer to figure out what the FECA is all about. In particular, with small Internet publishers, the dollar cost of many ad purchases is far less than what a lawyer with expertise in FECA law would charge to represent them in an FEC proceeding. By cutting off the revenue stream, or even threatening to do so, a malicious entity could use the FEC complaint procedure to silence a publisher.

Secondly, the secrecy of FEC complaint proceedings also works against innocent publishers. Complaints are not public record until decided. Hence, if a malicious entity files a complaint against a publisher's advertiser, the publisher is given no notice. The advertiser may drop the publisher, and the publisher will not even know the reason why. This, or course, violates the due process rights of the web site publisher who is the real party in interest in the proceeding.

Third, complaints can be filed at any time. Even the issuance of an advisory opinion by the FEC that a publisher is a "press entity" offers little protection against future complaints. A complainant can challenge the "press entity" opinion by raising new facts, or facts not considered in the original proceeding; or he may merely file an altogether frivolous complaint. But of greater concern, is that the language of FEC's "press" regulations present a host of other grounds for complaints.

Sections 100.7(b)(2) and 100.8(b)(2) of the FEC's regulations both state that it is the contribution or expenditure for a news story, etc., that may be exempt. Hence, even if the FEC has opined (or issued a license) that an entity is a "press entity," a complainant can file a complaint alleging that any individual news story fails to meet the criteria set out in the regulations.

These regulations are onerous indeed.[2] Each news story must be part of "a general pattern of campaign related news account". A quick review of the EXBTV web site reveals that iNEXTV does not have a general pattern of coverage of election campaigns. Each news story must also provide "equal coverage to all opposing candidates". The request for an advisory opinion makes no mention of covering conventions other than the Democrats' and the Republicans'. Thus, iNEXTV, like any other entity that receives an advisory opinion that it is a "press entity", would is still be vulnerable to complaints.

iNEXTV can afford to contest any such complaints. It would be a travesty if the FEC were to find against iNEXTV in any such complaint proceeding. And hopefully, any such outcome is highly unlikely. However, the unavoidable travesty is that iNEXTV, or other publishers, could lose advertisers as a result of malicious complaints long before the FEC rules on the complaints.

In the event that the FEC is disinclined to believe that its complaint process would be used to suppress political speech, it should consider several tactics that have recently been developed to intimidate or stop speech on the Internet.

The Internet has provided individuals, small publishing businesses, and small groups new venues to express their views. It has also lead to several disturbing trends in efforts to silence expression. First, there are efforts to pierce the veil of anonymity of Internet speakers, who use bulletin boards, discussion groups, and chat rooms to disseminate information or express views. Some of this expression involves information about businesses, and influences investors' decisions. Consequently, many companies have resorted to filing suits against Internet Service Providers for purpose of using the pretrial

[2] They are also unsupported by the statute.

discovery process to gain an individual's identity. That suit is then usually dropped, and then action is taken against the individual.[3]

Second, there are suits for slander. Third, many corporations are aggressively asserting copyright, trademark, and trade secrets law to prevent individuals from disseminating information about them through web sites.[4]

Finally, in the case of web sites with revenue streams, there are efforts to cut off this revenue.[5]

The point is this. The FEC will endeavor to administer its "press entity" rules and procedures in a non-partisan and unbiased fashion. But, it does not matter how professional and fair the FEC is. The complaint process will be abused by third parties. Speech will be suppressed. And harm to the democratic process will result.

4. The draft opinion evidences that the FEC is developing a legal framework for regulating speech that lacks simplicity, affordability, and predictability, and that will deter individuals and small publishing businesses from engaging in political speech.

The FECA and CFR provisions relating to federal elections fill up two books. The advisory opinions would fill up many more. Moreover, the language is often arcane and inaccessible to all but a small group of elite lawyers who specialize in federal election law. To make matters worse, almost all of these lawyers are in the Washington DC area and work for either the FEC or posh and expensive Washington DC law firms.

This would not be a problem if the only parties affected by the FEC process were the DNC and RNC, George W. Bush and Al Gore, and huge corporations. They have access to expert elections lawyers. In contrast, average Americans and small businesses do not have access to this expertise. And because of this, many individuals, small groups, and small businesses will be deterred from exercising their right to engage in political speech

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[3] This tactic was one subject of a hearing by the House Subcommittee on the Constitution on April 6, 2000 titled "The Fourth Amendment and the Internet." This tactic is also being challenged in U.S. District Court in Los Angeles in the case AquaCool v. Yahoo.

[4] The Ford Motor Company, Washington Post, Los Angeles Times, Church of Scientology, and the intellectual property arm of the Church of Latter Day Saints have all recently used these tactics to silence or attempt to silence their web site based critics.

[5] The most prominent example is the 1997 suit by Clinton aide Sidney Blumenthal against AOL and web site operator Matt Drudge. AOL was Drudge's sole source of income at the time the suit was filed. AOL dropped Drudge, and Blumenthal did not pursue his claims against Drudge. He has only done enough to keep the Court from dismissing the case for lack of prosecution.

because they cannot understand the law, cannot afford the lawyers who do, and cannot predict how a proceeding against them would turn out.

This is an important point because the Internet is enabling millions of average individuals and many small publishers to engage in expressive conduct and the dissemination of information about politics over the Internet.

The Supreme Court stated in Buckley v. Valeo that the FECA "is aimed in part at equalizing the relative ability of all voters to affect electoral outcomes . . ." The Internet, with its lower costs, provides a non-regulatory method of providing this equalization. The Congress recognized this when it wrote Section 230 of the Telecom Act of 1996. It wrote that:

> "The Internet and other interactive computer services offer a forum for a true diversity of political discourse . . ."

And that:

> "It is the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;"

The FEC recently witnessed an example of the disparity of understanding of the FEC rules in the matter of Zach Exley. The George W. Bush campaign, through Benjamin Ginsburg, an attorney with the mega law firm of Patton Boggs, filed a complaint with the FEC alleging that Exley's web site, which criticized Bush, violated the FECA. Patton Boggs is a firm that wealthy corporations and groups go to to purchase access, power, and influence in Washington.

Exley is an individual without a clue. His letter to the FEC in defense of his actions was an immature discourse devoid of legal argument. It appeared to have been drafted without any assistance of legal counsel, or an understanding of the applicable law. He did not cite any section of the FECA, any regulation promulgated thereunder, or any advisory opinion of the FEC. Nor did he raise the First Amendment of the Constitution.

Of course, the FEC is to be commended for its disposition of that matter.

But the astute decisions of the FEC cannot be relied upon to protect the free speech rights of many other Americans. Many web site operators would give up when faced with threats from a law firm like Patton Boggs (before a complaint is even filed with the FEC). Others would give up as soon as a complaint with the FEC is filed. The legitimate political speech of many people would be suppressed long before FEC disposition.

Now the FEC is embarking on a course of action that will inevitably lead to the building of a massive body of administrative law regarding the regulation of political speech on the Internet, and political speech generally.

From the outset of the Internet, and then the world wide web, and until quite recently, only a few requests for advisory opinions and complaints came to the FEC regarding the Internet and the web. However, as functions previously provided in print and broadcast media are migrating to the web, and individuals are using the web to express themselves, it now appears that the FEC is beginning to receive a stream of requests for advisory opinions and complaints regarding speech, the Internet, and "press entities".[6] This stream is likely to grow. And with it will come an immense body of advisory opinions. The FEC will also likely expand its rules in this area in a rule making proceeding.

Ampex (ticker: AXC) has a market cap of over $100 Million. And like many Internet companies, this is way down from the beginning of the year. It can afford the legal services of John Duffy. So can Disney, Time Warner, AOL, and the Washington Post. Small businesses and individuals can not. They will be prejudiced thereby.

Finally, there is the matter of predictability. The outcome of FEC complaint proceedings pertaining to the "press entity" exemption is not predictable, even for wealthy entities. The FEC has no rules or advisory opinions that elaborate the distinction between a covered "corporation" and an exempt "press entity". Nor has the FEC defined any of the key terms of the FECA, its regulations, or its advisory opinions. There are no definitions of the terms "news media", "disseminators of news", "news organization", "press entity", "press function", "news story", "commentary", "editorial", "newspaper", magazine", "periodical publication", "bona fide", "bona fide news", "bona fide news account", "equal coverage", "circulation or listening area", or many other essential terms contained in the FECA, the FEC regulations, and or the FEC advisory opinions.

The result is that many people who engage in political speech, or who might engage in political speech but for the lack of predictability of FEC proceedings, do not know how the FEC would resolve a complaint against them. This is a bad state of affairs. A fundamental concept of law is that people must know what the law is, and how it applies to them.

Also, this state of affairs works more to the disadvantage of individuals and small businesses. A large media conglomerate, when faced with an FEC complaint with an unpredictable outcome, can fight it; if it losses, it can go to federal court; if it losses again, it can appeal; it can go to the Congress to seek an amendment; it can seek the appointment of Commissioners more favorable to its point of view; and, it can even restructure its operations to comply with the FEC's determinations. Lack of predictability is nowhere near the deterrent that it is to small businesses and individuals.

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[6] In addition to the May 25, 2000 iNEXT Request for Advisory Opinion, there is the April 10, 2000 Complaint of NLPC against Grassroots.com, and the May 2, 2000, Request for Advisory Opinion of Voter.com.

5. The draft opinion does not set forth a method (nor is there any rational method) for applying the FEC's dichotomy between "any corporation whatever" and "press entities".

The methodology set out in the draft advisory opinion is that there are "corporations" that are subject to the statute and rules covering contributions and expenditures, and that there are "press entities" that are entitled to an exemption for certain "expenditures". This dichotomy presumes that the two categories (corporations and press entities) are mutually exclusive, and that they are distinguishable by an articulable set of rules.

The purpose of this comment is to argue if the FEC proceeds with this methodology, its attempts to distinguish between the two in rule making proceedings and the drafting of advisory opinions, will utterly fail. The result will be inconsistent outcomes, confusion among publishers, lack of predictability, a chilling effect on political speech, and a degradation of the quality of political discourse.

The first problem that the FEC will face is that most of the entities that the FEC will find to be "press entities" will also be corporations. Hence, the FEC will have to distinguish between "any corporation whatever" and any corporation that is a "press entity".

The second problem that the FEC will face is that news, information, and commentary is produced and disseminated by corporations that also engage in functions that are unrelated to the production and dissemination of news, information and commentary. How will the FEC distinguish between an exempted "news entity" corporation that has non news functions, and a non-exempted "corporation" that has news functions?

They are the same thing. The only thing that will distinguish them is the arbitrary label given to them by the FEC.

Ampex, the parent corporation of iNEXTV, is not as big as the large conglomerates that dominate the media industry today. Yet, it can be used as an example of some of the issues that may arise.

Ampex is a corporation which owns two subsidiary corporations. One of these wholly owned subsidiaries is iNEXTV, which is the subject of the present draft advisory opinion. However, Ampex also owns MicroNet, which makes high performance disk arrays and storage area networks products (principally DataDock, Genesis and SANcube products). Ampex also has its non-Internet technology licensing group and its Internet Technology Group. None of these other activities is arguably a "press entity" or performing a press function.

Yet Ampex's other business activities give it much incentive to attempt to influence the federal political process. It is involved in sales to the federal government.[7] Federal

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[7] For example, Business Wire published a story on June 14, 2000 titled "Manufacturer of Next Generation Recorder Teams With Ampex Data Systems". This story stated that:

elected officials frequently become involved in decisions that affect the award of federal contracts. Ampex is regulated by the EPA.[8] The Congress oversees and writes laws affecting the EPA. Ampex has an intense interest in how the federal government addresses network security, cybercrime, and taxation of Internet transactions.[9]

There is also the matter of Ampex's business plan. The draft advisory opinion states: "The Commission notes that it has previously indicated that a characteristic of periodicals qualifying as press entities is that they derive revenues from the sale of subscriptions or advertising. . . . You state that iNEXTV's web sites are supported by the sale of commercial advertisements." In contrast, Ampex states in its SEC disclosures that iNEXTV's revenue will also come from "electronic commerce".[10] There is considerable

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"L-3 Communications LLL announced today a letter of intent between its Communication Systems-East division and Ampex Data Systems Corporation. Ampex Data Systems, a subsidiary of Ampex Corporation AXC , is the world's leading supplier of data acquisition and archive systems for worldwide government and commercial customers. Under the terms of the agreement, Ampex will utilize and market a system solution based on L-3's solid state Strategic/Tactical Airborne Recorder (S/TAR(TM)) and Ampex's ground archiving systems for military and reconnaissance aircraft."

[8] See, for example, Form 10-Q For Period Ended 3/31/2000, filed by Ampex Inc. with the Securities and Exchange Commission on May 12, 2000, at page 8. "Ampex's facilities are subject to numerous federal, state and local laws and regulations designed to protect the environment from waste emissions and hazardous substances. Owners and occupiers of sites containing hazardous substances, as well as generators and transporters of hazardous substances, are subject to broad liability under various federal and state environmental laws and regulations, including liability for investigative and cleanup costs and damages arising out of past disposal activities. Ampex has been named from time to time as a potentially responsible party by the United States Environmental Protection Agency with respect to contaminated sites that have been designated as "Superfund" sites, and are currently engaged in various environmental investigation, remediation and/or monitoring activities at several sites located off Company facilities. Management has provided reserves, which have not been discounted, related to investigation and cleanup costs and believes that the final disposition of these matters will not have a material adverse effect on the Company's financial position, results of operations or cash flows."

[9] See, Ampex's 5/12/00 10Q, at pages 17-18. It states: "The development of iNEXTV and the implementation of the company's strategy to expand its Internet video businesses involve special risks and uncertainties, including but not limited to the following: . . . uncertainty about the adoption and application of new laws, proposed taxation and government regulations relating to Internet businesses, which could slow Internet growth, adversely affect the viability of e-commerce, expose iNEXTV to potential liabilities or negative criticism for mishandling customer security or user privacy concerns or otherwise adversely affect its Internet businesses; . . ."

[10] See, Ampex's 5/12/00 10Q, at pages 12, 15, and 17.

debate among people who consider themselves to be journalists as to what forms of electronic commerce are consistent with what they consider to be bona fide journalism.

This is not to suggest that the FEC should not allow iNEXTV to do what it has outlined in its request for an advisory opinion. If the FEC were to scratch the surface of any of the large media conglomerate corporations, it would find similar, and far more, of this overlap of publishing activities and other business interests. These points are raised to suggest that issues such as these illustrate the immensity and impossibility of constructing a set of rules that will enable the FEC to distinguish between covered corporations that also disseminate political information, and exempted press entity corporations that also engage in other businesses that may be affected by their dissemination of information.

One final note on this point: the draft advisory opinion concludes that iNEXTV will provide "features such as those provided by C-SPAN". The comparison may be very appropriate. The cable industry depends upon the kindness of the Congress and the FCC (which is appointed by the President and overseen by the Congress) for its continued prosperity. Not surprisingly, the primary purpose of the cable industry in creating C-SPAN was to court favor with Members of Congress. Yet, the FEC has opined that this constitutes exempted expenditures.

About your commenter: I own no Ampex stock. I am not employed by or have any contractual relationship with Ampex or any of its subsidiaries. I have no connection to the parties who requested this advisory opinion, or any competitors. My interest in this matter arises out of publishing a web site that could be adversely affected by the FEC's rules and procedures on this topic. The web site is located at http://www.techlawjournal.com/.

If I can be of any further assistance, please let me know. I can be contacted by phone at 202-364-8882, by email at dcarney@techlawjournal.com, or by mail at P.O. Box 15186, Washington DC, 20003.

Yours very truly,

David Carney