Colorado Broadcasters Association

Memorandum to Members

September 2016

News and Analysis of Recent Developments in Communications Law

No. 16-09

Fletcher, Heald & Hildreth

Provided by:
Frank R. Montero, Esquire
Fletcher, Heald & Hildreth, PLC
1300 N. 17th Street – 11th Floor
Arlington, Virginia 22209
703-812-0480
montero@fhhlaw.com

Trademark case takes "The Slants" route

Redskins "Offensive" Line May be Tested by Supreme Court

By Kevin M. Goldberg
goldberg@fhhlaw.com
703-812-0462

[*Editor's Note: To say our author, Kevin "The Swami" Goldberg, is opinionated is something of an understatement. One particular bug up his butt: the NFL team which is titularly Washington, D.C.'s, even though it practices in Virginia and plays home games in Maryland. As far as Kevin is concerned, we may as well refer to them as the Voldemorts. In any event, the opinions in this article are the Swami's own, and are not necessarily shared by FHH, its attorneys or its clients. You have been warned.*]

We can all safely assume that, for years, Daniel Snyder, owner of the [Voldemorts], has wanted nothing more than to see the team he supported as a child and owns as an adult win the Super Bowl®. (Reminder to broadcasters: if you're advertising with a football-related theme – especially in December, January or February – that would be "The Big Game".) With the team's 2-2 start this season (and yes, both two losses were at home, including one to hated rival Dallas Cowboys), it's unlikely that the team is going to end the 2016 season on top.

At least not the NFL season.

Inside this issue . . .

But thanks to an all-Asian, "ChinatownDanceRock" band, Danny may get a win that he may really want more than an NFL title.That's because the Supreme Court has agreed to hear a case regarding the constitutionality of Section 2(a) of the Lanham Act. Long-time readers know that that's the law which allows the United States Patent and Trademark Office (USPTO) to refuse to issue federal registrations to offensive trademarks, *i.e.*, marks that "may disparage ... persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt or disrepute".

Why should a "W" in the Supremes be a bigger deal than a Lombardy? Because the USPTO has canceled six "Redskins"-related trademarks owned by the team. That decision was later upheld by a United States District Court for the Eastern District of Virginia. Those trademarks are vital to the franchise's ability to exclusively sell certain branded merchandise and memorabilia; without the registrations, Danny's profits – the only thing he presumably covets as much as a title – could be threatened.

Normally, of course, the [Voldemorts'] next move would be to the Fourth Circuit, not the Supreme Court. But, in a possible stroke of good luck, the Asian dance rock band was already one step ahead of the football team. We're talking about the Slants.

You may recall our earlier articles regarding "The Slants", a Portland, OR-based outfit with a catchy sound and a somewhat controversial name. They like their name so much that they tried to get a federal trademark registration. But wouldn't you know, the USPTO deemed "the Slants" to be disparaging to Asians and, therefore, not appropriate for trademark registration – even though all of the members of the band are Asian and ***they*** don't figure it's disparaging. The Slants appealed to the Federal Circuit. They lost the first round before a three-judge panel. But, after a member of the panel wrote separately to suggest that maybe Section 2(a) violates the First Amendment, the Federal Circuit *en banc* declared Section 2(a) unconstitutional. The government wasn't happy with that decision and sought *cert* at the Supremes ... and so it's The Slants who have reached the Supreme Court first, as the Court granted the government's petition.

(Continued on page 8)

ASNE "Legal Hotline" Focuses on Use of "User-Generated" Photo/Video Content

By Kevin M. Goldberg
goldberg@fhhlaw.com
703-812-0462

I'm fortunate to represent a number of press-related trade associations. As part of my work for them, I provide a "Legal Hotline" service through which association members get to ask me questions without incurring massive legal fees. Of course, the responses I provide don't constitute "legal advice" because I represent the association, not its individual members, so the member asking me the question is not my client and can't rely on anything I say as "legal advice". Still, I like to think that the member ends up with a clearer idea of what his or her legal rights and obligations are and how he or she probably ought to proceed – even if the answer happens to be "it's really time to spend money on a lawyer".

The Hotline is a two-way street. While it gives members the chance to clear up questions, it gives me useful insight into the types of "hot button" issues clients and others are currently interested in. Once a particular question gets asked often enough, I recognize that I may be able to save everyone time and energy by addressing the question in a general answer that gets posted to the association's website.

Which is just what happened recently with respect to questions related to the use of "user-generated" content. By that I'm referring to photos and videos created by members of the local community and then shared with media outlets, both directly and through the outlets' social media sites. A number of questions came in to me from members of the American Society of News Editors, meaning they arose in the context of a daily news site (in this case, an actual newspaper) – but my response should be at least as interesting, if not more so, to FHH's radio and TV clients who are increasingly posting and reposting, via social media and the web, photos and videos submitted by audience members. (Some TV stations are also using such content in their over-the-air broadcasts.)

So I thought it would be useful to *Memo to Clients* readers to point them in the direction of my response on the ASNE website.

As I explain there, the use of user-generated content brings instant exposure to legal risk. While each situation must be viewed in the context of its own peculiar facts, there are certain easy steps to minimize your risk. My ASNE piece generally describes some of those steps. It also mentions a comprehensive memorandum (and an abbreviated, bullet-point "cheat sheet" version) I have prepared outlining key copyright and trademark infringement issues encountered when publishing on the web. That memorandum takes a look at frequently recurring situations like the use of music or photos on a website or in social media – including the use of crowd-sourced content.

We are happy to make these available (for a fee) to clients who share our belief that the materials can serve as a valuable reference for your employees. They can be used as part of overall introductory materials for new employees or incorporated into an employee handbook or set of employee guidelines. They can also be trotted out periodically as a copyright law refresher. And I've also created a Powerpoint presentation based on the memos which I'd be happy to present in person or via a webinar to station personnel, adding the extra value of immediate interactivity. Please feel free to contact me for further information.

FLETCHER, HEALD & HILDRETH P.L.C.

1300 N. 17th Street - 11th Floor
Arlington, Virginia 22209
***Tel*:** (703) 812-0400
***Fax*:** (703) 812-0486
***E-Mail*:** Office@fhhlaw.com
***Website*:** fhhlaw.com
Blog site: www.commlawblog.com

Editor
Harry F. Cole

Assistant Editor
Steve Lovelady

Contributing Writers
Karyn K. Ablin,
Anne Goodwin Crump,
Kevin M. Goldberg
and Laura Stefani

Even "routine" questions demand extra attention … and total accuracy

Siemens Suffers Six-Figure Spanking for Failing to Focus on Former Felonies

By Laura Stefani
stefani@fhhlaw.com
703-812-0450

Anyone who fills in pretty much any FCC form should be familiar with the certifications required by those forms. Anyone who "signs" an FCC form (whether electronically or otherwise) ***must*** be familiar with them; more importantly, the signatory must be sure that the certification being made is accurate. Failure to do so can be a pricey mistake.

One common certification, for example, asks the licensee or applicant to verify that it hasn't engaged in certain types of misconduct that might disqualify the licensee/applicant from holding an FCC license. For example, FCC Form 314, used for the assignment of broadcast licenses, requires the proposed buyer to certify that:

> [W]ith respect to the assignee and each party to the application, no adverse finding has been made, nor has an adverse final action been taken by any court or administrative body in a civil or criminal proceeding brought under the provisions of any law related to any of the following: any felony; mass media- related antitrust or unfair competition; fraudulent statements to another governmental unit; or discrimination.

While $175,000 may seem steep, it could have been worse. False statements made intentionally could be determined to constitute misrepresentation

In the same vein, all FCC applications require an "Anti-Drug Abuse Act Certification," indicating whether the applicant is "subject to denial of federal benefits pursuant to Section 5301 of the Anti-Drug Abuse Act of 1988, 21 U.S.C. Section 862". And, of importance to the Siemens Corporation, Question 50 to Form 601, which is used for applications for wireless licenses, asks whether "the Applicant or any party to this application, or any party directly or indirectly controlling the Applicant ***[has] ever been convicted of a felony by any state or federal court***?"

Thanks to the fine-print-legalese nature of these certifications, it can be tempting not to bother to pay much attention to them. After all, the "correct" answer (usually, "yes"- depending on how the certification is phrase) is obvious, a fact that tends to discourage careful consideration of the certification language.

Our friends at Siemens, though, have just brought us a cautionary tale, after failing to disclose on Form 601 that Siemens' parent company, as well as a subsidiary of that parent company, had pled guilty to multiple felonies. And for this oversight, Siemens has agreed to pay the government $175,000 in a consent decree with the Enforcement Bureau.

According to the decree, the parent company, Siemens AG, pleaded guilty to violating the Foreign Corrupt Practices Act (FCPA) back in 2008, while a subsidiary of a subsidiary of Siemens AG pleaded guilty to a single federal felony charge of obstruction of justice in 2007. Despite that, Siemens Corporation kept filing Form 601s (and also a few others) certifying that no party directly or indirectly controlling it had "ever been convicted of a felony".

Obviously, those certifications weren't accurate, a fact that didn't escape the attention of the Enforcement Bureau. The Bureau concluded that Siemens Corporation had violated Section 1.17(a)(2) of the FCC's rules, which prohibits applicants (among others) from providing any "material factual information that is incorrect or omit[ting] material information that is necessary to prevent any material factual statement that is made from being incorrect or misleading".

While $175,000 may seem steep, it could have been worse. False statements made intentionally could be determined to constitute misrepresentation, which is among the most serious of all potential offenses in the FCC's book. Presumably, Siemens convinced the Bureau that its inaccurate certifications were a result of an unintended oversight rather than an intent to deceive – in other words, the type of inadvertent inaccuracy that Section 1.17 is intended to reach. After all, as we have seen, it can be easy not to pay enough attention to the specifics of the FCC's certifications. And within a company the size of Sie-

(Continued on page 4)

BMI strategy begins to pay dividends

BMI Rate Court Rejects DOJ Consent Decree Interpretation

By Karyn K. Ablin
ablin@fhhlaw.com
703-812-0443

You may recall our report last August that the U.S. Department of Justice (DOJ) had closed a two-year inquiry into the ASCAP and BMI Consent Decrees by determining that no changes to the Decrees were necessary. DOJ also weighed in on a particularly controversial issue – the licensing of musical works whose copyright is owned by multiple persons where some – but not all – of those persons are members of ASCAP or BMI. DOJ concluded that the Decrees required ASCAP and BMI to grant full-work licenses for those works and barred them from licensing only the fractional copyright interests held by their members. ASCAP and BMI were none too happy with that decision and united to pursue a two-pronged strategy to overturn that determination, with ASCAP seeking legislative change and BMI turning to the federal rate court judge that oversees its operations, Judge Louis Stanton.

That strategy has begun to pay off.

In a five-and-a-half-page opinion released on September 16, Judge Stanton rejected DOJ's Decree interpretation. He found that "[n]othing in the Consent Decree gives support to [DOJ's] views" and that "[t]he Consent Decree neither bars fractional licensing nor requires full-work licensing". Judge Stanton acknowledged that the Decree defined BMI's repertory as "'those compositions, the right of public performance of which (BMI) has ... the right to license or sublicense". He found, though, that the phrase was "descriptive, not prescriptive" and that "[t]he 'right of public performance' is left undefined as to scope or form, to be determined by processes outside the Consent Decree". In other words, in Judge Stanton's view, the BMI Decree simply does not speak to the issue of full-work versus fractional licensing.

No one knows where the dust will settle on the full-work versus fractional licensing issue.

Judge Stanton is the judge responsible for overseeing the operation of the BMI Consent Decree, so with the stroke of his pen, his interpretation overrides DOJ's, for now. But the Decree fight is far from settled. Judge Stanton's interpretation affects only the BMI Decree – it does not alter DOJ's reading of the ASCAP Decree. DOJ may decide to ask Judge Stanton to reconsider his determination or to amend the BMI Decree to reflect the government's views, but this may not be the most effective tactic given Judge Stanton's ruling. Alternatively, it may even decide to appeal the BMI Decree interpretation to the Second Circuit, which could overturn it. DOJ, and perhaps affected music licensees, may also seek a contrary ruling from the ASCAP rate court judge, Denise Cote, who has not always seen eye to eye with Judge Stanton in music licensing issues. And all parties may seek legislative help to enshrine their music licensing views into law.

While no one knows where the dust will settle on the full-work versus fractional licensing issue, we do know that we have not heard the last of this fight. We'll continue to watch the issue and will keep you posted ....

(Continued from page 3)

mens, it may also be possible that some people in some parts of the company may not be aware of goings-on in other parts (although in this case that may not be an entirely credible explanation, since the felony pleas in question resulted in $800,000,000 in penalties and were, thus, likely known to most in the organization).

The moral of our tale? Any licensee, applicant or other party subject to the FCC's jurisdiction must look under the covers and in the closets throughout their corporate structure to ensure that there is no missing information that would be pertinent to certifying that responses to the FCC are true and accurate.

The FCBA's Annual Charity Auction, that is.

Mark Your Calendar: The Auction Date Has Been Set

OK, all you current or wannabe high rollers, risk takers, deal makers, thrill seeking bargain hunters, bon vivants … and anybody else, for that matter. Get out your calendars and mark ***November 10, 2016*** – because that's the date of this year's FCBA Charity Auction. It's a Thursday, if that makes a difference. It's also the day before Veterans Day (more about that below).

As usual, the action will be going down at The Sphinx Club at the Almas Temple (conveniently located at 1315 K Street, NW, in downtown D.C.). Doors will open at 6:00 p.m. They're estimating last call for some time around 10:00 p.m., but let's not forget that the next day is a Federal Holiday. Also as usual, it's free! AND you get free tickets for a drink (plus food) just for showing up! What's not to like?

We here in the *Memo to Clients* bunker don't get out much, but the FCBA Auction is one of those Be-There-Or-Be-Square shindigs that can't be missed. So as a service both to the Auction ***and*** to our readers, we're providing this "Save the Date" notice.

Since the prize list for Auction 2016 is still in development, it's too soon to preview all the goodies up for grabs. We do hear, though, that this year you'll be able to bid on dinner for two in the company of *Washington Post* restaurant critic Tom Sietsema, a James Beard Award winner. Sign us up!

The Veterans Day Eve scheduling of this year's Auction is not a coincidence. Proceeds from the auction will go to both the FCBA Foundation and Miriam's Kitchen, a D.C. institution for more than 30 years which is dedicated to ending chronic homelessness in Washington, D.C., with a specific focus on ending homelessness for veterans in the Nation's Capital by the end of THIS year.

Not going to be in D.C. on November 10? No problem – there's going to be an online auction, too.

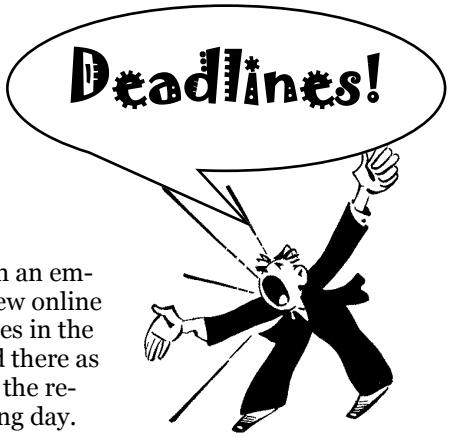
(BTW – If you've got something to contribute to be auctioned – and you know that you probably do – they want to hear from you. Contact Starsha Valentine at the FCBA. Her email is starsha@fcba.org, or you can give her a shout at 202-293-4000. You'll also need to complete an Auction Donation Form, but Starsha can totally hook you up with that, or you can download it here.)

FHH - On the Job, On the Go

Our long-distance travelers in October will be **Cheng Liu** and **Tony Lee**, who will be jetting to beautiful downtown Long Beach, California to present a session (title: "Telecommunications Issues for Non-Telecom Utilities") at the American Public Power Association's Legal & Regulatory Conference on October 18.

Sticking closer to home, **Matt McCormick**, **Frank Montero**, **Davina Sashkin** and **Bob Winteringham** will be attending the 2016 Public Radio Super-Regional Conference in Pittsburgh from October 25-27. **Bob** will be appearing on a panel ("Rights, Wrongs and Politics"), waxing eloquent on CPB compliance issues, including the new CPB certification requirements and audits by CPB's Inspector General. Fun fact: the panel moderator will be none other than **Chuck Singleton**, the General Manager of FHH client Station WFUV.

Pittsburgh won't be **Frank M**'s only perambulation. Look for him in Detroit on October 5-6, where he'll be attending the National Bankers Association Conference. (He's presenting on "Opportunities in Broadcast Lending".) From there it's: off to New Jersey for the New Jersey Broadcasters Association's Board Meeting (October 18); down to D.C. for the FCBA's 80th Anniversary Reception (October 19); up to the Big Apple for the Hispanic Television Summit on October 20 (just in time for the fourth annual NYC Television and Video Week, presented by *Broadcasting and Cable*, *Multichannel News* and *Next TV*); out to Pittsburgh for the Public Radio show; and back to D.C. for the annual George Washington University Law School Alumni Board Meeting on October 29.



October 3, 2016

EEO Public File Reports – All *radio* and *television* stations *with five (5) or more full-time employees* located in **Alaska**, **American Samoa**, **Florida**, **Guam**, **Hawaii**, **Iowa**, the **Mariana Islands**, **Missouri**, **Oregon**, **Puerto Rico**, the **Virgin Islands** and **Washington** must place EEO Public File Reports in their public inspection files. TV stations must upload the reports to the online public file. Radio stations in the top 50 markets and in an employment unit with five or more employees must place these reports in their new online public inspection files; all other radio stations may continue to place hard copies in the file for the time being. For all stations with websites, the report must be posted there as well. Per announced FCC policy, the reporting period may end ten days before the report is due, and the reporting period for the next year will begin on the following day.

EEO Mid-Term Reports – All *radio* stations *with eleven or more full-time employees* in **Iowa** and **Missouri** and all *television* stations *with five or more full-time employees* in **Florida**, **Puerto Rico** and the **Virgin Islands** must electronically file a mid-term EEO report on FCC Form 397, with the last two EEO public file reports attached.

Noncommercial Television Ownership Reports – All *noncommercial television* stations located in **Alaska**, **American Samoa**, **Florida**, **Guam**, **Hawaii**, the **Mariana Islands**, **Oregon**, **Puerto Rico**, the **Virgin Islands** and **Washington** must file a biennial Ownership Report (FCC Form 323-E). All reports must be filed electronically.

Noncommercial Radio Ownership Reports – All *noncommercial radio* stations located in **Iowa** or **Missouri** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323-E.

October 11, 2016

Children's Television Programming Reports – For all *commercial television* and *Class A television* stations, the third quarter 2016 children's television programming reports must be filed electronically with the Commission. These reports then should be automatically included in the online public inspection file, but we would recommend checking, as the FCC bases its initial judgments of filing compliance on the contents and dates shown in the online public file. Please note that use of the Licensing and Management System for submission of the children's reports is mandatory. This system requires the use of the licensee FRN to log in; therefore, you should have that information at hand before you start the process.

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

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

Issues/Programs Lists – For all *radio*, *television*, and *Class A television* stations, a listing of each station's most significant treatment of community issues during the past quarter must be placed in the station's public inspection file. A reminder: radio stations in the top 50 markets and in an employment unit with five or more employees will have to place these reports in the new online public inspection file, while all other radio stations may continue to place hard copies in the file for the time being. Television and Class A television stations will continue upload them to the online file. The list should include a brief narrative describing the issues covered and the programs which provided the coverage, with information concerning the time, date, duration, and title of each program.

(Continued on page 7)

(Continued from page 6)

Class A Television Continuing Eligibility Documentation – The Commission requires that all *Class A Television stations* maintain in their online public inspection files documentation sufficient to demonstrate that the station is continuing to meet the eligibility requirements of broadcasting at least 18 hours per day and broadcasting an average of at least three hours per week of locally produced programming. While the Commission has given no guidance as to what this documentation must include or when it must be added to the public file, we believe that a quarterly certification which states that the station continues to broadcast at least 18 hours per day, that it broadcasts on average at least three hours per week of locally produced programming, and lists the titles of such locally produced programs should be sufficient.

November 14, 2016

EAS National Test - Participants' ETRS Form Three Due – All *EAS participants* must prepare and file in the EAS Test Reporting System (ETRS) a Form Three for each station by 11:59 p.m. on November 14. This form provides information as to results of the September 28 EAS national test. If a station successfully received and passed on the test, it must report from which source it first received the test, when it passed on the alert, and other details of what was received. If the station did not receive the test properly, it is asked to explain what it knows of why not. The Commission has stated that its goal is to figure out how to make the system work, not to punish stations for any failures.

December 1, 2016

DTV Ancillary Services Statements – All *DTV licensees* and *permittees* must file an Ancillary/ Supplementary Services Report in the FCC's Licensing and Management System (LMS) stating whether they have offered any ancillary or supplementary services together with their broadcast services during the previous fiscal year (October 1, 2015, through September 30, 2016). ***Please note that the group required to file includes Class A TV, LPTV, and TV translator stations that are offering digital broadcasts***. If a station has offered such services, and has charged a fee for them, then it must separately submit a payment equal to five percent of the gross revenues received and an FCC Remittance Advice (Form 159) to the Commission. The report specifically asks for a list of any ancillary services, whether a fee was charged, and the gross amount of revenue derived from those services. Ancillary services do not include broadcasts on multicast channels of free, over-the-air programming for reception by the public.

EEO Public File Reports – All *radio* and *television* stations *with five (5) or more full-time employees* located in **Alabama**, **Colorado**, **Connecticut**, **Georgia**, **Maine**, **Massachusetts**, **Minnesota**, **Montana**, **New Hampshire**, **North Dakota**, **Rhode Island**, **South Dakota** and **Vermont** must place EEO Public File Reports in their public inspection files. TV stations must upload the reports to the online public file. Radio stations in the top 50 markets and in an employment unit with five or more employees will have to place these reports in the new online public inspection file; all other radio stations may continue to place hard copies in the file for the time being. For all stations with websites, the report must be posted there as well. Per announced FCC policy, the reporting period may end ten days before the report is due, and the reporting period for the next year will begin on the following day.

EEO Mid-Term Reports – All *radio* stations *with eleven or more full-time employees* in **Iowa** or **Missouri** and all *television* stations *with five or more full-time employees* in **Colorado**, **Minnesota**, **Montana**, **North Dakota** and **South Dakota** must electronically file a mid-term EEO report on FCC Form 397, with the last two EEO public file reports attached.

Noncommercial Television Ownership Reports – All *noncommercial television* stations located in **Alabama**, **Connecticut**, **Georgia**, **Maine**, **Massachusetts**, **New Hampshire**, **Rhode Island** and **Vermont** must file a biennial Ownership Report (FCC Form 323-E). All reports must be filed electronically.

Noncommercial Radio Ownership Reports – All *noncommercial radio* stations located in **Colorado**, **Minnesota**, **Montana**, **North Dakota** and **South Dakota** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323-E.

To the cloud!

FCC Lightens USPS Load

By Denise Branson, Senior Paralegal
branson@fhhlaw.com
703-812-0425

If you're a frequent flyer in the FCC's Universal Licensing System (ULS) or Antenna Structure Registration (ASR) system, don't panic if you notice a sudden drop-off in hard-copy letters from the FCC. The FCC is moving both systems to a cloud-based platform and, in preparation, it's cleaning house before packing up for the move.

Historically, ULS and ASR system have generated a total of 33 different types of automated paper notices which the FCC then sends through the U.S. mail. These notices generally inform applicants and licensees about things like the status of their applications or licenses. Needless to say, much of the same information can also be found in public notices or online in the ULS or ASR systems … so reliance on snail mail dead tree notices is largely redundant.

So, as of September 23, the Commission has stopped sending out as many notices. Of the 33 types of notices historically sent, 15 have been abandoned, leaving a mere 18 types (15 in ULS, three in ASR). Lists of the notices terminated and those retained can be found here. The 18 types of notices still being sent out include, among others, notices that require a response and notices about approaching deadlines that require action by the applicant, licensee or registrant. Of the 18 notices retained, more will be migrated to the cloud platform eventually, including notices about things you will probably really want to know about, like application dismissal letters. It's unclear whether the FCC will continue to reach out to applicants as to such matters, or expect us to go digging through ULS.

The only kind of notice not slated for eventual migration are license cancellations in ULS, although even those will be eliminated in "services as they are deployed in the new wireless licensing system". In the latter cases, the Commission promises unspecified "electronic safeguards" to help prevent licensees from inadvertently cancelling a license.

So going forward, you can expect fewer of those envelopes with the blue return address. But the ones you do get will probably not be good news.

(Continued from page 1)

No schedule for briefing or argument has yet been announced and, at least at this point, the [Voldemorts] are still just sitting in the stands watching. That's not for lack of trying: a few months ago the team – in a move fitting of its owner's ego – tried to convince the Court that the team should be permitted to by-pass the Fourth Circuit and argue its case along with the Slants'.

(Author's Note: Personally, I'd argue that the Slants' facts are far superior to the team's for Supreme Court review purposes but, hey, that's just me – or maybe not, given this post from The Slants themselves.)

I am The Swami, of course, and I never back away from a prediction when it comes either to the Supreme Court or to sports – and hey, here we've got both. So you're probably thinking that I'm going to make a prediction now, right? Maybe something like, "well, if the Supremes took The Slants case after the band won at the lower level, they certainly must be seeking to reverse that decision". Or maybe "the Court must realize it needs to address this issue sooner or later and it wants to do so before the Fourth Circuit does, so that obviously means it's going to declare Section 2(a) unconstitutional".

Well, you'd be wrong.

The fact that we still have only eight Justices on the Court makes me a bit uncertain about how this will play out. With one Justice missing, the entire dynamic of the Court can change: the way the Justices interact with each other before, during and, especially, after the argument. It's like how removing an instrument from an orchestra changes the sound, or how a ***REAL*** football team has to "play down" after a player is shown a red card. And if a ninth Justice takes the bench before oral argument, that too will change the mix.

So I'm going to wait until after oral argument to make a more informed decision. I'm very much looking forward to attending that argument in person, if possible. After all, there are some fascinating issues raised in this case (as top legal scholar Eugene Volokh addressed in this excellent piece in the Washington Post). And let's be honest: I'm also hoping to hear the Justices address the "Take Your Panties Off" argument.

That argument, advanced by the [Voldemorts] in their Fourth Circuit briefing, poses a simple question. That question is why "The Slants" (or "Redskins") is so offensive that it was denied trademark protection when the USPTO had no problem with such marks as: "Take Your Panties Off" (clothing); "Dangerous Negro" (shirts); "Slutseeker" (dating services); "Dago Swagg" (clothing); "Dumb Blonde" (beer); "Twatty Girl" (cartoons); "Baked by a Negro" (bakery goods); "Big Titty Blend" (coffee); "Retardipedia" (website); "Midget-man" (condoms and inflatable sex dolls); and "Jizz" (underwear). Hearing Justice Ginsburg rattle those off would totally make it worth a trip down to First Street, even if Daniel Snyder comes out on top in a truly big Supreme Court game. (And, BTW, as a true devotee of the First Amendment, I'm rooting for the Slants and, yes, in this limited instance, the Dan.)