Broadcast LAW BLOG

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Why Broadcasters Have To Air Political Attack Ads Even If They Don't Want To

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With the Florida broadcast airwaves overrun with political ads in the last few days - the great majority of them attack ads - many ask why do broadcasters keep running those ads? Of course, there are revenue considerations. But as the attacks get nastier, and perhaps even go against the interest of the station owners themselves, why do broadcasters keep running these ads? Often, it's because broadcasters have to - under the applicable laws. We've seen two stories this week that illustrate that point - one where Gloria Allred, the well-known attorney, has written to a number of television stations asking them to refuse graphic anti-abortion ads to be run during the Super Bowl sponsored by purported Democratic presidential candidate Randall Terry, and a second about an NBC-owned station in Florida apparently continued to run a Mitt Romney ad attacking Newt Gingrich, featuring NBC News footage of an old Tom Brokaw Nightly News report, even after NBC News asked the Romney campaign to stop using the clip. The NBC station apparently recognized its obligations, while Ms. Allred ignored the station's obligations under **Section 315 of the Communications Act** and the FCC's political broadcasting rules.

Broadcasters are sometimes in a sticky position with nasty political ads, as by law (Section 315 of the Communications Act) they are **not allowed to censor a candidate ad**. What this means is that they cannot reject a candidate ad based on its content, with the possible limited exception of where the ad violates a Federal felony statute like the obscenity laws (though not the indecency rules, which are not felony statutes). If the ads just violate someone's property interests, or could give rise to some sort of civil liability (e.g. defamation), as we've written before, the broadcaster is immune from liability for running the ad by a candidate or his authorized campaign committee. The broadcaster is also immune from liability from a perceived copyright action like that alleged by NBC. But that immunity arises only because the station cannot, under law, reject the ad. So the only remedy for someone objecting to the content of a candidate's ad is to seek a remedy against the campaign itself, not against any station that runs the campaign's ad. (See examples of suits against the candidates, but not the stations, in cases we wrote about here and here) So, even if the copyright owner who objects to the use of its copyrighted content in an ad owns the TV station, it is still stuck running the ad if the candidate insists.

Similarly, in the case that Ms. Allred complained about - asking stations to pull the **graphic anti-abortion ads sponsored by Randall Terry**, she posed the wrong question - alleging that the ad would be offensive and inflammatory. Stations can't make those judgments about political ads - they have to run them even if they can be upsetting. The FCC has even been told by the Courts that it can't allow stations to channel upsetting political ads (like those anti-abortion ads that Mr. Terry plans to run), into late night hours. If a candidate wants to run ads in the middle of the day (or in the middle of children's programs), a station can warn its audience that the ad may be disturbing and that it is being forced by law to run it, as long as such warnings are done in a neutral fashion, but it must run the ad in the form the candidate created it. So what should Ms. Allred have argued about the Terry ads?

In recent weeks, as the Terry ad has sprouted on more and more TV stations around the country (see our article here), there have been questions raised as to whether he really is a bona fide **legally qualified candidate** for the Democratic nomination for president. Some have questioned whether he is even a

Democrat, and recently the Democratic National Committee issued a letter addressing the subject - finding that Mr. Terry did not meet the party's qualifications to be a Presidential candidate. Mr. Terry is contesting whether that letter is enough to take him out of the status of a "legally qualified candidate", especially in states where he has qualified for a place on the ballot. Stations will need to make a judgment as to whether this letter itself is sufficient to disqualify him as a candidate based on some prior precedent from the FCC that seemed to decide, in a 15 year old case involving Lyndon LaRouche, that where the party declared someone was not qualified, the FCC would not second guess that determination. But the facts of that case were different, including the fact that the primaries had been completed at the time of the ad request. So we don't know for sure what decision on this issue will come from the FCC. Watch to see if there is any FCC guidance in the few remaining days before the Super Bowl.

But back to the subject at hand - stations must run candidate ads without censorship. But note, as we've written many times before (see, for instance, our articles here and here), the **no-censorship provision applies only to candidate ads**. Third party ads - those by PACs, Super PACs, labor unions, interest groups or even corporations or individuals - don't get this same "no censorship" treatment - so **stations are not shielded from liability for the contents of those ads**. We are sure that we will be writing about this subject again soon as this hotly contested campaign cycle plays out.