United States Court of Appeals

FOR THE EIGHTH CIRCUIT

CASE NO. 13-1506

Curtis J Neeley Jr.

Plaintiff - Appellant

v.

Federal Communications Commission, et al.

Defendants - Appellees

Appeal from U.S. District Court for the Western District of Arkansas – Fayetteville
(5:12-cv-5208-JLH)

PETITION FOR REHEARING *EN BANC* PER EXCEPTIONAL IMPORTANCE AND CONFLICTS WITH UNITED STATES SUPREME COURT

INTRODUCTION

As addressed in FRAP 35(a)(2), FRAP 35(b)(1)(B) and FRAP 40(a)(2); This proceeding involves questions of exceptional importance and each is herein concisely stated. These questions involve issues on which the panel decision conflicts with authoritative rulings of the United States Supreme Court in *FCC v Pacifica* and with *Golan v Holder*. The *Pacifica* decision requires regulation of broadcasts when a pervasive intruder in the home especially when assessable to children. The *Golan* decision requires "*unstinting*" Berne Convention compliance. The Summary Affirmation of the District Court misapprehension conflicts Supreme Court rulings as well as being of the most exceptional importance.

QUESTIONS OF EXCEPTIONAL IMPORTANCE

I. Criminal Unauthorized Access to Communications Allowed

1. Google Inc and Microsoft Corporation provide or provided access to UNAUTHORIZED anonymous public parties by illegally broadcasting harvested naked images otherwise offered exclusively to identified, contactable subscribers of private publications. Anonymous public parties were never intended to know these naked images were created, existed or were offered for sale by Mr Neeley.

2. These clear violations of 18 USC §2511 allow for punitive civil recovery authorized by 18 USC §2520(b)(2). These actions were computer trespasses and frauds per ACA 5-41-103 and ACA 5-41-104 and are forbidden by the Communications Act of 1934 per 47 USC §605. A jury is normally required for nullification of criminal acts and not District Court and Eighth Circuit Court nullification of law by misapprehension. This violates Article 6bis of the Berne Convention and the holdings of *Golan v Holder*.

II. Federal Communications Commission Failure to Protect the Use of Wire Communications to Present Images of Naked Females as Limited Visual Art Prints by Curtis J Neeley Jr.

A. FAILURE TO PROTECT PERSONAL PRIVACY

1. The Federal Communications Commission failed and still fails to protect the personal privacy of Curtis J Neeley Jr and allowed Google Inc and Microsoft

Corporation to bypass adult subscriptions required and **broadcast** naked females, or other adult art, to unauthorized anonymous minors or otherwise prohibited parties.

2. Curtis J Neeley Jr tagged these images as indecent and offered these exclusively to adult subscribers choosing to view nakedness in "art catalogs" and not by **PUBLIC BROADCASTING**.

3. This was and is criminal abuse of communications by Google Inc and Microsoft Corporation violating 18 USC §2511 and violating Mr Neeley's privacy and right to attribution and **integrity** for art protected by US Treaty and formerly protected by 17 USC §106A before the Eighth Circuit affirmed judicial nullification by Honorable Jimm Larry Hendren of this US law protecting artist integrity for visual art display "online" in order to comply with the Berne Convention.

B. FAILURE TO PROTECT THE GENERAL PUBLIC

1. The Federal Communications Commission fails to protect children of the public, the children of Curtis J. Neeley Jr., and the schoolmates of Mr Neeley's minor children and allows Google Inc and Microsoft Corporation to fraudulently associate illegal BROADCASTS of naked female images with Mr Neeley's personal name.

2. These continuing presentations are fraudulent broadcasts of indecent art to the anonymous who may be minors or otherwise prohibited persons accessing these illegal radio/wire broadcasts on random publicly available computers without adult

supervision due FCC nonfeasance and allowing unregulated broadcasts to the public as is clearly illegal per 18 USC §1464. See BROADCASTS for "*labia*" from one art catalog bypassing each artists indecency tagging.

3. Microsoft Corporation (MSFT) and Google Inc (GOOG) bypass "*authenticated adult subscriptions*" required by each artist at deviantart.com after tagging these "labia" images as indecent and illegal to broadcast to the unauthenticated public.

4. These two pervasive and criminal **(MSFT)** or **(GOOG)** radio database broadcasts of harvested indecency are adult speech tagged by the artists to limit exposure to only "***authenticated adult readers"*** of this publication and prevent criminal broadcasting like being done. This Panel summary affirmation diametrically conflicts *Pacifica*, *the progeny of Pacifica*, and the clear intentions of *Golan v Holder* by allowing **unauthenticated** assertions of an "*age of majority*" to bypass BROADCAST prohibition for unauthenticated parties required by each artist like Mr Neeley and by all sellers of tagged indecent images at **deviantart.com.**

5. This **deviantart.com** tagging is bypassed by **(MSFT)** or **(GOOG) to a**llow illegal porn radio BROADCASTING to protect porn-engine profits for Google Inc and Microsoft Corporation. This organized criminal business harmed the **integrity** of Mr Neeley and other artist still selling indecent art supported by the Berne Treaty and the legislative intent of 17 USC §106A to comply with the Berne Convention.

Indecent and obscene *criminal* image Database BROADCASTS violating 18 USC §1464, 18 USC §2511, 47 USC §605, and Article 6bis of the Berne Convention

1. <curtis neeley site:deviantart.com> broadcast by GOOG;
2. <curtis neeley site:deviantart.com> broadcast by MSFT;
3. <Curtis Neeley Nude> broadcast by MSFT ;
4. <Curtis Neeley Nude> broadcast by GOOG ;
5. <"curtis neeley" nude site:creative-nude.net> broadcast by GOOG;
6. <"curtis neeley" nude site:creative-nude.net> broadcast by MSFT;

III. Federal Communications Commission and Eighth Circuit Panel Ignored Supreme Court Holdings Prohibiting Broadcasting Nakedness to the Public, Conflicting *Pacifica's Progeny*, *Golan,* and 18 USC §1464

A. *FCC v Pacifica*, (438 U.S. 726) Historical Perspective

1. In 1978, Justice Stevens wrote the following explanation for the rational used to justify government regulation of communications when BROADCAST to the unwitting public in a media that is "*pervasive*" and "*accessible to children*".

> ***"Of all [types] of communication, broadcasting has the most limited First Amendment protection. Among the reasons for specially treating indecent broadcasting [by radio] is the [] pervasive presence [this media] of expression occupies in the lives of our people. [Radio b]roadcasts extend into the privacy of the home and it is impossible completely to avoid those that are patently offensive. [Radio b]roadcasting, moreover, is []accessible to children."***[1]

[1] This direct quote from the ruling of *Pacifica* has the no longer applicable superfluous adverb of "uniquely" removed and singular "that medium" updated to "this media", and "form" updated to "type". Broadcast(s)ing corrected to "Radio broadcast(s)ing". This was understood by most US citizens long ago.

2. Concise, effective legal writing does not use superfluous words like adverbs often are. Use of the superfluous adverb "*uniquely*" made this writing dependent on historical context for interpretation as is improper for legal writing.[2]

3. The context included in error by Honorable John Paul Stevens was comparing radio broadcasting of communications in 1978 to other broadcasting like telegraph wire broadcasts, hit movie broadcasting, and print broadcasting by book, newspaper, and magazine.

4. All other broadcast media considered in 1978 required audience action beyond "*tuning a radio*". In 1978, video and audio were often both broadcast in the radio medium like AM/FM radio and Wi-Fi [sic] "internet" media are broadcast now as an intruder or unwelcome guest in the home "*accessible to children*" and spouses.

5. Television-media evolved away from radio broadcasting and began closed wire broadcasting called "cable-TV". Cable-TV broadcasting required subscriptions and was inappropriately exempted from broadcast regulations due the beginning of FCC nonfeasance due to responsibility-shifting and pervasive FCC misapprehension of *Pacifica* that continues now distorting clear US law.

B. *FCC v Pacifica*, (438 U.S. 726) Update of Perspective

[2] See Brouchoux, Deborah E; "*Aspen Handbook for Legal Writers*" Barnes&Noble, Amazon; Chapter 4: "*Features of effective legal writing*"; 2005; pp 71-109.

1. The development of communications technology from 1978 to 2010 does not compare like one-inch compares to the distance from goal line to goal line on football fields. These advancements in communications technology compare like one-inch compares to the distance from Earth to the planet Saturn or Mars.

2. Humans made phenomenal increases in communications technology at the close of the last century and are not able to keep these technologies within the bounds of "good behavior" using misinterpretations of law.

3. Communications technology will never be moral, or safe when regulated by legal ideals developed since 1978 between opposing desires. Free Speech activist like ACLU fight regulation supported for radio broadcasting in 1978, if sought applied to another media like the video broadcast of a quick indecent peek at Janet Jackson's naked female breast during a professional sporting event in 2004. The ACLU will fight the desperate need for FCC regulation of [sic]"internet" broadcasts by radio and by wire communications.

4. FCC regulation of all broadcasting by radio to the public is required by clear US law, 18 USC §1464. Safety is required for ALL public radio broadcasting including the [sic] "internet" by clear United States law. *Pacifica* required regulation of ALL pervasive public speech when accessible to minors. In 1978 this "*uniquely*" included radio media but today includes [sic] "internet" and satellite due to radio broadcasts of Wi-Fi [sic] "internet" and satellite radio.

C. "Golden Globes" OPINION AND ORDER (2004)

This FCC order attempted to advise of the intention to begin to hold all *per se* egregious indecent material to be prohibited for radio broadcasts without respect to ANYTHING but common sense. The FCC confused this statement of position enough hoping to avoid litigation with ACLU to render the notice wholly invalid.

D. FCC v. FOX TELEVISION STATIONS, INC. (No. 07-582)

Fox Inc asserted the fines using the new "ambiguous" criteria for regulation were "arbitrary" and "capricious" per the Administrative Procedures Act or 5 USC §706(2)(a). The fine was set aside by the Second Circuit Court. The Supreme Court then remanded this decision as follows hoping for clarified FCC regulations of indecent radio broadcasting after "strike-one".

> *"The FCC's orders are neither "arbitrary" nor "capricious" within the meaning of the APA."*

E. FCC v. FOX TELEVISION STATIONS, INC. (No. 10–1293)

The Second Circuit Court on remand then described the entire confusing new policy as unconstitutionally vague and invalidated the entire policy requiring only common-sense. The supreme Court then, of course, held as follows for "strike-two".

> *"Because the Commission failed to give Fox or ABC fair notice prior to the broadcasts in question that fleeting expletives and momentary nudity could be found actionably indecent, the Commission's standards as applied to these broadcasts were vague."*

F. FCC & USA v. CBS Corp., et al., (06-3575)
FCC & USA v. CBS Corp., et al., 567 US ____(2012)

1. The Third Circuit Court ruled the 2004 Super Bowl indecent breast pandering fine was arbitrary and capricious because the behavior required to prevent fines for broadcasting indecency were not clearly stated as directed by *Fox I & II*. The current standards remain indiscernible and stated improperly. The FCC third-strike was denied review by the Supreme Court.

2. This continuing mistake or legal "strike-out" DEMANDED the proceedings begun with GN 13-86 where 101,696 comments were entered as of 6/19/2013 from every US State and with Fox Inc, CBS, ABC, NBC and dozens of comments filed by parties using lawyers and seeking unbridled free speech like against clear US law(s).

3. The comments include the clear method for regulation of the Internet with tagging like suggested by *ACLU v Reno*[3], (96-511), – as quoted below. Tagging increases both free speech and public safety for wire communications and is done by Google Inc and Microsoft Corporation today in self-serving ways.

> *"Moreover, the arguments in this Court referred to possible alternatives such as requiring that indecent material be "tagged" to facilitate parental control, making exceptions for messages with artistic or educational value, providing some tolerance for parental choice, and regulating some portions of the Internet differently than others."* – underlining added

4. "*[I]ndecent, obscene, or profane*" database broadcasts are done in the continuing organized criminal enterprise of trafficking criminal broadcasts of

[3] The honorable O'Connor and Honorable Renquist dissent hoped for zoning the [sic] "internet" like has now occurred everywhere if not recognized by most making unqualified First Amendment protection ignorant though [sic] "internet" broadcasting should never have made unsafe communications to the unknown PERIOD.

harvested indecency by Google Inc and Microsoft Corporation as allowed by FCC nonfeasance failing to follow 47 USC §151, 18 USC §1464, *Pacifica*, and *Golan*.

5. The rule set served in this litigation is the work of Harvard, Yale, Cornell, Arkansas, and other constitutional law professors and various communications law firms contributing years of costly research semi-anonymously with options preserved for identification for posterity if desired. All mistakes entered in this were made by Curtis J Neeley Jr. *See* 47 USC §232.

6. This request for an *en banc* reconsideration will be entered as a reply comment to GN 13-86 with the FCC. The "r*ule set*" developed will either soon be adopted by the FCC "semi-voluntarily" or become legislation and was served to Congress, the media, and within this action via the FCC "*ecfs*" and is found "online" as follows.

1. http://apps.fcc.gov/ecfs/document/view?id=7021913417
2. http://apps.fcc.gov/ecfs/comment/view?id=6017164922
3. This Petition for *en banc* rehearing at the FCC ecfs

SUMMARY

1. The Eighth Circuit panel summary affirmation that wire communications BROADCASTING should not be regulated by the FCC conflicts with *Pacifica*.

2. Affirming US visual artists have no human right to exclusively control original visual art creations "online" repeats the District Court error invalidating moral copy[rites] or the Visual Artists Rights Act of 1990 "online" for even naked creations

artists regret having disclosed and leaves the United States Berne Convention non-compliant in direct conflict with *Golan v Holder*, (10-545).

3. This panel holding is in DIRECT CONFLICT with the Supreme Court ruling in *Golan v Holder,* (10-545) where the following are direct quotes from Justice Honorable Ginsburg's 69-page ruling noting Supreme Court deferral to Berne Convention compliance chosen by Congress being called constitutional repeatedly.

> *"[t]his Court has no warrant to reject Congress' rational judgment that exemplary adherence to Berne would serve the objectives of the Copyright Clause.*
>
> *[m]oreover, Congress adopted measures to ease the transition from a national scheme to an international copyright regime.*
>
> *[b]y fully implementing Berne, Congress ensured that these works, like domestic and most other foreign works, would be governed by the same legal regime*
>
> *[h]istorical practice corroborates our reading of the Copyright Clause to permit full U. S. compliance with Berne.*
>
> *...the TRIPS accord, leading the United States to comply in full measure with Berne, was also a signal event"*
>
> *[g]iven the authority we hold Congress has, we will not second-guess the political choice Congress made between leaving the public domain untouched and embracing Berne unstintingly."*

4. *Golan v Holder* addressed §514 of Title 17 rather than §106A, which this panel affirmed to be properly invalidated by the Western District of Arkansas for "online". This affirmation conflicted and conflicts with a Supreme Court that would "*not second-guess the political choices of Congress*" and stated that Congress was

"*embracing Berne unstintingly*" in direct conflict with the consideration given for Summary Affirmation by Panel.

5. The Panel recognized the **extraordinary public importance** of this matter by granting IFP. The Rehearing by Eighth Circuit *en banc* is now warranted or was sought by the panel recognizing the persistent pursuit by Curtis J Neeley Jr to address this **extraordinarily important public matter.**

6. Summary affirmation by the panel is invalidation of Berne Convention compliance ruled the constitutional decision allowed for Congress by the Supreme Court and is judicial nullification of the Visual Artists Rights Act of 1990, or "[r]ights of certain authors to attribution and integrity" of 17 USC§106A.

7. 17 USC§106A was Congress acknowledging the international grant of the personal moral right of visual artists to prevent disparaging modification of visual art or display and attribution to art that harms the integrity of an artist's reputation. Excluding all "online" uses make integrity preservation IMPOSSIBLE for the US.

8. This misapprehension of current law clearly violates Article 6bis and conflicts with the Supreme Court and is exceptionally important due to violating US Treaties accepted by Congress and affirmed as constitutional in *Golan v Holder*.

9. Summary affirmation by the panel was judicial nullification of 47 USC §605 allowing unauthorized broadcasting of databases used for communications and strips visual artists and pornographers, in particular, of the protections recognized by Congress for sales of indecent naked visual art "online" from publications requiring being "**contactable adult subscribers**" of these particular art publications instead of illegal database broadcasting of images, tagged as indecent, to the public.

10. 47 USC §605 formerly protected against criminal re-broadcasting of indecent art to the general public that was declared by artists to be proscribed for minors and being "*obscene, indecent, or profane*" and criminal to broadcast to the public per 18 USC §1464.

11. **The summary affirmation by panel is extremely important and diametrically opposes two Supreme Court rulings and one US Treaty**.

CONCLUSION

1. Database broadcasts for {+"curtis neeley" +FCC +internet"} from only FIVE networked computers owned by defendants or others will reveal to the Eighth Circuit Court and the public how transparent and exceptionally important the seeking of FCC law enforcement for "*obscene, indecent, or profane*" database broadcasting has become even if called [sic]"*open internet*" for disguise.

-

Duck Duck Go, Defendant Microsoft Corporation Bing.com
Defendant Google Inc Google.com, yandex.com, FCC.gov

2. The FCC fails to regulate broadcasting by wire despite the *Pacifica* explanation of the important government need to protect public broadcasting that is an intruder in the home like [sic] "internet" is without question.

3. The indecent database broadcasting crime being preserved by Eighth Circuit Court panel affirmation warrants *en banc* reconsideration or will be why illegal "pornography" database re-broadcasting continues after ***Neeley Jr v FCC, et al*** ends.

4. Nullification of laws in this civil and criminal claim allows organized criminal trafficking of database broadcasts of indecency by Google Inc and Microsoft Corporation by radio and by wire to minors and otherwise forbidden public viewers without requiring authentication in clear violation of 18 USC §1464 and the clear holdings of Pacifica, its progeny, and *Golan*.

5. Curtis J Neeley Jr prays the entire Eighth Circuit now consider this Petition for Rehearing *en banc* and establish a briefing schedule and request *amicus* from the US Attorney General to accompany the many supporting and opposing briefs that will follow this internationally impacting demand by an artist for the right to use the [sic] "Internet" safely by requiring tagging of directories, pages, and image files.

6. **Supreme Court Petitions will follow due the exceptional international impact of this issue though *en banc* decisions should be affirmed and are**

preferred by Curtis J Neeley Jr, and many US citizens, to Supreme Court holdings of only nine.

7. The briefs in this litigation should lead to the end of the unregulated and illegal [sic] "*open internet*" broadcasting of the "*obscene, indecent, or profane*" or be the end of the "*porn-by-wire*" ruining billions of families. Continuous criminal violations of 18 USC §1464 by "*porn-engine*" database rebroadcasts have been allowed inappropriately since simultaneous "online" wire and radio communications first developed and were mistakenly called a "*wholly new medium*" in 1997 by seven of the entire Supreme Court of nine.

8. Restoring the safety of ALL pervasive public broadcasting of communications **is EXCEPTIONAL and the clear results of enforcing existing US laws.**

Curtis J. Neeley Jr.
2619 N Quality Lane
Suite 123
Fayetteville, AR 72703

Failure is impossible,
/s/ Curtis J Neeley Jr
Curtis J Neeley Jr