



June 2008

Updates on the News

Embedded advertising in the cross-hairs – As we were about to send this issue to print, the Commission has released a Notice of Inquiry and Notice of Proposed Rule Making (NOI/NPRM) expressing concern about “embedded advertising” – and its two primary components, “product placement” and “product integration” – in current programming, particularly as those practices implicate the sponsorship identification rules. The FCC describes “product placement” as the mere use of commercial products as props, while “product integration” entails the inclusion of such products in the dialogue and/or plot of a program. It has recently been reported that, with the increased use of digital recording devices, TV audiences in particular are affirmatively skipping traditional commercial breaks; accordingly, advertisers, with the cooperation of program producers, have gravitated toward embedding techniques to assure access to the audience. The Commission fears that such embedding, when combined with established sponsorship ID techniques, may not adequately inform the public of the nature – or even the fact – of the embedded advertising. The NOI/NPRM is short on detail. It simply describes the concerns which have been expressed by some groups about embedded advertising, and seeks comments on those concerns. Interestingly, the FCC does suggest, in the NPRM portion of the item, that sponsorship ID notifications on TV be required to be of a certain minimum size and on-air for a particular length of time. The NPRM does not indicate what size/length the agency might have in mind, but it does allude to political broadcasting requirements specifying lettering at least four percent of the vertical picture height and duration of at least four seconds. We will report on the NOI/NPRM in greater detail in next month’s *Memo to Clients*.

Power grab for HD Radio™? – In a tacit admission that the HD Radio™ digital audio service may not deliver all that everybody hoped in the way of signal strength, a group of broadcasters and equipment manufacturers has filed a proposal for increased HD power by up to 10 dB . . . except that the increase would not necessarily apply to some Super B stations (because higher digital power for those stations were found to have potential adverse effects on the analog signal of first adjacent Class Bs). The proposal would, according to its proponents, result in significantly greater HD coverage areas and improved signal penetration into buildings. Of course, the proponents say nothing but nice things about HD service, but one may well wonder why, if HD service is everything it’s cracked up to be, a significant power increase might be called for. Additionally, the fact that even the proponents – who seem to be avid cheerleaders for the HD service – have to carve out some exceptions because of interference concerns does not inspire

confidence. While it may be possible that interference would be limited to a particular class of station in particular circumstances, the acknowledgment of any potential interference at least establishes, well, that there is a potential for interference at all. The proposal was filed as a letter in MM Docket No. 99-325. As of this writing the Commission has not requested comment on it.

Plus ça change, plus c'est la même chose – Rep. Anna Eshoo (Gesundheit!) has introduced the Commercial Advertisement Loudness Mitigation Act (H.R. 6209). If signed into law, her bill would require the FCC to prescribe regulations to assure that: (a) ads accompanying video programming (from broadcasters and/or MVPDs) not be “excessively noisy or strident”, and (b) ads not be “presented at modulation levels substantially higher” than the programming they accompany; and (c) the average maximum loudness of ads not be “substantially higher” than the accompanying programming. Putting aside the obvious observation that her proposals are lacking in necessary definitions of important terms – how should we define “strident” or “excessively noisy”, for example? – we are constrained to note that Rep. Eshoo appears not to be aware that the FCC has already struggled with the issue of loud commercials for more than 40 years. In 1962, the FCC commenced an inquiry into that very question. (Check it out – Docket No. 14904, 27 Fed. Reg. 12681 (December 21, 1962).) After three years of fact-finding, though, that inquiry was terminated “with little new information gained”. Between 1965-1973, the FCC conducted spot surveys to determine whether any broadcasters were deliberately jacking up their levels during spots – but no such evidence was found.

In 1979 the FCC opened yet another inquiry into the subject. (You can look that one up, too – BC Docket No. 79-168, 44 Fed. Reg. 40532 (July 11, 1979).) After five more years of tests, public comments, industry studies, etc., etc., the FCC concluded that “due to the subjective nature of many of the factors that contribute to loudness, it would be virtually impossible to craft new regulations that would be effective.” The FCC observed that “loudness” includes many factors, such as “audio processing, mood of the listener, listener’s experience with the product being advertised, and method of presentation.”

It appears that Rep. Eshoo eschewed a look back at the record before she introduced her bill. Or perhaps she has been able to ferret out information that the FCC’s own multi-year efforts failed to – although one could not tell that from her bill. Ideally, this item will die on the vine, leaving the Commission free for more useful and fruitful activities.