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Memorandum to Clients

December, 2011 News and Analysis of Recent Developments in Communications Law No. 11-12

December, 2011: All is CALM

The new rules governing "loud" television commercials: What they require, when they kick in

By Paul J. Feldman
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Back in December, 2010, the CALM Act (short for "Commercial Advertisement Loudness Mitigation Act") was signed into law, giving the FCC precisely one year to get its regulatory keister in gear and adopt rules mandated by the Act. We are pleased to report that the Commission met that deadline, with two days to spare. In a Report and Order adopted on December 13, 2011, the Commission established a set of complex technical rules and procedures intended to reduce the problem of "loud" commercials on television.

The CALM Act is intended to lower the volume (or, more accurately, the "loudness") of televised commercials. We won't have a sense of whether or not the new rules will work for another year or two (and maybe not even then). As discussed below, even the Commission acknowledges that the CALM Act will not necessarily eliminate the perception that some commercials are loud. But regardless, TV licensees and MVPDs are now under the gun to bring themselves into compliance with the new rules by ***December 13, 2012*** (although, also as discussed below, some stations may be eligible for an additional year or so to bring themselves into compliance).

In crafting the technical specs, the Commission had little heavy lifting to do. That's because Congress directed the Commission had to deal with the problem, *i.e.*, by mandating a "recommended practice" (RP) devised by the Advanced Television Systems Committee (ATSC). The ATSC, of course, is the international non-profit organization largely responsible for the design of the DTV standards now in place in the U.S. So pretty much all the Commission had to do on that front was explicitly incorporate the RP – known as ATSC A/85 RP to the *cognoscenti* – into the rules. (Fuzzy on ATSC A/85 RP? Check out our posts on the CALM Act at www.CommLawBlog.com.)

The real problem confronting the Commission was how to craft an enforcement system that divvies up the compliance responsibilities appropriately. And props to the Commission: the system they came up with, although a bit complicated, seems to do the trick.

Who do the new rules apply to? The new rules apply to digital full-power broadcast television licensees and multichannel video programming distributors (MVPDs) (*e.g.*, cable, satellite, etc.). There is one exception. As we all know, the CALM Act is intended to lower the volume on loud *commercials*. Accordingly, the new rules do ***not*** apply to noncommercial television stations because, by definition, noncoms don't broadcast commercials – unless, of course, those stations are providing commercial material on one of their digital streams. In that case, the new rules would apply to that commercial matter. (Note: Lest there be any doubt, ***political*** commercials are indeed "commercials" for CALM Act purposes.)

When do the new rules apply? Although adopted last month, the new rules will not take effect until ***December 13, 2012***. And (as we'll get to below) the Commission has already announced the availability of waivers that could relieve qualifying station/MVPDs of CALM Act obligations for up to two years beyond that. But don't be lulled into an undue sense of complacency: now would be a good time to familiarize yourself in detail with the CALM Act rules and take the steps necessary to assure that, when the time comes, you're in compliance.

What needs to be done to comply? The goal of the CALM Act is to eliminate, or at least discourage, "loud" commercials" by implementation of the RP. As a preliminary matter, ***all stations/MVPDs must (a) have the equipment necessary to pass through RP-compliant programming and (b) be able to demonstrate that that equipment has been properly installed, maintained and utilized to ensure compliance with the RP.*** The equipment permits the station/MVPD to adjust the commer-

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Inside this issue . . .

Reminder: Closed Captioning Exemption Requests Due by January 18, 2012

By Christine E. Goepp
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If you happen to be one of the 298 television programmers who lost closed captioning exemptions last October, heads up – your programming must be fully compliant with the closed captioning rules beginning January 19, 2012. But take heart, you can re-apply for your exemptions. The deadline for re-filing is ***January 18, 2012***.

As we reported back in the October *Memo to Clients*, the Commission pulled the exemption rug out from under nearly 300 programmers who thought, not unreasonably, that the exemptions that the FCC's Consumer and Governmental Affairs Bureau (CGB) had granted them five years ago were permanent. Turns out that the full Commission disagreed.

But the Commission did leave the door open for any of those programmers to try to get their exemptions back, as long as they can satisfy the new standards announced in October. The deadline for making such a request is January 18, 2012.

Programmers who are interested in petitioning for a new exemption must submit current, detailed documentation showing that it would be "economically burdensome" to provide closed captioning on the specific programming for which an exemption is sought. ("Economically burdensome" is the standard established by the Twenty-First Century Communications and Video Accessibility Act of 2010, but the Commission has provisionally interpreted the new test to mean the same thing as the old "undue burden.")

Whether closed captioning is considered economically burdensome for a particular provider or program owner will depend on: (1) the nature and cost of the closed captioning; (2) the impact on the operation of the entity; (3) the financial resources of the entity; and (4) the type of operations. Although these factors appear similar to those used in the past, the categorical presumption that CGB used to use – a presumption that allowed it to green light lots of exemptions without carefully inspecting each request – is now gone. Instead, each new petition will now be considered strictly on a case-by-case basis.

Petitions for exemption must include:

- Documentation of financial status to demonstrate the programmer's inability to provide closed captioning;
- Verification that the programmer has obtained information about the costs of captioning specific program(s);
- Verification that the programmer has sought closed captioning assistance from its video programming distributor and note to the extent to which such assistance has been provided or rejected;
- Indication of whether the programmer has sought additional sponsorship sources or other sources of revenue for captioning, and a showing that, even if these efforts have not been fruitful, the programmer does not otherwise have the means to provide captioning for its programming; and
- Other relevant factors specific to the programmer's particular situation.

If you happen to be one of the programmers stuck in this dilemma and you'd like our help in re-petitioning for an exemption from the closed captioning rules, please contact us well before the January 18 deadline for assistance in preparing your submission. (Don't know whether you're one of the elite 298? You can find a list of the affected programmers in Appendix A to the FCC's October order – there's a link to the order available at www.CommLawBlog.com.) Bear in mind that, if you don't file an exemption request by that deadline, you will be required to provide closed captioning for your programming as of January 19.

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21st Century – so what? FCC stays old school

EEO: Web-only, Word-of-Mouth-Only Recruitment NOT Enough

By Peter Tannenwald
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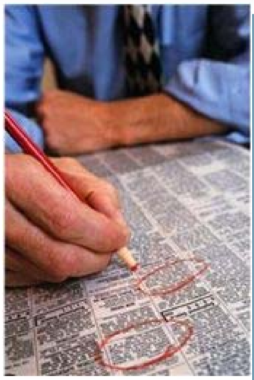

Despite the fact that the Commission has itself acknowledged, repeatedly, that the Internet is an important, maybe even "critical", resource for job-seekers, broadcasters with jobs to offer had better not rely on the Internet alone when recruiting for those jobs. If they do, they're looking at a fine that could run into five digits. Ask a couple of licensees – one in Virginia, one in South Carolina – who just found out the hard way.

The FCC has long required broadcast employment units with five or more full-time employees to recruit broadly for minority and female applicants for ***all*** job openings. A report of recruitment efforts, including the referral sources that are notified of openings, must be placed in the public file of all stations in such employment units every year; they must also be posted on the stations' websites (if they have websites). At the middle of the license term and at renewal time, those employment units must submit reports on their EEO efforts to the Commission. And each year the Commission also conducts random audits of EEO performance.

Mailing notices of vacancies to lists of organizations may be futile in the Real World, but apparently not on Planet FCC.

We have cautioned clients for at least a couple of years that the FCC insists on a broad spectrum of recruitment sources. The classic "word-of-mouth" approach and "referrals from friends" are ***not*** enough. And as we wrote just a year ago, the FCC has also cautioned that Internet-based recruitment can***not*** be relied on alone. (Irony alert: the fact that some businesses accept job applications ***only*** via the Internet has been touted by the Commission as a justification for its National Broadband Plan, which includes repurposing TV broadcast spectrum for wireless broadband.)

In the two recent cases (released on the last business day of 2011), the FCC nicked two station groups for $8,000 and $12,000 for inadequate dissemination of recruitment notices for some of their openings. For some, but not all, of their openings the groups had relied on Internet and word-of-mouth to spread the word. Not enough, the Commission announced. Its words are direct and speak for themselves (although we've highlighted a particularly noteworthy sentence below):

> The Licensee's reliance on non-public sources such as word-of-mouth referrals and its own employee board, did not constitute sufficient recruitment as contemplated under the Commission's rules, which require public outreach. . . .While the Commission does not require the use of a specific number of recruitment sources, if a source or sources cannot reasonably be expected, collectively, to reach the entire community, as here, a licensee may be found in non-compliance with the Commission's EEO Rule. ***Further, the Commission's interpretation of the EEO Rule does not allow a licensee to recruit solely from Internet sources to meet the requirement to widely disseminate information concerning the vacancy.***

We have been told over and over again by clients that the Internet is just about the only recruitment source that produces any results and that mailing notices of vacancies to a large list of community organizations is an exercise in futility. That may be so in the Real World, but on Planet FCC things are apparently different – so the wise licensee will continue to keep a good supply of paper and postage stamps on hand.

Focus on FCC Fines

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This month the Enforcement Bureau's staff issued a Notice of Violation to a Los Angeles television station concerning the failure of the station's Chief Operator to sign the station's logs. During an inspection of the station, FCC agents reviewing the logs happened to notice the distinct lack of signatures on the station's EAS logs spanning at least eight weeks.

That, of course, presented something of a problem. Section 73.1870 of the FCC's rules requires that a station designate a Chief Operator and that the designation be in writing and posted with the station license. As a function of the job, the Chief Operator must conduct a review of the station's records at least once a week and ensure that the records are complete. When the weekly inspection is complete, the chief operator must record the results of the review in the station's log – the required entries include notations about the status of the station's EAS gear.

The lack of signed EAS logs is of particular concern in view of the Commission's heightened attention to EAS matters in recent months. (Readers will recall the nationwide EAS test in early November, which focused considerable attention on the routine operational status of EAS equipment at all broadcast stations.)

While some Chief Operators may be tempted to skip a week or two, the new year is an opportunity to revise one's habits. A weekly review helps to ensure that the station is keeping up with FCC regulations. By completing required logs, a chief operator can track patterns as well as ensure that logs will be ready to present in case of a surprise inspection by the FCC.

Plus ça change, plus c'est la même chose

Media Ownership NPRM: What Hath Quad Wrought?

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Three days before Christmas, the FCC delivered a little present for broadcasters: a Notice of Proposed Rule-making (*NPRM*) proposing changes to its media ownership rules. The *NPRM* followed up on a Notice of Inquiry (*NOI*) issued 18 months ago. While some might be thrilled with this gift, for most it's probably more like a lump of coal.

Under the 1996 Telecom Act, the Commission is required to review its media ownership rules every four years to determine if they remain "necessary in the public interest as a result of competition." These quadrennial reviews tend to be controversial – the 2002 and 2006 reviews both ended up in appeals (before the Third Circuit) that essentially left the ownership rules the same as they were *before* the beginning of the 2002 review.

With this history in mind, in June, 2010, the Commission opened the latest round of media ownership review with the *NOI*. The FCC requested comment on not only the existing rules, but also "fundamental questions" related to media ownership – Big Questions like what public interest goals the Commission should be advancing and how those goals should be defined and measured. In the intervening 18 months, much has happened: vast numbers of comments and reply comments have been filed, studies have been released, and the Third Circuit has weighed in again, overturning portions of earlier FCC ownership rulings.

Given all that, you might have expected some pretty significant changes to be proposed in the *NPRM*. If so, you'll probably be disappointed, since the FCC seems to gravitate back to the status quo. However, from the multitude of questions the *NPRM* poses, it's at least possible that the Commission may be positioning itself to make considerably broader changes than the surface of the *NPRM* suggests.

The *NPRM* rambles on for nearly 100 pages. We'll take a more detailed look at the high points below. Here's a quick-hit glimpse at those points.

The FCC proposes to:

- retain, for the most part, the existing media ownership rules, including the local radio ownership rules, the dual network rule, and the local television ownership rule (with minor modification);
- toss the existing blanket ban on newspaper/broadcast cross-ownership (NBCO), replacing it with a modified version that would allow some cross-ownership in the largest markets; and
- repeal the radio/television cross-ownership rule entirely.

In ominous news for some broadcasters, the FCC requests comment on whether it should treat shared services and news sharing agreements as attributable interests, although it stops short of proposing rules to that effect.

In response to the Third Circuit's decision overturning its diversity rules, the Commission notes that it doesn't have enough information to reinstate those rules. Accordingly, it asks for suggestions on how it could get such information or otherwise take actions to encourage minority and female ownership.

Finally, the NPRM requests comment on the 11 media ownership studies it released in the last year.

On the Big Picture side, the *NPRM* reflects the FCC's inclination to retain the traditional broad policy goals of its ownership rules, *i.e.*, increasing competition, localism and diversity. (Notably, the notion of formally adding other goals – like the "protection" of local news/journalism – is apparently dead for now, although we would not be surprised if the Commission's final Order mentions such goals at least a few times.) With these goals tentatively identified (or, more accurately, re-identified), the Commission addresses its five main media ownership rules.

The FCC would retain the traditional broad policy goals of its ownership rules.

Here's the nitty-gritty.

Local Television Ownership: Currently, an entity is allowed to own two television stations in the same DMA, but only if one of two conditions is met: (1) if there is no Grade B contour overlap between the commonly owned stations; or (2) if at least one of the commonly-owned stations is not ranked among the top-four stations in the market ("top-four prohibition") and at least eight independently owned television stations remain in the DMA after ownership of the two stations is combined ("eight-voices test").

The Commission figures that this rule is still necessary to promote competition. While the FCC acknowledges the availability of non-broadcast video services (*e.g.*, cable, Internet), the Commission thinks that broadcasters compete against themselves in a market separate from non-broadcast operators. (One basis for that conclusion: non-broadcast video services do not change their programming based on decisions taken by local television stations and, to some extent, in response to local concerns at all.) So the local ownership rules would remain in place.

In place, that is, except for the "Grade B exception". The Commission is proposing to eliminate that option entirely, meaning that same-DMA duopolies would have to satisfy the top-four/eight-voices tests, which the Commission would keep in place. (But the Commission nonetheless still poses a

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wide variety of questions – some likely to be controversial – about the possible need to revise or replace either or both of those tests.)

Tossing the Grade B exception would raise a number of practical issues – like whether and, if so, how, to grandfather any existing situations that would not satisfy an ownership regime lacking the Grade B exception.

The NPRM also asks whether the DTV-spawned potential for multicasting should affect local ownership rules.

Local Radio Ownership: Along the same lines as the local TV ownership rules, the Commission proposes generally to keep its local radio ownership limits, complete with AM/FM subcaps. This tentative conclusion is based on the view that broadcast radio constitutes a market unto itself, separate from satellite and Internet services. Again, however, the Commission poses a wide range of questions about possible alternatives, so it's impossible to say for sure whether the status quo will remain the status quo once all is said and done.

Among the questions posed are a number relating to the competitiveness of the AM service. The Commission is currently of the opinion that AM operators may still suffer some competitive disadvantages, and that the AM/FM subcaps assist in easing, if not overcoming, those disadvantages. But the availability of on-line streaming, HD radio technology and FM translators for rebroadcasting AM signals may also help level the playing field.

The Commission proposes to keep its local radio ownership limits, complete with AM/FM subcaps.

Newspaper/Broadcast Cross-Ownership (NBCO): Perhaps the greatest source of controversy in the past two quadrennial reviews has been the NBCO rule, which flatly prohibits any common ownership of a daily newspaper and a broadcast station in the same market. The rule has been in place since 1975 – since efforts in 2002 and 2006 to change it were overturned by the Third Circuit.

As the FCC now sees it, the NBCO rule doesn't have any impact on competition – in fact, newspaper/broadcast combinations could well serve the goal of localism. On the other hand, the Commission remains tentatively convinced that such combinations pose a risk to diversity, and particularly viewpoint diversity – so some restrictions on cross-ownership remain necessary. In assessing "diversity", the Commission discounts (as it did in 2002 and 2006) the impact of the Internet as a source of news. The web isn't a significant source of independent local news, in the FCC's view, largely because it doesn't provide significant independent newsgathering, as opposed to commentary; plus, the local news sites that do exist tend to draw very small audiences compared to daily newspapers and local broadcast stations.

The Commission's solution: Continue to prohibit newspaper/broadcast cross-ownership, BUT declare that, presumptively, certain combinations in the top-20 DMAs are acceptable, while combinations in other markets may be permissible if they satisfy a complicated waiver standard. This approach incorporates certain elements of the version of the rule proposed in the 2006 ownership review, with some twists. (One such twist under consideration: cross-ownership of *any* newspaper in a TV station's DMA would be prohibited, not just those newspapers published within the station's Grade A contour.)

The prohibition would preclude (a) TV/daily newspaper combinations if the paper is published in the TV's DMA, and (b) radio/daily newspaper combinations if the paper is published within the 2.0 mV/m contour (for AM stations) or 1.0 mV/m contour (for FM's). The presumptive waiver would then permit combination of a single radio station and daily newspaper in the top-20 DMAs. Common ownership of a single TV and daily newspaper in the top-20 DMAs would also be permitted, as long as the television station was not ranked in the top four and if at least eight "major media voices" would remain in the market.

The Commission may not be wedded to the radio/newspaper prohibition, though. The *NPRM* specifically asks whether that aspect of the NBCO rule could simply be eliminated, since radio stations tend not to constitute "primary outlets that contribute to local viewpoint diversity".

As with the rest of the *NPRM*, this portion poses a raft of questions both conceptual and practical. Again, grandfathering generally, and the transferability of grandfathered combinations, are among the particular concerns.

Radio/Television Cross-Ownership: In perhaps the lone clearly deregulatory aspect of the *NPRM*, the Commission proposes to totally toss its existing limits on radio/television cross-ownership. According to the FCC, radio and TV stations don't compete for advertising in the local market and don't, from the perspective of listeners/viewers, serve as substitutes for one another. The Commission also doesn't fear that elimination of this prohibition is likely to result in significant consolidation.

The Commission's analysis in this portion of *NPRM* raises interesting contrasts with the remainder of the *NPRM*. Elimination of the radio/TV cross-ownership prohibition is said here to be justified in part because broadcast stations generally face increasing competition from non-broadcast sources of news and entertainment (including particularly the Internet), and the "primary marketplace for news is shifting". Perhaps so, but the Commission discounted the effect of competition from such non-broadcast services in its analysis of its rules governing local radio, local TV and newspaper/broadcast ownership limits.

Dual Network Rule: The existing prohibition on a single entity owning any two of the top-four English-language television networks (ABC, CBS, NBC, or Fox) would be retained. In the Commission's tentative view, the top-four networks remain categorically different from their competitors in terms of both viewership and advertising rates. As a result, a combination of any two networks would have a

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A new way to squelch squatters

ICANN's New Uniform Rapid Suspension System

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For years I've urged readers to register their major identifiers – corporate names, slogans, call signs, etc. – as federal trademarks. (Check out a couple of my posts on www.CommLawBlog.com dating back to 2007 and 2009 if you doubt me.) And now the time has come to beat that drum again, with the impending roll-out of a new "Uniform Rapid Suspension System" (URS) designed to make it easier to protect such marks against cybersquatters.

Cybersquatters are folks who register Internet domain names based on recognizable trademarks or tradenames belonging to others. Their goal might be to use the familiarity of the underlying mark to attract a lot of traffic to their site, or it might be to try to sell the domain name to the owner of the trademark/tradename, usually at a ridiculously inflated price.

The Internet Corporation for Assigned Names and Numbers (ICANN) – the international body that regulates domain names, among other things – has a system in place to help rightful holders of trademarks targeted by cybersquatters. That's the Uniform Domain Dispute Resolution Policy (UDRP), which provides a reasonably quick arbitration process aimed at squelching unauthorized use the mark and transferring control of the infringing domain name to the trademark owner. (Additionally, trademark owners can also sue for infringement in federal court – if they have the time, money, patience and masochistic inclination to undertake a serious piece of litigation.)

By registering your trademarks, you'll be able to satisfy an important element of the test: the validity of your trademark rights.

But ICANN is reportedly on the verge of implementing the URS.

It's apparently already taking applications from folks looking to serve as arbitrators. Given the fact that ICANN is looking to charge only about $300 per URS arbitration, some are wondering whether there will be enough money in play to entice many arbitrators to sign on for the gig. After all, if an arbitrator can't get more than $300 (if that much) for each proceeding, many potential arbitrators are likely to take a pass rather than commit to providing their services for low-end payments. Still, I think it's safe to say the ICANN will eventually get the URS up and running.

The URS is similar to the UDRP. Under both procedures, the aggrieved party must show that:

® the cybersquatter's domain name is identical or confusingly similar to a mark in which the complainant has valid trademark rights; and

® the cybersquatter has no legitimate right to the domain name; and

® the cybersquatter registered and is using the domain name in bad faith.

By registering your trademarks, you'll be able to satisfy an important element of the first part of that three-part test: the validity of your trademark rights. A federal trademark registration establishes that validity conclusively. Without such registration, you would have to pull together miscellaneous strands of circumstantial evidence to try to establish the existence of common law trademark rights. (Proving that a squatter has no legitimate claim to use of the domain name and is using it in bad faith may take a little additional digging.)

What's the difference between the established UDRP and the new URS? While the UDRP is a very complainant-friendly process – statistically speaking, 85% of all complaints filed are successful – it's not cheap. The UDRP process generally carries a filing fee of about $1,000 and, if you hire a lawyer, it's not unusual to spend $3,000–5,000 in legal fees and waiting several months to get a domain name transferred from a cybersquatter to you. That's a lot of time and money to protect even the most important marks, a fact which seems to embolden some cybersquatters.

The new URS removes many of these hurdles, making it considerably easier to protect your marks in what ICANN refers to as "clear cut instances of trademark abuse". Fees for invoking the URS are expected to be in the $300 range, a fraction of the current UDRP filing fees. The entire process is expedited, with an initial administrative review to be conducted within two business days of the filing of a complaint. If the complaint is in order, the URS Provider will notify the company through which the cybersquatter registered the domain name at issue – think "GoDaddy" – that it must "lock" the registration, thereby preventing the domain name from being transferred or otherwise altered to avoid enforcement actions.

Within 24 hours of this "locking", the URS provider officially notifies the cybersquatter by sending hard and electronic copies of the complaint to the contact person(s) listed in the WhoIs database for the contested domain name. The notice also alerts the squatter of the possibility that it might lose the registration. The cybersquatter then has 14 days to respond (although that time limit may be extended under certain circumstances). The complaint and response (if any) are then referred to an Examiner. If the squatter doesn't respond to the initial notice, the proceeding goes forward based solely on the evidence presented by

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the complainant.

Whether or not the registrant files a response, the key issue is whether the three-part test outlined above has been satisfied by "clear and convincing evidence", leaving no "genuine contestable issue". If the Examiner concludes that the complainant has met that standard, he/she will issue a Determination in favor of the complainant. That will result in the suspension of the contested domain name for the balance of the current registration period. (Visitors to the contested domain will be redirected to a website explaining the URS and the reason the domain name has been suspended.) While a successful complainant does *not* automatically get the domain name registration, it does have the first option of extending the registration period for an additional year at commercial rates.

If the Examiner concludes that the complainant has *not* made its case, then the requested relief will be denied and the URS proceeding will be terminated. The complainant will nevertheless be able to pursue its case through the UDRP or through federal trademark litigation, if it chooses.

Once it's finally implemented, the URS will provide a very streamlined process, considerably faster and cheaper than the UDRP (and vastly faster and cheaper than the litigation route). With the availability of such a process, trademark holders now have more incentive to take steps to protect their most important identifiers. I'm not advocating that every business flood the USPTO with trademark applications for any catchphrase or nickname that comes to mind. But I don't think it's unreasonable to suggest that, at a minimum, unique business names and prominent "brands" be protected with federal registration.

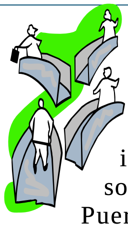
Let's say, for example, that you're a radio station owner. You have one major identifier: your call sign. You may also have a key slogan that you feature even more prominently that your call – something like "Hot 99 - Rocking the Valley". And maybe you also have some wacky morning drive DJs using locally-popular personas that you helped create and cultivate (f'rinstance, the fictional but awesome "Crazy Ira and the Douche"). A federal trademark application costs $275 to file, not including a couple of hours of legal time, give or take, to put together and file. You could probably register all three of the identifiers – call sign, slogan, character names – for well under $5,000. And that protects you for 10 years, as long as you continue to use the marks in question and maintain your registrations.

Who are you protecting yourself against? Anyone that might try to use your mark to draw attention to themselves. I'm seeing a significant increase in Internet-only radio stations using "call signs" to identify themselves. This wasn't a problem 15 years ago, when over-the-air radio ruled and Internet radio was at most a clunky niche option. But now anybody can start a "radio station" on the Internet. Do you really want potential listeners to google your call sign, only to find a completely unaffiliated online "station" instead?

Isn't it prudent to protect your investment in your brand identifiers?

Registering your call sign for use in conjunction with radio broadcasting (and Internet radio broadcasting, if you are, in fact, streaming) gives you leverage against anyone free riding off your name – whether or not they incorporate your call sign into a domain name – and facilitates legal action if it comes to that. Note that the likelihood that it will "come to that" might also be diminished if you register your marks, as the registration will put others on notice of your existing use, and signal to them that you intend to protect your marks. You're also getting protection against those who would "dilute" your name or brands by using them in conjunction with goods or services you wouldn't otherwise want to be associated with (see my article on .xxx domain names in last August's *Memo to Clients*).

Businesses routinely invest a lot of money in the development of brand identifiers. Isn't it prudent to protect that investment? I like to think of trademark registration as "insurance", a relatively small expense now to protect money that's already been invested, and perhaps even increase the value of the investment in the long run.



FHH - On the Job, On the Go

On January 12, 2012, **Frank Jazzo**, **Harry Cole** and **Bobby Bake**r, Assistant Chief, Policy Division, Media Bureau, Federal Communications Commission, will conduct a political broadcasting webinar for the Alaska Broadcasters Association; the Arkansas Broadcasters Association; the Louisiana Association of Broadcasters; the Maryland/ DC / Delaware Broadcasters Association; the Mississippi Association of Broadcasters; the New Mexico Broadcasters Association; the Radio Broadcasters Association of Puerto Rico ; and the Tennessee Association of Broadcasters.

On January 17, **Harry** will present a webinar on indecency for the Texas Association of Broadcasters.

On January 24, 2012, **Dan Kirkpatrick**, **Frank J** and **Harry** will conduct a license renewal webinar for the Tennessee Association of Broadcasters.

Frank Montero will serve as a presiding officer at the Minority Media and Telecommunications Council's 2012 Broadband and Social Justice Summit --- January 26---27 at the Westin Georgetown Hotel, 2350 M St. NW in Washington. The Summit will be held on January 26-27; Frank will preside at the plenary session on "Spectrum Reallocation: How Will The National Broadband Plan's Goals Be Realized?" on January 26.

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cial's "loudness" to conform with the RP *before* the commercial is inserted in the programming. This requirement should not impose any huge burden, as such gear is generally necessary for the provision of any audio at all. Still, stations/MVPDs should have their technical staff review their equipment to assure that it conforms. Note also that merely having the gear on hand is *not* enough. The gear must be properly installed, maintained and utilized.

Demonstrating compliance.

It's difficult to prove, today, that a commercial you ran a month or two ago wasn't "loud". The FCC does not indicate how you might do so, but presumably there are ways. If you can prove that a particular commercial alleged to have been too "loud" was in fact fully compliant with the RP, that would be all you would need to answer an FCC inquiry about that particular commercial. As an alternative, the Commission offers a couple of mechanisms that will afford TV/MVPD operators a way of avoiding liability even if they can't reach back in time to provide conclusive evidence of non-loudness.

It's difficult to prove, today, that a commercial you ran a month or two ago wasn't "loud".

Commercials, of course, can find their way into a transmission by one or two (or three) ways. A station/MVPD can insert the spot itself, or the spot might arrive at the station/MVPD already embedded in programming produced elsewhere. (The third alternative involves commercials inserted locally by third parties under an arrangement with the station/MVPD.) The FCC's compliance approach distinguishes among these different situations.

Inserted commercials. With respect to commercials *inserted by the station/MVPD*, the Commission will deem the operator "in compliance" if, in response to an FCC inquiry about local insertions, the operator can:

- demonstrate that the equipment described above has indeed been installed, maintained and utilized in a "commercially reasonable" manner "to ensure continued proper operation"; ***and***
- certify either that (a) it has no actual knowledge of any violations of the RP or (b) any violation of which it is aware was corrected promptly after it came to the operator's attention.

Note that an operator who knows of a violation but fails to correct it ***cannot*** properly certify that it has utilized its equipment "in a commercially reasonable manner".

Embedded commercials. Embedded commercials are more problematic. The TV/MVPD operator can't control the relative audio levels in already-produced programming delivered to them. While the operator could theoretically use real-time processing equipment to ride herd on audio levels, the practical availability and utility of that approach are dubious. Accordingly, the Commission has devised an elaborate "safe harbor" approach for embedded commercials. That approach is designed to split the compliance burden between the TV/MVPD operator and the originating programmer (although, as Congress mandated, the TV/MVPD operator is the one who bears the ultimate responsibility for compliance).

The "safe harbor" system requires, first, that TV/MVPD operators obtain "certificates of compliance" from their programmers confirming that the programs are RP-compliant. The certificates must be "widely available", *i.e.*, available to all stations and MVPDs, possibly through a website posting. Since lack of a certification could discourage TV/MVPDs from transmitting the programming, the program's producers should have an incentive to provide the proper certification. (Note that the Commission stops short of dictating the period to be covered by such certifications, but for a TV/MVPD operator to be able to rely on any particular certification, that certification must be in effect.)

Even in the absence of a certificate of compliance from a programmer, TV/MVPD operators may still transmit that programmer's programming. The catch here is that all such non-certified programming must be "spot-checked" annually for two years by "large television stations" and "very large MVPDs". "Large MVPDs" will have to conduct more limited spot-checks, while small operators (TV or MVPD) need not perform any spot-checks unless they receive an FCC inquiry, in which event they will have 30 days to complete the required spot-check. (In FCC-speak, a "large television station" is any station with more than $14.0 million in annual receipts in calendar year 2011, as set out in the BIA Kelsey Inc. Media Access Pro TV Database. "Very large MVPDs" are those with more than 10 million subscribers nationwide as of December 31, 2011, according to the NCTA. Merely "large MVPDs" have more than 400,000 subscribers but fewer than 10 million.)

The first round of annual spot-checks will have to be completed by December 13, 2013.

An annual spot-check is not a minor undertaking. It involves monitoring 24 uninterrupted hours of programming with an audio loudness meter set up per RP specification and follow-up review of the resulting records to determine if any commercials violated the RP. If (as is likely to happen with TV stations and some MVPDs) no single 24-hour period contains representative programming from *all* program suppliers, the annual spot-check much consist of loudness measurements over a seven-day period, totaling no fewer than 24 hours, capturing at least one program, in its entirety, from each non-certified programming transmitted as part of the operator's overall program schedule.

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The less exhaustive spot-check to be conducted by "large MVPDs" (as opposed to "very large MVPDs") must encompass 50 percent (chosen at random) of the noncertified channels carried on any of the MVPD's systems.

Two pieces of good news about spot-checks. First, MVPDs need *not* spot-check any broadcast programming (since any non-certified programming there will already be subject to spot-checking by large TV stations). Second, if the first two years' worth of spot-checks come back clean, no further checks of that program need be performed. If a spot-check turns up noncompliance, however, the spot-check clock is reset, and the programmer in question must be checked for another two years. Also, if a spot-check performed in response to an FCC inquiry turns up noncompliance, the spot-check clock gets reset for another two years there, too.

Third-party local insertions. The Commission recognizes that commercials may enter the transmission stream by means of third-party insertions. This involves arrangements between the TV/MVPD operator and the third-party pursuant to which that third-party provides a service to the TV/MVPD operator, often placing equipment at the TV/MVPD's site. In such cases, the TV/MVPD itself isn't inserting the commercials, but it's still much closer to that process than in the embedded commercial context. The FCC's response: the TV/MVPD operator can enjoy "safe harbor" status for such third-party inserts as long as the third-party certifies that (a) all commercials it is inserting comply with the RP and (b) they are being inserted in compliance with the RP. Of course, the TV/MVPD must have no reason to believe that that certification is false. If an FCC inquiry rolls in the door, the TV/MVPD will have to go through the spot-check drill, as outlined above.

The Complaint Process. The Commission will not be independently monitoring compliance with its CALM Act rules. Rather, it will rely on consumers to bring potential noncompliance to its attention. Complainants will be able to submit information to the Commission on-line. They will be expected to provide enough details to allow the Commission to take appropriate action. But the receipt of a single complaint is not likely to trigger any FCC response. Instead, the Commission will be on the look-out for "patterns" or "trends" in incoming complaints that "suggest a need for enforcement action." However, the Commission has provided no indication of what will be enough to constitute a "pattern" or "trend". On the positive side, though, the Commission has said that, once a "pattern" or "trend" has surfaced, the agency "will be conscious of the greater resources available to large entities when determining where to address our initial inquiries."

The Commission will not be independently monitoring compliance with its CALM Act rules. Rather, it will rely on consumers to bring potential noncompliance to its attention.

If a "pattern" or "trend" pops up on the FCC's radar, the Commission may open an official inquiry. As part of that inquiry, it may notify one or more TV/MVPD operators of the situation. If the operator(s) so notified wish to remain in the "safe harbor" relative to embedded commercials, the operator(s) must perform a spot-check of the channel or program specified by the Commission within 30 days of the FCC's notification. While the spot-check requirement can be expensive, even small operations will still have to perform the spot-check regardless of cost if they get the notice from the Commission. However, to do so they may borrow or contract for use of the necessary equipment; that is, they won't have to buy the gear necessary for the spot-check process.

If a spot-check (whether annual or in response to an FCC inquiry) turns up evidence of non-compliance, the TV/MVPD operator must notify the FCC and the programmer within seven business days and provide the programmer with information about any relevant complaints. Additionally, the TV/MVPD operator should check its own equipment, to confirm that that equipment s not the source of the non-compliance. Within 30 days a follow-up spot-check must then be performed, the results of which must be reported to the Commission and the programmer. If the follow-up check comes up clean, the TV/MVPD will still be in the "safe harbor" with respect to that program; if the follow-up check continues to show non-compliance with the RP, then the TV/MVPD is no longer in the "safe harbor" for that program, and the TV/MVPD will be liable for any future commercial loudness violations in that programming, regardless of any certification or previous problem-free spot-checks involving that programming.

Waivers. Congress specified in the CALM Act that the FCC must provide one-year waivers (renewable for a second year) upon a showing of "financial hardship" arising from having to obtain the equipment necessary to comply with the rules. The Commission has adopted a streamlined waiver approach for "small" TV stations and MVPD systems. If you're a TV station located in TV markets 150-210 or if you have no more than $14 million in annual receipts, you're a "small" TV station for these purposes; you're a "small" MVPD system if you have fewer than 15,000 subscribers (as of 12/31/11) and you aren't affiliated with a larger operator serving more than 10% of all MVPD subscribers.

If you qualify for the "small" operator's waiver, you need only send the FCC a certification that (a) you meet the definition of "small" TV/MVPD operation and (2) you need the extra year to "obtain specified equipment in order to avoid the financial hardship that would be imposed" if you had to get the equipment sooner. You must identify or describe the kind of equipment in question, but you don't need to specify model number.

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Inquiring minds want to know: what's up with Wilmington, NC?

FCC Approves First "White Space" Operations

By Mitchell Lazarus
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The FCC has approved the first "white space" database and the first end-user devices to begin operation on January 26, 2012, initially limited to the Wilmington, NC area.

White space devices are supposed to provide Wi-Fi-like services, only better, using locally vacant TV channels. Successful operation will depend on complex databases to help each device identify channels on which it can safely operate, without causing interference to TV stations, radio astronomy, wireless microphones, and several other services entitled to protection. We reported just last month that the first of ten FCC-approved database providers, Spectrum Bridge Inc., had posted the results from a 45-day test of its system. The FCC has now announced its acceptance of that system, and simultaneously, its approval of an end-user white space device that operates in conjunction with the Spectrum Bridge database.

Operators of the various services protected against the devices – we included a list in our white spaces article in the September, 2011 *Memo to Clients* – should make sure their facilities are properly listed in the database.

White space operations will be limited at the outset to the environs of Wilmington, NC. Wilmington was also the city chosen by the FCC a few years back for an early trial of the cut-over from analog to digital TV. We're not sure why the FCC keeps putting Wilmington's TV reception at risk. Perhaps the city is an unheralded center for high-tech early adopters. Or the home of someone whom the FCC just doesn't like.

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Entities that don't qualify as "small" must provide: (1) evidence of their financial condition; (2) cost estimate for obtaining the necessary equipment; (3) a "detailed statement explaining why its financial condition justifies postponing compliance"; and (4) an estimate (with support) of how long it will take to comply.

Waiver requests, which will have to be filed through the FCC's ECFS electronic filing system, will be due no later than ***October 14, 2012,*** *i.e.*, 60 days prior to the effective date of the rules.

The Commission also retains its general authority grant waivers to deal with unforeseen circumstances.

Wrap-up. Importantly, the Commission recognizes that the passage of the CALM Act and the implementation of these rules in its wake will ***not*** necessarily mean the end of consumer complaints. As the FCC admits, "while it may seem to some consumers that a commercial is loud, the commercial may, nevertheless, comply with the RP." What the Commission does not admit is that the passage of the CALM Act (and the publicity attendant to that passage) may have created exaggerated expectations in the minds of consumers. New reports about the CALM Act – and, indeed, some of the Commissioners' own statements – may have created the impression that the era of loud commercials is gone.

That would be a misimpression.

To a great degree the perception of loudness is in the ear of the beholder, and is dependent on a wide range of objective and subjective factors. The CALM Act cannot eliminate the perception of loudness. It can merely impose a means of controlling some – but by no means all – aspects of loudness.

So we can expect complaints about "loud" commercials to continue to roll in.

The FCC's approach seems reasonably well-designed to distribute among the various interested parties the responsibility for addressing such complaints. For many TV/MPVD operators, the initial burdens – and possibly even the ultimate burdens – seem reasonably light. But all TV/MVPD operators should recognize that the loudness problem is still with us and will remain with us for some time to come. That being the case, care should be taken to comply with the FCC's new rules sooner rather than later so that, if and when complaints are filed, you will be able to demonstrate that you have done what you were supposed to do to prevent excessively "loud" commercials.

It's an election year — do you know what your LUR is?

Lowest Unit Rate and Internet Streaming

By Frank Montero
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[*Blogmeister Note: The following piece, in a more compact form, appeared in Radio Ink magazine. We thank our friends at Radio Ink for allowing us to post this here as well.*]

As we enter the political season, radio stations are being bombarded with reminders about the FCC's political broadcasting rules – including, of course, the lowest unit rate ("LUR") requirement for many, but not necessarily all, political spots.

LUR, of course, means that stations must provide *all* political candidates (federal, state and local) with the LUR for advertising bought during a statutorily-specified pre-election windows. Those windows include the periods: (a) 45 days before a primary election, and (b) 60 days before a general election.

How does Internet streaming of content – including political spots – affect LUR calculations?

In general terms, the LUR is the lowest rate of the station for a particular class and amount of time during a particular period. "Lowest" means lowest. Thus, candidates must get the benefit of all discounts, including those offered to the station's most favored commercial advertisers for the same class and amount of time for the same period as that purchased by the candidate. Note that only ads bought by candidates are entitled to receive LUR. Also, federal candidates must provide the "stand by your ad" certification in order to be entitled to receive the LUR.

A spot "class" is one that has particular rights and characteristics, such as morning drive, afternoon drive, fixed position, ROS, etc. In many instances calculating the LUR for different classes of time can be relatively simple. But in other instances – particularly when different classes are bundled into packages for non-political advertisers, the calculation can get tricky fast. Unlike state and local candidates, federal candidates can***not*** be denied "reasonable access" to a station, which means that they are effectively entitled to any and all commercial opportunities as a standard advertiser. (State and local candidates can be limited to certain classes.) So for federal candidates, stations must determine the per-class LUR for each component of the package and make that rate available to the political advertiser, whether or not he/she buys the whole package.

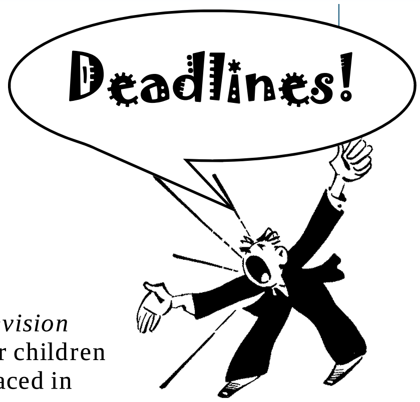
That process is already confusing enough – and it has gotten increasingly so as stations have expanded their streamed content on the Internet. How does Internet streaming of content – including political spots – affect LUR calculations?

First, you should know that the LUR requirement does ***not*** apply to Internet-only advertising time. However, broadcasters operating websites should be careful to distinguish sales of Internet-only advertising time from sales of over-the-air advertising time. This is especially so if an advertising package includes broadcast spots as well as Internet-only advertising. Example: a candidate buying over-the-air spots receives, as part of a package, a banner ad on the station's website. Such packages may impose obligations on a station with respect to political advertising sales and the value of the Internet component may impact the station's LUR.

If a station offers a combined package of broadcast and Internet advertising, LUR rules will apply to the broadcast component. Also, remember that the equal time requirements apply so if the station sells a package with broadcast spot time and Internet spots to one candidate, then the same should be made available to competing candidates for the same office. In short, be careful when selling combined broadcast and Internet advertising packages and be aware of how such bundling may impact the LUR and your bottom-line.

Yup, we're hopelessly late — by more than a week — in getting the December, 2011 issue of the *Memo to Clients* out the door . . . and we're sorry. An unprecedented (at least in the recent annals of the *MTC*) confluence of deadlines spanning the last two weeks of December and the first week of January interfered with our usual editorial efficacy, much to our chagrin.

But here it is, better late than never. We aim to get back on track with the January issue, and we thank our readers for their patience in the meantime.



January 10, 2012

Children's Television Programming Reports - Analog and Digital - For all *commercial television* and *Class A television stations*, the fourth quarter reports on FCC Form 398 must be filed electronically with the Commission, and a copy must be placed in each station's local public inspection file. Please note that the FCC now requires the use of FRN's and passwords in order to file the reports. We suggest that you have that information handy 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 placed in the public inspection file.

Website Compliance Information - *Television station licensees* must place and retain in their 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 local public inspection 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.

January 18, 2012

Closed Captioning Petitions Due - Any *television station* or *television programmer* that had a closed captioning waiver request based on undue burden considerations and was filed prior to October 20, 2011, must re-file its waiver petition by this date or commence offering the program(s) in question with closed captioning by the next day.

February 1, 2012

License Renewal Applications - *Radio* stations located in **Arkansas**, **Louisiana**, and **Mississippi** must file their license renewal applications. These applications must be accompanied by FCC Form 396, the Broadcast EEO Program Report, regardless of the number of full-time employees.

Post-Filing Announcements - *Radio* stations located in **Arkansas**, **Louisiana**, and **Mississippi** must begin their post-filing announcements with regard to their license renewal applications. These announcements must continue on February 16, March 1, March 16, April 1, and April 16.

License Renewal Pre-Filing Announcements - *Radio* stations located in **Indiana**, **Kentucky**, and **Tennessee** must begin their pre-filing announcements with regard to their applications for renewal of license. These announcements must be continued on February 16, March 1, and March 16.

EEO Public File Reports - All *radio* and *television* stations *with five (5) or more full-time employees* located in **Arkansas**, **Kansas**, **Louisiana**, **Mississippi**, **Nebraska**, **New Jersey**, **New York**, and **Oklahoma** must place EEO Public File Reports in their public inspection files. 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.

Noncommercial Television Ownership Reports - All *noncommercial television* stations located in **Kansas**, **Nebraska**, and **Oklahoma** 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 **Arkansas**, **Louisiana**, **Mississippi**, **New Jersey**, and **New York** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323-E.

Wilkommen, Bienvenu, Welcome!!!

Bob Butler Joins Fletcher Heald

FHH is pleased to announce that Bob Butler has joined the firm as a member. Bob has more than three decades of telecom law practice under his belt. His broad experience has focused on e-commerce transactions on behalf of premier dot com companies and other sophisticated multi-national corporations with large scale transmission and data processing requirements. He also advises such entities on federal, state, and international regulatory issues, website and other online disclosure and liability issues, privacy issues, and creditor issues in bankruptcy and related proceedings.

Bob, an undergraduate Spartan from Michigan State (high honors, thank you very much) with a Harvard law degree (magna cum laude, thank you very much again), lives in Fairfax, Virginia. He collects gems, designs jewelry, ballroom dances, and "dabbles in wine appreciation" — clearly our kind of guy.

We are happy that Bob has joined the team. He can be reached at 703-812-0444, or butler@fhhlaw.com.

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negative effect on competition among the networks, and affiliated stations, for programming and the sale of advertising time.

In addition to the specific ownership rules, the *NPRM* also addresses a number of other areas touching on the general notion of media ownership:

Diversity Order Remand: Last July the Third Circuit rejected all FCC rules based on the agency's definition of "eligible entity". Those rules had been adopted as part of the Commission's efforts to increase minority and female ownership of broadcast properties. There are constitutional limits on a governmental agency's ability to engage in decisionmaking based on race, gender or ethnicity, of course, so the Commission adopted an alternative approach. Using the concept of "eligible entities" – a revenue-based term defined essentially by the Small Business Administration – the FCC hoped to benefit minorities and women without expressly carving out set asides based on constitutionally suspect categories.

The Third Circuit seemed to feel that the Commission had not shown that offering a benefit to businesses with low revenues necessarily served the stated goals of increasing female and minority ownership. So the court voided all the Commission's rules and policies based on the "eligible entity" concept and ordered the Commission to address the problem in this quadrennial ownership review.

In the *NPRM*, the Commission essentially punts, concluding that it still doesn't have a sufficient evidentiary record to permit it to address the Third Circuit's concerns. As a result, while the NPRM requests comment on how it might support or replace its definition of eligible entities, it proposes pushing off resolution of the issue to the 2014 quadrennial review. The Commission does conclude that promoting diversity in ownership, and particularly female and minority ownership, remain important policy goals, and requests comment on other, non-eligible entity-based, ways in which it can accomplish those goals.

Media Ownership Studies: In the 2010 NOI, the Commission commissioned 11 studies to provide data that would support its analysis of the media ownership rules. It has since released the final reports of these studies, as well as peer review information and the data sets underlying the reports. In doing so, the Commission made clear that it didn't want comments on the reports then. For anyone inclined to comment on those studies, *now* is the time. The *NPRM* invites comments on any or all of the 11 studies.

Attribution Standards: Finally, at the end of the Christmas stocking that is the *NPRM*, we get to the lump of coal for broadcasters. The Commission asks whether it should revise its rules to make certain arrangements between stations – such as shared services agreements, local news sharing arrangements, agreements related to joint retransmission consent negotiations and the like – attributable to the stations' owners. Some such arrangements already are treated as attributable — some radio LMAs, for example. Expanding the concept of "attribution" to include other contractual relationships would impose considerably greater constraints on many broadcasters, since "attributable" interests trigger the Commission's media ownership rules.

The Commission could follow up with comprehensive and dramatic rule changes.

The proposal to expand attribution standards arises from a number of complaints and petitions for rulemaking focusing on arrangements between and among various stations. The complainants allege that various parties, primarily television stations, are attempting to circumvent the ownership rules through contractual arrangements that allow stations to work together to produce news, or manage other station operations. The *NPRM* requests comments on why, whether, and if so, how, its attribution rules should be adjusted to address such arrangements.

The filing dates for comments and reply comments on the *NPRM* have not yet been set. Check on our blog (www.CommLawBlog.com) for updates.

This is an extraordinarily wide-ranging proceeding. While the Commission's particular proposals appear to involve little if any substantial change from the status quo, let's not forget the extraordinary litany of questions on which the Commission has sought comments. Having at least posed those questions in the *NPRM*, the Commission could follow up with comprehensive and dramatic rule changes veering far afield of the seemingly benign "proposals" described in the *NPRM*. Attention should be paid.