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The Swami explains

FCC v. Fox: The Supremes Take the Fifth

First Amendment challenge to indecency policy sidestepped

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[*Editor's Note: It looks like we're all going on another spin around the Indecency Merry-Go-Round. The Supreme Court has vacated the Second Circuit's most recent decisions in the* Fox *and* NYPD Blue *cases and shipped them back down for further proceedings.*

While the decision to vacate the lower court's rulings – which favored the broadcasters – would ordinarily be seen as a victory for the FCC, that's not the situation here. Instead, the Supremes determined that neither Fox nor ABC had adequate notice of exactly what the FCC's indecency policy prohibited. Accordingly, the Commission's determinations penalizing Fox and ABC for their broadcasts have now been set aside.

We were hoping that the Court would provide a clear and conclusive resolution of the longstanding tension between the First Amendment, on the one hand, and the FCC's efforts to regulate "indecency", on the other. Instead, the Court snuck out the side door, choosing to ignore the First Amendment and rely instead on a very narrow application of the Fifth Amendment. So the First Amendment question lives on, to be decided some other day years from now.

The Court (in a unanimous decision authored by Justice Kennedy) held that the FCC could not penalize Fox or ABC for the particular broadcasts at issue (those would be a couple of awards shows in which presenters let slip with one or two "fucks" or "shits" and an episode of NYPD Blue featuring a very brief glimpse of Charlotte Ross's tush). While that bottom line ruling is no doubt a relief to Fox and ABC, it does little for the rest of us. Or does it?

For more in-depth analysis, we turned to our resident guru in such matters, the Swami himself, Kevin Goldberg.]

Editor: So Swami, when you reported on the oral argument in the *Fox* case back in our January, 2012 *Memo to Clients*, you counted the votes as 5-3, maybe 4-4. The actual vote turned out to be 8-0. In the words of Mike LaFontaine, "Hey! Wha happened?"

Swami: I may have missed on the vote count, but I nailed the result – both in terms of the victor and, more importantly, the narrowness of the holding.

Why was I so sure that the Supremes would keep it tight?

Several justices have historically demonstrated uneasiness with the notion of removing regulations they perceive as necessary (or at least useful) in maintaining some sense of morality or decorum on the public airwaves. No big surprise there – I have repeatedly noted in earlier posts that the Court has been cautious about language and decorum. (For instance, they frown on use of the actual words – fuck, shit, etc. – in the courtroom or in their opinions. They opt instead for euphemisms like "f-word" and "s-word".) In particular, it was always highly unlikely that Justices Roberts, Scalia and Alito were going to sign on to a decision opening the airwaves to what they felt would be a cacophony of indecency.

Furthermore, this Court has always been somewhat cautious when it comes to First Amendment cases (as I have discussed in previous posts). I have detected little sentiment on the Roberts Court for actions that completely overturn longstanding laws based on facial First Amendment challenges. And, truth be told, the Court has historically not shown any such sentiment. In fact, the longstanding principle of "constitutional avoidance" holds that the Court will not take on a constitutional issue when it can dispose of a case via other means.

So it's not surprising that the Court as a whole may have

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Aftershocks from the DTV transition

"Viewability" Rule Set to Ride Off Into the Sunset in December

Small System HD Carriage Exemption Survives Another Three Years

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Several years ago, with the DTV transition looming on the near horizon, the Commission adopted two rules aimed at easing the anticipated effects of the transition on some cable viewers and cable systems. Since those effects were expected to be relatively short-lived, the rules were set to expire, or "sunset", three years after the DTV transition.

Amazingly enough, we have just passed the third anniversary of the transition. In view of that occasion, the Commission has taken another look at the two rules to determine whether the sunset provision should be allowed to take effect or whether, instead, a continuing need exists for either or both.

The result: one of the two – the "viewability" rule – is gone, or will be gone in six months; the other – which exempts some small cable systems from having to carry HD broadcast signals in HD – will remain in effect for another three years.

The Viewability Rule

The viewability rule applies only to cable operators with *hybrid* analog/digital systems. Hybrid systems are those that opted, after the 2009 DTV transition, to provide an analog tier of programming (consisting of local TV signals and, in some cases some cable channels) so that subscribers with analog receivers would not require additional equipment.

The Communications Act requires that all broadcast stations carried pursuant to must-carry (as opposed to retransmission consent) be "viewable". Accordingly, the FCC adopted the "viewability" rule, giving operators of hybrid cable systems two options: either (1) provide the digital signal of all must-carry stations in analog format (in addition to any digital version carried) to all analog cable subscribers, or (2) transition to an all-digital system and carry the signal in digital format only, provided that all subscribers have the necessary equipment to view the broadcast content.

As noted above, the rule was scheduled to sunset on June 12, 2012 (the third anniversary of the DTV transition). But the Commission figured that, as that date approached, it would take another look to see whether the rule might need to be retained. The Commission would consider whether or not to let the viewability rule die in light of the potential cost and service disruption to consumers and the state of technology and the marketplace.

Having taken that second look, the FCC has decided that the viewability rule should be allowed to sunset, but only after a six-month transition period. So the rule remains on the books until December 12, 2012. After then, while the Act will still impose a general "viewability" requirement, hybrid cable operators will enjoy greater latitude in satisfying that requirement. For example, they could choose to continue to down-convert digital must-carry station to analog, as they have been doing. Alternatively, they could transition to all-digital, but if they do so they'll have to make must-carry signals available to analog subscribers by offering those subscribers "the necessary equipment for sale or lease, either for free or at an affordable cost that does not substantially deter use of the equipment". As the FCC sees it, an "affordable" cost in this context means "free or a monthly fee of no more than $2".

Hybrid cable operators that opt to transition must-carry broadcast TV stations from analog to digital delivery will have to give ***90 days*** prior written notice (***not*** the 30 days applicable to other similar notices) to affected broadcast stations and customers.

Importantly, the Commission's Order does *not* change a number of aspects of cable carriage arrangements. In particular, it doesn't change any carriage arrangements governed by retransmission consent agreements. Also, cable systems providing analog-only cable service must still continue to carry local must-carry stations in analog format. And (with some limited exceptions discussed below) must-carry TV stations broadcasting in HD format must be carried in HD on the cable.

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Misrep Lite

When Thinking You're Being Honest Just Isn't Enough

One of the most fundamental axioms of communications law: correctness is essential, whether you're filling out an application, filing a pleading, responding to an FCC inquiry, or whatever. When you tell the Commission something, you had better be right. We're not talking about affirmatively lying to the Commission. That, of course, is even higher up on the list of mortal sins in the FCC's catechism. But nowadays, *any* inaccuracy in what you tell the agency – even if it's not an intentional inaccuracy – can land you in hot water, unless you can show that you had a "reasonable basis" for your statement. The FCC enforcement folks, whose contributions to the government's coffers have increased dramatically in recent years, have recently driven this point home with considerable vigor.

As we have previously observed, Section 1.17(b) of the Commission's rules prohibits what we have referred to as "misrepresentation lite". As my colleague Mitchell Lazarus described it, the misconduct prohibited by the rule

> does ***not*** involve "misrepresentation" – what many of us know as "lying" – because that requires some element of deceit. No showing of deceit is necessary to trigger Section 1.17. All it takes is the filing of "incorrect" information "without a reasonable basis for believing" that the information is, in fact, correct. This seems to say that *any* mistake in an application could subject the applicant to a very substantial penalty, even if the mistake is purely unintentional.

An AM licensee in Texas found out about this the hard way.

When the station was inspected in December, 2010, the FCC whacked it for a total of $25K in fines – $10K for main studio violations (since no management personnel were present during any of the three separate inspections conducted) and $15K for public file violations. According to the Notice of Apparent Liability (*NAL I*) issued back in 2011, the station's public file was missing a current copy of the station authorization, service contour map, the licensee's most recent ownership report, a copy of the FCC's *Public and Broadcasting* manual, and any issues-programs lists.

In addition to imposing the forfeiture, *NAL I* required the licensee to certify, under penalty of perjury and within 30 days of the release of *NAL I*, that the station's public file was complete.

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No Blood from the Stone?

Demand More Blood!

The FCC has demanded $25,000 from a licensee who failed to make a "voluntary contribution" which it had committed to pay as part of a consent decree (*i.e.*, a settlement agreement in an enforcement proceeding). That earlier payment wasn't made because the licensee said it didn't have the $8,000 which it had promised to pay. Tough, says the FCC – mere financial distress will not justify relief if you break your promise.

An AM licensee in Puerto Rico was fined $15K in 2005 for various violations. After several years of back and forth, the licensee and the FCC entered into a Consent Decree, which included an $8K "voluntary contribution" to the U.S. Treasury (we love the way the government uses the term "voluntary" – it reminds us of the things we "volunteered" to do for Uncle Sam in basic training).

Things weren't going so well business-wise for the licensee (more on that below), and it never paid the eight grand. Wow, the FCC said – short changing the government is no-go in spades. So last year the FCC proposed an additional $25,000 forfeiture for failure to pay the $8,000.

"Can't pay," the licensee responded. How come? According to the licensee, all but two of its owner's companies are in bankruptcy, and it's facing "overwhelming debt and almost nonexistent cash". The FCC didn't have to take the licensee's word for all this – the licensee gave the Commission a number of financial documents. The Commission grudgingly acknowledged that those documents "may arguably support [the licensee's] asserted inability to pay".

But so what?

The Commission has now issued a Forfeiture Order for the full $25K. The FCC acknowledges that inability to pay is a factor that can warrant reduction of a forfeiture. (In fact, in our experience that's usually the *only* consideration that will cause the FCC to reduce a forfeiture by any significant amount.) But not this time. According to the Commission, where conduct is especially egregious, you will feel our wrath – and reneging on a consent decree is egregious, ranking right up there with lying to the agency. (In the FCC's words, "a consent decree violation, like misrepresentation, is particularly serious.")

So a licensee that's already down and out gets kicked one more time. And to what end – does the Commission seriously think that piling on more fines is going to result in

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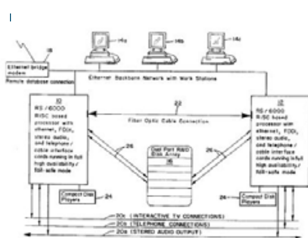

Patent (litigation) pending

Mission Abstract Data Resurfaces

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They're baaaaaack!

Mission Abstract Data – or, more accurately, its successor (Digimedia), its licensing agent (IPMG AG), and a bunch of very aggressive reps (for simplicity's sake, we'll just refer to them all collectively as MAD) – are back, trying to convince radio broadcasters that they should be signing licensing agreements covering certain technology for which MAD claims to be the patent holder. While MAD's materials do *not* expressly threaten that non-signing broadcasters will be sued, recipients might still feel the cold chill of potential litigation as they consider MAD's pitch.

The technology in question involves use of computer hard drives to store and retrieve musical selections for broadcast. (While the two patents in question specifically refer to recalling selections "pursuant to prior programming", MAD has insisted that its claims do not involve "broadcast automation systems".)

MAD itself didn't create the technology or get it patented. (That honor goes to a gentleman named Robert J. Goldman, who obtained the two patents in 1997.) But MAD acquired the patents and has, for more than a year, been seeking to extract licensing deals from the radio broadcast industry. In March, 2011, MAD sued a passel of very large broadcast groups for patent infringement; soon thereafter it began peppering radio operators large and small with mailings and phone calls. You can read our previous posts about MAD's activities on our blog (www.CommLawBlog.com).

The lesson here is: take everything MAD says with a grain of salt.

As we reported last fall, the MAD lawsuit (pending in the U.S. District Court for the District of Delaware) was stayed pending further review of the underlying patents at the United States Patent and Trademark Office (USPTO). The stay made sense, particularly in view of the apparently impermanent nature of the USPTO's determinations relative to the validity of the patents in question. Those patents were originally approved back in 1997. But then approval of major elements of them was withdrawn in October, 2011.

Undaunted, MAD went back to the USPTO for further reexamination of the patents. With all that going on, any attempt to litigate a patent infringement case would have been problematic, to say the least: if you don't know for sure that there's a patent, how can you tell whether there's been any infringement? Further, why waste everybody's time in court if the government agency best equipped to answer that question says they aren't valid anyway?

But there has recently been a new development at the USPTO. As a result, MAD is at it again, dumping yet another aggressive sales pitch on radio broadcasters' doorsteps.

The materials with which MAD is now bombarding stations consist (in the instances we've seen so far) of about 50 pages' worth of items, including:

- A covering letter (it says "Mission Abstract Data" across the top, but it will actually come from IPMG AG, the Swiss company that bought up the licensing rights for these two patents; the actual ownership rights in the patents are held by Digimedia, the new name under which Mission Abstract Data is operating);
- A copy of a "Patent Sub-License Agreement"; and
- Some materials from the USPTO regarding the validity of the underlying patents.

It's those USPTO materials that are the catalyst for the latest round of MAD outreach.

According to MAD's cover letter, the USPTO has now re-thought its action from last October (in which the USPTO raised questions about the viability of many of MAD's claims of patentability). As a result (still according to MAD), several of the tossed claims have now been untossed, which supposedly reinforces the validity of MAD's patents. Because of that, MAD has trotted back into court and asked that the stay be lifted.

In other words, the threat of litigation – and consequent potential liability – has now been elevated to DEFCON One [*Editor's Note: Quasi-obscure reference to WarGames, to which we give multiple thumbs up*] . . . or at least that's what MAD would have us all believe.

But the broadcast defendants in the Delaware litigation have, as expected, opposed any lifting of the stay, so – at least for the time being – nothing has really changed on that front. (Note: In a conversation I had with a MAD representative a week or two ago, the rep told me that the stay had already been lifted. When I told him that the court's docket didn't reflect any such action – in fact, at the time of our conversation MAD hadn't yet even asked for the stay to be lifted – the MAD rep backtracked pretty quickly and couldn't get off the phone fast enough. So the lesson here is: take everything MAD says with a grain of salt. Now is a good

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time to remember that old journalism adage: "If your mother says she loves you, check it out".)

How should one respond to MAD's missives?

First and foremost, don't panic. As with any such situation, it's best to maintain a clear head.

Second, get good advice and rely on it. In this case, the ultimate question to be answered is whether MAD really does have a patent that is being infringed by you, the radio station operator. That is a highly technical question with a couple of obvious subparts, those being: (1) Are MAD's patents valid in the first place, and if so, (2) do those patents cover the particular computerized music system you're using?

The answer to Question No. 1 requires informed input from patent counsel. We here at Fletcher Heald are ***not*** patent lawyers, and we are ***not*** in a position to evaluate MAD's patents or the niceties of the recent USPTO actions. Those actions are written in a language that can be fully understood ***only*** by experts in the field, people who are familiar with the arcane terminology and concepts of patent law. Before you decide whether to sign up with MAD, you would be well-advised to have your own patent lawyer review the materials and advise you about them. (Heads up: The earnestly expressed beliefs of MAD's various reps who are calling around do ***not*** necessarily constitute "good patent advice". Our guess is that those folks aren't expert patent lawyers – in fact, we'd guess they're not even lawyers – and they have an obvious interest in characterizing the status of the patents favorably to MAD. Again, take whatever they say with a grain of salt.)

*The mere lack of immediate clarity does **not** mean that you can or should just blow MAD off.*

And as to Question No. 2, you would need someone familiar not only with the patents, but also with the particular technology you happen to be using and any indemnification or insurance to which you might be entitled from third parties (such as the vendor who provided the system or the system's manufacturer). Again, this calls for input from an expert, as well as some legwork by you.

Once your expert(s) has/have reviewed your particular situation, he/she/they should be able to give you some idea of what, if any, liability you may be subject to. This will likely involve some speculation, but informed speculation from an objective expert is more reliable than the threatening claims of a MAD rep looking to get your signature on a deal.

Once you're armed with objective input from a knowledgeable expert, you will be in a better position to deal with MAD.

It's important to bear in mind that the most recent flurry of high pressure contacts from MAD appears to be nothing more than an effort by MAD to capitalize on the one good bit of news they have received in this entire process, *i.e.*, the recent USPTO actions that, according to MAD, put their patents back on track. But from what we can see in the USPTO files, those actions – whatever their actual impact on MAD's patents – are not final yet. And we have heard some third-hand reports that some folks (possibly including some or all of the broadcasters in the Delaware litigation) are planning to go back to the USPTO to seek further re-examination of the patents.

In other words, the recent USPTO actions may not be the final word in any of this.

And let's not forget the Delaware litigation. As noted, MAD has asked the court to lift the current stay, and the broadcasters have opposed that effort. The back-and-forth arguments in those pleadings, although obviously couched in legalese, make for interesting reading. (We've posted links to both at www.CommLawBlog.com.) MAD has an opportunity to reply to the broadcasters' opposition, and then we'll all have to wait for the court to decide what to do. (If and when MAD does reply, we'll try to get a link to that item up on the blog as well.)

With so much uncertainty already in the air and with more to come in short order, it's not clear whether MAD's latest round of contacts is mere opportunism or whether it offers you the last best opportunity to get out before things get really expensive.

But the mere lack of immediate clarity does ***not*** mean that you can or should just blow MAD off. Even if you have simply ignored MAD's communications in the past, that's ***not*** an acceptable response anymore.

MAD's latest round of salesmanship should be taken seriously. The MAD materials should be read, and efforts should be made to confirm the extent of any available insurance coverage and possible indemnification. There are multiple issues with regard to each, from whether you're covered at all to whether there is a limit on the amount of coverage to when it kicks in. All such information is necessary to making informed decisions.

Furthermore, only you can gauge your financial situation and your risk aversion/tolerance levels. If you're concerned about how best to deal with MAD, you should contact your attorney and discuss your situation, with special reference to the documents MAD has sent around. You should also consider seeking specialized patent counsel for expert input about the validity of the patent claims and their applicability to you.

And check back with CommLawBlog.com for updates on further developments.

NCE LMAs: Profit-generating Monetization Not Allowed

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Local marketing agreements – a/k/a LMAs or Time Brokerage Agreements or TBAs (among other catchy titles) – have been a common feature of the broadcast landscape for a couple of decades now. The regulatory boundaries relative to LMAs have become reasonably well established, at least as far as *commercial* stations are concerned.

For *noncommercial* (NCE) stations, not so much.

But NCE stations are now *officially* on notice that, when they broker airtime to a third-party programmer, the collection of any fees in excess of "reimbursement of operating expenses" is verboten. That news comes to us through a Consent Decree (CD) between (a) the University of San Francisco and Classical Public Radio Network, LLC, on the one hand and (b) the Media Bureau, on the other. The CD provides that the Media Bureau will grant the license assignment of NCE Station KUSF(FM), San Francisco, from USF to CPRN – provided that USF and CPRN make a joint "voluntary contribution" to Uncle Sam to the tune of $50,000.

Why the hefty price tag (which, by way of comparison, is exactly twice the fine issued to Google for thumbing its nose at the Commission)? Because, under the CPRN/USF deal as initially implemented, CPRN was making it worth USF's while to hand programming time over to CPRN while the assignment application was pending. Oh yeah, and CPRN and USF guessed wrong about how the FCC would feel about that.

The deal presented to the Commission in January, 2011 specified that CPRN would buy KUSF, a mainstay of the NCE scene in San Fran for 35 years, for a cool $3.75M. Among the various terms and conditions was an LMA of sorts, in this case titled a "Public Service Operating Agreement" (PSOA). The PSOA provided that, while waiting for the FCC's blessing to become licensee of the station, CPRN would take over all of the airtime of the station. In return, CPRN would pay to USF a flat monthly fee (initially $5,000, rising to $7,000 per month after a few months) *in addition to* reimbursement of all operation expenses. (The expenses specifically covered were: the cost of broadband or other circuits used for delivery and reception of the programming, electrical power to the transmitter site, regulatory fees, insurance rider, and telephone expenses incurred at the transmitter site.)

These terms would be fairly conventional in a commercial transaction. But NCE stations are subject to different rules. Those would be Sections 73.503(c) (for radio) and 73.621(d), for TV, which specify that NCE licensees

> may broadcast programs produced by, or at the expense of, or furnished by persons other than the licensee, if no other consideration than the furnishing of the program and the costs incidental to its production and broadcast are received by the licensee. The payment of line charges by another station network, or someone other than the licensee of a noncommercial educational FM broadcast station, or general contributions to the operating costs of a station, shall not be considered as being prohibited by this paragraph.

That language is not a model of clarity or specificity. In an effort to divine the precise metes and bounds of the rule, CPRN and USF apparently combed through the FCC's records, checking other NCE transactions that (a) included provisions similar to the PSOA and (b) had received FCC approval. Based on that research, CPRN and USF felt that their deal conformed to the rules.

They guessed wrong.

> *CPRN and USF felt that their deal conformed to the rules.*
>
> *They guessed wrong.*

Responding to complainants' concerns about the deal, the Bureau sent CPRN and USF a letter of inquiry. From the CPRN/USF responses to that letter, the Commission found that the PSOA violated Section 73.503(c). But the CD does not indicate precisely what aspects of the KUSF deal accounted for that violation. Presumably the fees over and above operating expense reimbursements were a problem, but were the separate reimbursements all OK, or might they, too, have been excessive in some respect? The CD doesn't say.

In an unusual statement issued in connection with the CD, Media Bureau Chief William Lake said that the rules forbid payments "unless they are limited to reimbursement of operating expenses". That seems a bit different from the actual language of the applicable rules, so while Lake's statement may have been intended to be helpful, it doesn't seem to clarify things much – other, of course, than to make clear that ***any*** payments not tied to reimbursement of some sort are impermissible.

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Coming soon to an Internet near you . . .

Proposed New Top Level Domain Names Revealed

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ICANN (Internet Corporation for Assigned Names and Numbers) has published the list of 1,930 "strings" people around the world have requested for new top level domain names. On "Reveal Day," June 13, the Internet Community paused for a moment from its busy activities to stop and look at the nearly 2,000 new words and letters submitted by companies and organizations as possible additions to the Internet's global nomenclature. None have yet been accepted, but the formal process of evaluation and objection has begun.

At 8:15 a.m. ET, ICANN sponsored a press and public event in London with its CEO Rod Beckstrom and Senior VP Kurt Pritz, featuring a big-screen scroll through the requested names, followed by questions from the press. The list has brand names, including .DELOITTE and .NOKIA, famous place names, including .ISTANBUL, .PARIS, .OSAKA and .LONDON, and generic terms, including .RUGBY, .VIP and .KETCHUP.

I've been intimately involved in helping to negotiate the rules of new generic top level domain names for four years. What I will remember most about this event is the non-English new gTLDs that jumped off the screen, written in Chinese, Arabic, Japanese, and Cyrillic. These foreign script new gTLDs represent a range of companies, geographic regions, and generic uses – such as BAZAAR. Although they are only 116 of the 1,930 new applications, they represent a huge step forward, because they open the previously English-oriented Internet domain name system to a range of languages and to a majority of the world – a key reason many of us worked so hard on this process.

The formal objections – based on legal rights, public interest, and possible confusion – will soon fly. Some will involve fights among those who spent money in applying for the same new gTLDs, including seven applicants for .WEB, five for .FREE, and four for .RADIO.

But before that happens, it's good to take a moment to pause and celebrate. ICANN issued an invitation to the world to apply for new gTLDs. They were expensive, and the application process was difficult. Frankly, we weren't sure who would show up. But the world responded. Just as many of us suspected, there is a global need for growth and innovation in domain names.

I'll share some of the strangest new gTLDs that I found (The rest are posted on the ICANN website):

.FOO .BOO .GOO
.VIVA .BABY .LOVE
.PLAY .POKER .FISH
.AND .ARE .OOO
.PARTY .FUN .ONE

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On top of that, CPRN and USF were also found to have violated Section 1.17, which prohibits false certifications. In their assignment application, both parties had certified – incorrectly, as it later turned out – that their deal was consistent with FCC rules. In the CD the Bureau did acknowledge that this particular violation was not as serious as it might have been, since the seller and buyer had not tried to hide the terms of the agreement. Indeed, they had filed the agreement with the Commission as part of their application.

What about all those earlier applications that the Commission granted with LMA provisions – you know, the ones that CPRN and USF relied on for their belief that the PSOA would pass muster? Lake acknowledged that the PSOA was not necessarily dissimilar from a "practice" that "developed in past NCE radio transactions, in apparent violation of the rule, without [the Bureau's] knowledge".

Of course, the Bureau *could* have known about the specific terms of other NCE transactions that the Bureau had approved, if the Bureau had examined the materials that the parties to those transactions had filed. But the Commission does not typically make it its business to learn the finer points of sale and brokerage contracts, so the fact that similar provisions might have been included in previous deals does ***not*** mean that the Commission had approved them, or was even aware of them. (In fact, the PSOA's violation of this provision may well have gone unnoticed, had the sale of KUSF not been so controversial, attracting press scrutiny and resulting multiple informal objections and petitions to deny.)

The bottom line here was probably best expressed by Lake, who admonished that NCE licensees may not "monetize their licenses by selling program time for a profit." How the Bureau will identify such improper "monetization" isn't clear, a fact that Lake tacitly acknowledged by urging any NCE licensee or programmer who might not be certain about the prohibition to contact the Bureau's staff to discuss the matter in advance.

We interrupt our regular programming to bring you . . .

FCC Eyes Easier NCE Fundraising for Third Parties

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The Commission is asking whether noncommercial educational (NCE) radio and TV stations should be routinely permitted to interrupt their regular programming for fundraising activities for the benefit of any non-profit entity other than the station itself. The proposal is in response to a study published in June, 2011 by the FCC's Working Group on Information Needs of Communities.

Historically, because of their noncommercial nature, NCE stations have been prohibited from breaking into their regular programming for extended third-party fundraising even when the entity to be benefited was itself non-profit. (Public service announcements and brief paid-for underwriting announcements are OK.) While sometimes an extraordinary need for such fundraising might arise – relief efforts in the wake of Hurricane Katrina, for example, or the Japanese earthquake/tsunami, or the Haitian earthquake – in such circumstances the Commission has been willing to waive the rule (which, technically, appears in Section 73.503(d) (for radio stations) and 73.621(e) (for TV stations). But such waivers have been limited to "a specific fundraising program or programs, or for sustained station appeals for periods which generally do not exceed several days." And waivers are *not* invariably granted. (Case in point: Back in the 1970s a proposal to run an on-air auction to benefit a financially-distressed local symphony orchestra was nixed by the Commission.)

NCE stations might be required to file reports, annually, and certify compliance in their renewal applications, too.

Lurking in the background of the latest proposal is the FCC's apparent discomfort with the amount of air time already being devoted by NCE stations to begging for bucks. That factor is a primary reason for the existing limitation on third-party fundraising efforts. (One question the Commission poses in its Notice of Proposed Rulemaking (*NPRM*): Just how much airtime do NCE stations actually spend on fundraising?)

Any relaxation of constraints on third-party fundraising would likely be limited.

The NPRM suggests that the FCC might allow only one percent of a station's annual air time to be devoted to third-party fundraising – a cap that could be applied to all digital program streams for TV (although, oddly enough, the FCC seems to forget about multiple streams on digital FM stations). The length of each individual fundraising program might be limited. The Commission also asks whether such programs should be produced by the station itself (rather than the third party benefiting from the fundraising), and whether the beneficiaries should include only organizations local to the station's service area and/or organizations with a Section 501(c)(3) exemption from the IRS.

The *NPRM* says that one of the motivations underlying possible relaxation of the fundraising restrictions is the "need to remove unnecessary burdens on broadcasters who aim to serve their communities". Of course, imposition of a new requirement that such extended fundraising be station-produced or limited only to certain qualifying organizations hardly suggests "removal" of burdens, but maybe that's just us. And then, there are the reports.

The *NPRM* suggests that NCE stations might be required to file reports, annually, to let the Commission know, for each fundraiser:

- the date and time of the fundraiser;
- the name of the non-profit entity benefitted by the fundraiser and whether this entity is a local organization;
- the specific cause, if any, supported by the fundraiser;
- the type of fundraising activity;
- the duration of the fundraiser; and
- the total funds raised.

And as long as reports might be filed, why not also require that they be placed in the station's local public inspection file, too? That would, the Commission supposes, "help to ensure that the public has access to information about how NCE broadcasters are serving the public interest and their local communities". (Don't worry – the Commission assures us that it doesn't "believe that filing such reports would be unduly burdensome".)

And over and above the reports, the Commission suggests that it might be inclined to include, on the license renewal application form, a new certification requirement relative to compliance with third-party fundraising limits.

So much for "removing unnecessary burdens".

The FCC is itself limited in its ability to regulate in this particular area. The First Amendment of your friendly U.S. Constitution, for example, limits governmental restrictions on speech based on the content of programming and the identity of the speaker. And Section 399B of the Communi-

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For the birds

Revised Tower Registration Process Now In Effect

By Dan Kirkpatrick
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It's official!! The Commission's revised antenna structure registration process is now in effect. We know that because the FCC has said so, in the Federal Register – and you can't get more official than that. The notice announces that the Office of Management and Budget has approved the "information collection" aspects of the new system, so the FCC is cleared to crank it up – which it has now done, ***effective June 18, 2012***.

This is important news for anyone who is:

> planning to build *any* new tower that would have to registered through the FCC's Antenna Structure Registration (ASR) system. The only exceptions are for (a) towers to be built on sites for which some other federal agency has responsibility for environmental review or (b) cases in which an emergency waiver has been granted; or
>
> modifying an existing registered tower by (a) increasing its overall height by more than 10% or 20 feet, or (b) adding lighting to a previously unlit structure, or (c) modifying existing lighting from a more preferred configuration to a less preferred configuration. (Helpful tip: the "most preferred" configuration is no lights at all; the least preferred is red steady lights. Anything else falls in the middle.); or
>
> amending a pending application involving either of the foregoing situations and the amendment would (a) change the type of structure, or (b) change the structure's coordinates, or (c) increase the overall height of the structure or (d) change from a more preferred to a less preferred lighting configuration or (e) an Environmental Assessment is required.

If you're looking for background on what the changes may mean for you, check out our article in last month's *Memo to Clients*. Or you could watch the FCC's introductory presentation and demonstration of the new system, which is available at the Commission's website. (Time Management Tip: Before committing to watch the whole show, be prepared to invest 75 minutes of your valuable time.)

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cations Act prohibits a noncommercial station from accepting funds to express the views of any person with respect to any matter of public importance or interest or to support or oppose any candidate for political office. That cuts out fundraising for issue-oriented or political organizations in most states. (While the U.S. Court of Appeals for the 9th Circuit has struck down this part of the 399B restriction, the FCC says in the *NPRM* that it plans to honor that decision only in states located in the 9th Circuit, once the Court's mandate becomes effective.)

On the other hand, Section 399B restricts only programming for which a station receives consideration; it does not stop a station from broadcasting political material as a free public service, as long as the station doesn't editorialize in its own name.

Then there's the Corporation for Public Broadcasting (CPB), which requires CPB-funded stations to devote the substantial majority of their daily program hours to CPB-qualified programming. Such programming is defined as "general audience programming that serves demonstrated community needs of an educational, information, and cultural nature." Fundraising for third parties will not likely be popular if it threatens a station's CPB grant.

So in the end, any relaxation of FCC-imposed limits on third-party fundraising may benefit only religious, student-operated stations, and the handful of community stations that do not receive CPB funding.

The proposed relaxation is not necessarily endorsed by all the stations it would affect. For sure, some NCE stations may be attracted by the public service opportunities the relaxation might provide. But other licensees prefer the present rule, which enables them to turn down requests for fundraising by blaming the FCC's prohibition, which effectively ties their hands. If the rule is lifted, licensees can probably expect a barrage of such requests, followed by PR headaches (*e.g.*, hard feelings and criticisms) when some (or all) of those requests are rejected.

And here's a tip to anybody who might view fundraising as a potentially lucrative revenue opportunity: beware the recent *KUSF* case (*see* related story on Page 6), which indicates that NCE stations selling program time are not supposed to be paid more than their expenses.

The *NPRM* has been published in the Federal Register. If you have something to say in this proceeding, comments are due by ***July 23, 2012***, with reply comments due by ***August 21***.

PBS/NPR Proposed 2013-2017 Royalty Rates Out for Comment

By Kevin M. Goldberg
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In the April, 2012 *Memo to Clients*, we reported that the Copyright Royalty Board (CRB) had invited comments on a number of proposals to govern copyright royalties owed by noncommercial (NCE) broadcasters to ASCAP, BMI and SESAC from 2013 through 2017. The various proposals covered a substantial portion of the NCE universe, with one important exception. As we noted, the CRB's notice did not mention proposed rates for NPR or PBS stations.

Now we know why.

It appears that NPR and PBS were still working on their proposed rates. But that work has now been concluded. In joint comments filed in May with the CRB, NPR and PBS have outlined their proposed approach, which would require payment based on the use of the musical work (or piece of art), the type of station performing it, and the manner in which it is performed. And now the CRB wants to know what everybody else thinks of the NPR/PBS proposal.

Kevin's Copyright Corner

As in our April article, we'll forego a detailed listing of all fees in favor of a general overview:

The overall structure would be unchanged from the 2008-2012 period. Unlike non-NPR, non-PBS stations – which will pay a blanket fee to ASCAP, BMI and SESAC (with a reduced fee option available to stations that favor news/talk/sports over music) – NPR and PBS stations would pay for the use of each individual piece of music.

The amount in question varies depending on a number of factors. Rates for PBS and its affiliates would be greater than those for NPR and its affiliates. They would also vary depending on whether the broadcast is a network program or the work of an individual affiliated station (with the latter costing less than the former). Context would also come into play: does the musical work in question appear in a "featured presentation", or is it background or theme music (the former would be more expensive than the latter)?

The across-the-board increase is relatively small. Regardless of PBS vs. NPR, network vs. individual affiliate station, feature vs. background/theme, the increase in every category tends to be no more than 2% over the corresponding rate from the previous five-year period.

The CRB has invited comments on the NPR/PBS proposals. Those comments are due by ***July 26, 2012.***

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RMLC and BMI Announce Royalty Deal

By Kevin M. Goldberg
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Earlier this year, the Radio Music License Committee (RMLC) and ASCAP reached a deal setting the royalty rates to be paid, through 2016, by broadcasters to perform musical works by composers repped by ASCAP. The major components of the deal were (a) a simplified payment process and (b) a basic licensing fee equal to 1.7% of gross revenues.

We had since heard through the grapevine that RMLC and BMI had reached a deal, also running through 2016, for use of BMI-represented musical works. Good news – on June 11 RMLC and BMI issued a joint press release confirming the deal, and providing a summary of the details. Though the agreement must still be formally approved by the United States District Court for the Southern District of New York (because of some antitrust litigation involving ASCAP and BMI that goes back several decades), the prospects for approval are generally good. And that's welcome news for broadcasters, because the BMI deal is very similar to the ASCAP deal.

Here are the high points:

Most importantly, the old "benchmark fee" based computation system is gone. It's being replaced by a much simplified percentage of revenue payment rate, with broadcasters paying the same 1.7% of gross revenues to BMI that they are paying to ASCAP.

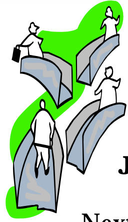
Broadcasters can also take a standard deduction of 12% for revenue derived from terrestrial/analog and HD multicasting broadcasts and 25% for revenue attributable directly to new media.

The "per program" option reducing a news/talk station's royalties by at least 50% from its blanket license is being retained. There is a base fee of 0.2958% of gross revenue with the same deductions as above.

There is also expanded rights coverage to accommodate new media uses.

This translates into a $70.5 million credit across the industry which will be reflected in broadcasters' June, 2012 statements. So what we have here are lower rates ***and*** a simplified computation mechanism that will apply to both ASCAP and BMI.

That's what is known in legal circles as a "win-win". Kudos to Bill Velez and his team over at RMLC for their great work.



FHH - On the Job, On the Go

A big *Memo to Clients* shout-out to **Howard Weiss**, who received the Volunteer of the Year Award from the Federal Communications Bar Association.

It was Franks all over the place on June 11, as both **Frank Jazzo** and **Frank Montero**, along with **Scott Johnson**, attended the NAB's Service to America Awards ceremony in Washington, D.C.

Next month, though, the Franks will be splitting up. **Frank M** will be attending, and speaking at, the MMTC Access to Capital and Telecom Policy Conference, set for July 18-19, 2012 in Washington.

Meanwhile, **Frank J** will be conducting the Legal and FCC Issues Seminar, along with the NAB's **Ann Bobeck**, at the annual convention of the Arkansas Broadcasters Association on July 20 in Little Rock.

On August 4 **Frank M** and **Harry Martin** will be participating in an FCC legal panel at the West Virginia Broadcasters Association's annual meeting in White Sulphur Springs, West Virginia.

On August 9, **Harry Cole** will join FCC Enforcement Bureau official **Stephen Lee** for a panel about FCC enforcement activities at the annual Convention & Trade Show of the Texas Association of Broadcasters in Austin.

On August 10-11, **Scott Johnson** will conduct a TV license renewal seminar *and* a separate political broadcasting seminar (the latter will also feature the FCC's **Bobby Baker**) at the Alabama Broadcasters Association Convention in Birmingham.

And now available online, an interview with **Kevin Goldberg** discussing the Supreme Court's decision in *FCC v. Fox Television Stations* (see related story on Page 1). It's on LXBN TV, a feature of the LexBlog network, which hosts CommLawBlog.com. If you'd like to see it — and, frankly, who wouldn't? — just go to http://lxbn.lexblog.com/tag/lxbn-tv/ and search for "Goldberg". It should pop up.

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Whether or not CRB receives any comments on this part of the puzzle, we expect it to include these PBS/NPR rates along with the proposed rates for other, non-PBS/non-NPR categories of stations that it announced last April.

Those earlier proposed rates were not, of course, etched in stone and may be modified somewhat based on the few other comments filed in response to CRB's April notice, although no major changes are expected. The other comments focused on the possible creation of a separate tier for very, very small noncommercial broadcasters.

We will, of course, keep you posted about any developments. Again, if you are a PBS or NPR affiliate, you'll want to start figuring out how these rates will affect you and perhaps look closely at the actual proposed royalty rates now that we know what they are.

(Continued from page 2)

Small System HD Carriage Exemption

The Communications Act requires that cable operators carry broadcast signals "without material degradation." The Commission has historically interpreted this to mean, among other things, that HD broadcast signals must be carried to cable subscribers in HD. In response to concerns from small cable operators about cost and technical capacity, however, the FCC provided an exemption from the HD carriage requirement for certain small systems. The exemption was available to (a) cable systems with 2,500 or fewer subscribers that are not affiliated with a large cable operator (one serving more than 10 percent of all national multichannel subscribers), and (b) systems with an activated channel capacity of 552 MHz or less.

The exemption allows eligible systems to carry broadcast signals in standard definition (SD) digital and/or analog format, even if the signals are broadcast in HD, as long as all subscribers can receive and view the signal. The exemption, adopted in 2008, was (like the viewability rule) set to expire three years after the DTV transition.

But the FCC has now decided to extend the exemption to June 12, 2015. The goal is to provide small systems with additional time to upgrade their systems, allowing them to come into full compliance with the "material degradation" requirement, *i.e.*, by carrying HD versions of all HD broadcast signals. The extra three years are intended to cushion the financial blow by letting the exempt systems spread the costs of the upgrade out over time.

The Commission's decision setting out its disposition of these two rules has been published in the Federal Register, which means that the decision is now technically in effect. As a practical matter, that has little immediate effect, since the Commission has left both the viewability rule and the small system HD carriage exemption in place, at least for the time being. However, Federal Register publication does establish the deadlines for petitions for reconsideration or the initiation of judicial review proceedings. Some representatives of broadcast interests spent considerable energy attempting to get the viewability rule extended for another three years. Whether those interests will now attempt to get the FCC's decision reconsidered or reversed remains to be seen.

(Continued from page 1)

been reluctant to push the button on the First Amendment thermonuclear option when a narrower alternative was available.

Editor: But the "narrower" alternative here was *still* a constitutional provision – the "due process" clause of the Fifth Amendment. How does that fit into any "constitutional avoidance" notion?

Swami: Sure, it's still the constitution, but look at the differences. Assume that everybody agrees that the FCC should *not* have penalized the Fox and ABC broadcasts at issue here. To get to that result through the First Amendment, the Court would have had to hold that the FCC's indecency policies – or at least some significant subset of them – are barred by the First Amendment. That would open up a whole host of follow-up questions that would almost invariably take the Court back to *Pacifica*. By contrast, the Fifth Amendment approach the Court used allowed them to find that, whether or not the indecency policy is consistent with the First Amendment, the two broadcasters (Fox and ABC) didn't get the due process notice to which they were entitled under the Fifth Amendment. Net result: the penalties meted out to those two broadcasters are tossed without anybody having to come to grips with the First Amendment arguments.

The two broadcasters (Fox and ABC) didn't get the due process notice to which they were entitled under the Fifth Amendment.

This is, of course, very frustrating for those of us who have been waiting patiently for some conclusive ruling by the Supreme Court as to the constitutionality of the FCC's indecency policy. When it agreed to hear the *Fox* case this time around, the Court specified that the only question to be considered was

> [w]hether the Federal Communications Commission's current indecency-enforcement regime violates the First or Fifth Amendment to the United States Constitution.

Many of us read that to refer to the overall indecency regime as a whole, not merely the particular application of that regime to two particular parties. We obviously guessed wrong.

(This is a good time to point out another possible reason that the Court decided this unanimously and narrowly. It's a hypothesis advanced by UCLA professor Eugene Volokh. Volokh theorizes that the recusal of Justice Sotomayor left the Court in serious danger of a 4-4 split on the merits if it ruled on the overriding First Amendment issue. That would have been the worst possible result, leaving the Second Circuit result in place (but not necessarily its rationale), while providing no Supreme Court precedent. The narrow decision was therefore a tactical means of getting to a result favored by all justices without forcing the Court through a divisive and ultimately deadlocked First Amendment analysis.)

Editor: But that doesn't mean that the First Amendment problems with the FCC's indecency policy have gone away, does it?

Swami: Absolutely not. That issue isn't going away. The Court's unwillingness in the *Fox* case to address that issue squarely, for once and for all, means we're almost certain to be back here several years from now (maybe just in time for another election day).

Editor: OK, so here we are, with a very narrow, largely analysis-free Supreme Court decision based on Fifth, not First, Amendment grounds – a decision that appears to apply only to these three broadcasts. What comes next?

Swami: That's unclear. According to the Supremes, "[t]he judgments of the United States Court of Appeals for the Second Circuit are vacated, and the cases are remanded for further proceedings consistent with the principles set forth in this opinion." So the Second Circuit's broad, sweeping (and, to many us, welcome) opinion holding the indecency policy to be inconsistent with the First Amendment has now been tossed by the Supremes. As a result, the FCC's indecency regime, as a whole, remains in place.

I'm guessing the Court is also telling the Second Circuit that it should simply and quickly issue an order reversing the FCC's actions for the reasons stated by the Supremes. Since the Second Circuit obviously feels strongly about this case – you can tell that from its first two opinions – I suppose it's possible that the Circuit might use the opportunity of a remand to signal how broadly it plans to read the Supreme Court's decision and whether the Second Circuit will continue to be the "go-to" circuit for indecency cases. And you can take the Swami's word for it – there will be more indecency cases. As the Supreme Court expressly observed, its decision leaves the courts "free to review the current policy or any modified policy in light of its content and application".

The more intriguing question, though, is how the FCC will react to this decision. It obviously just dodged a bullet. Does it tweak its indecency policy, does it massively overhaul that policy, does it scrap the policy entirely, or does it just leave it the way it's been for the last six-seven years? In light of the Commission's traditional behavior, I suspect it'll be the last option – the FCC as Decency Police will continue to pound the beat – but you never know. After all, we now have Justices Thomas and Ginsburg on the record saying that they seriously question whether the indecency policy could withstand First Amendment scrutiny. At some point the FCC may be able to take a hint.

Editor: And beyond that, what does the Supreme Court's decision mean for indecency cases pending at the FCC?

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Hey, it's another Memo to Clients sidebar!!!

Two Down, Seven to Go

Justices Ginsburg, Thomas question continued vitality of *Pacifica*

The Supreme Court's 1978 *Pacifica* decision – which determined that the FCC could regulate broadcast indecency consistently with the First Amendment – lives on, despite the fact that many observers saw a reasonable possibility that the Court would take the opportunity of the *Fox/ NYPD Blue* case to toss it (and possibly also its doctrinal relative, the scarcity doctrine articulated in the 1969 *Red Lion* decision).

Does this mean that *Pacifica* is bullet-proof? Far from it. Consider Justice Ginsburg's terse concurrence in the *Fox* case, which reads, in its entirety, as follows:

> In my view, the Court's decision in *FCC* v. *Pacifica Foundation*, 438 U. S. 726 (1978), was wrong when it issued. Time, technological advances, and the Commission's untenable rulings in the cases now before the Court show why *Pacifica* bears reconsideration. Cf. *FCC* v. *Fox Television Stations, Inc.*, 556 U. S. 502, 532–535 (2009) (THOMAS, J., concurring).

Now put that together with the separate concurrence of Justice Thomas back in 2009, when the *Fox* case passed through the Supremes for the first time:

> [E]ven if this Court's disfavored treatment of broadcasters under the First Amendment could have been justified at the time of Red Lion and Pacifica, dramatic technological advances have eviscerated the factual assumptions underlying those decisions. Broadcast spectrum is significantly less scarce than it was 40 years ago. . . . Moreover, traditional broadcast television and radio are no longer the "uniquely pervasive" media forms they once were. . . . For all these reasons, I am open to reconsideration of Red Lion and Pacifica in the proper case.

So we now have two justices, on polar opposite ends of the ideological spectrum, ready to pound a stake into the heart of *Pacifica*, and possibly *Red Lion* as well.

(Continued from page 12)

Swami: That, too, remains to be seen. In a perfect world, the Commission would go through all the million or more still-pending indecency complaints and divide them into two groups: (a) complaints involving "fleeting expletives" and (b) all others. Then it would take all the complaints in Group (a) and subdivide them into two categories: (i) those that occurred prior to the 2004 *Golden Globes* decision that announced an end to the Commission's previous "fleeting expletive" policy (*i.e.*, the policy that let such instances slide without penalty), and (ii) those that occurred after. I get the need to draw that latter line from Justice Kennedy's majority opinion. He makes a point of saying that "[the] regulatory history, however, makes it apparent that the Commission policy *in place at the time of the broadcasts gave no notice to Fox or ABC* that a fleeting expletive or a brief shot of nudity could be actionably indecent" (emphasis added).

So once all complaints involving fleeting expletives or nudity that occurred before the 2004 *Golden Globes* decision are identified, the Commission would promptly dismiss them, since they would all be essentially identical to the *Fox/NYPD Blue* situations. All other complaints would be left for routine processing.

But with the sheer volume of pending complaints, it's hard to imagine that the Commission is in a position even to begin such a triage process.

And let's not forget the fact that, even if the FCC goes ahead with indecency complaints which may survive the Supreme Court's decision, and even if it ends up issuing fines in those cases, the government will be hard-pressed to collect any fines in cases older than five years. That's because of 28 U.S.C. §2462, a federal law that requires that lawsuits by the Feds to enforce a civil fine, penalty or forfeiture be initiated within five years after the underlying claims accrue. The Communications Act provides that, if a licensee hit with a fine simply declines to pay, the FCC's only recourse is to sue the licensee for payment – and until that suit is finally resolved in favor of the FCC, the Commission can't use the licensee's alleged violence in any way that might prejudice the licensee. So any case that would be subject to the five-year statute of limitations in 28 U.S.C. §2462 could (and, in an ideal world, should) all be summarily tossed regardless of the *Fox* decision.

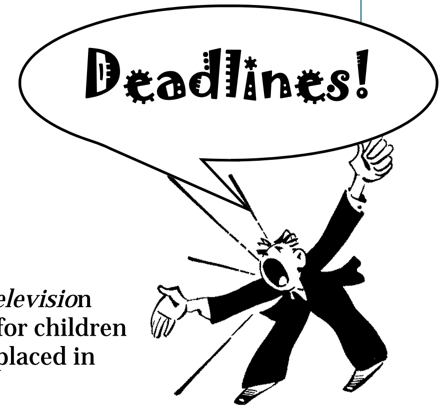
Editor: When you look into your crystal ball, what do you see happening on the indecency front?

Swami: The Court told the FCC expressly that the Commission "remains free to modify its current indecency policy in light of its determination of the public interest and applicable legal requirements." And it told the courts that they are "free to review the current policy or any modified policy in light of its content and application".

So we could see the FCC revise its policy. Or we could see the FCC stick to its guns, applying the current policy against another broadcaster in one of those nonfleeting expletive or post-*Golden Globe* cases. If that broadcaster then brings challenges the constitutionality of the entire scheme, that challenge could work its way up the courts, finally returning to the Supreme Court, maybe just as we round into yet another Presidential election year.

Or not. Concentrate and ask again later.

July 10, 2012



Children's Television Programming Reports - For all *commercial television* and *Class A television* stations, the second 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.

August 1, 2012

Radio License Renewal Applications - *Radio* stations located in **Illinois** and **Wisconsin** 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.

Television License Renewal Applications - *Television* stations located in **North Carolina** and **South Carolina** 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.

Radio Post-Filing Announcements - *Radio* stations located in **Illinois** and **Wisconsin** must begin their post-filing announcements with regard to their license renewal applications. These announcements must continue on August 16, September 1, September 16, October 1, and October 16.

Television Post-Filing Announcements - *Television* stations located in **North Carolina** and **South Carolina** must begin their post-filing announcements with regard to their license renewal applications. These announcements must continue on August 16, September 1, September 16, October 1, and October 16.

Radio License Renewal Pre-Filing Announcements - *Radio* stations located in **Iowa** and **Missouri** must begin their pre-filing announcements with regard to their applications for renewal of license. These announcements must be continued on August 16, September 1, and September 16.

Television License Renewal Pre-filing Announcements - *Television* stations located in **Florida**, **Puerto Rico**, and the **Virgin Islands** must begin their pre-filing announcements with regard to their applications for renewal of license. These announcements must be continued on August 16, September 1, and September 16.

EEO Public File Reports - All *radio* and *television* stations *with five (5) or more full-time employees* located in **California**, **Illinois**, **North Carolina**, **South Carolina**, and **Wisconsin** 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 **California**, **North Carolina**, and **South Carolina** 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 **Illinois** and **Wisconsin** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323-E.

(Misrep Lite - Continued from page 3)

The station duly complied, stating that "[i]n coordination with [an independent consultant], all missing materials cited in [*NAL I*] have been placed in the Station's Public Inspection File." That was in August, 2011.

Wouldn't you know it, the FCC inspectors dropped by the station again for another look-see two months later, only to find that issues-programs lists had gone missing again. In response to a letter of inquiry sent by the inspectors, the licensee acknowledged that it was guilty of "oversight". It seems that the station was being operated pursuant to a time brokerage agreement, and the licensee thought that the broker's daily program logs had been placed in the public file. The licensee said that it had hired an "outside consultant to review the public file" and that that consultant had indicated that the file was complete.

Wrong, said the FCC in a recent follow-up Notice of Apparent Liability (*NAL II*): the logs weren't in the file on the date of the October inspection. *NAL II* also suggested that even if they had been, mere program logs are not necessarily the same as issues-programs lists, for reasons the FCC didn't bother to explain.

According to *NAL II*, the licensee failed to exercise "even minimal diligence prior to the submission of its certification" in August, 2011. Had the licensee done so, "it would not have submitted incorrect and misleading material factual information". Down came the hammer: another $25K fine for "providing material factual information that was incorrect without a reasonable basis for believing that the information was correct and not misleading".

On the one hand, the FCC's response here is understandable: a violation brought to the licensee's attention in the June, 2011 *NAL I*, and supposedly corrected within two months, was found to have been repeated again in October, 2011. The Commission might well conclude that the licensee was sticking its regulated thumb in the FCC's regulatory eye.

But hold on there. Does the fact that the public file lacked issues-programs lists in October *really* mean that the licensee's statement two months earlier lacked any "reasonable basis"? After all, the licensee claimed that it was relying on an outside consultant. We all know that licensees are ultimately responsible for failure to comply with the rules, whether the failure was the fault of some employee, the licensee itself, or somebody else. And here, the licensee *was* held responsible for the public file violation, to the tune of $15,000.

But a public file violation is different from a violation of Section 1.17(b). In the latter case, the existence of a "reasonable basis" is exculpatory. Might not the licensee's reliance on a consultant have provided a "reasonable basis" for the licensee's August statement, even if it turned out that the consultant didn't get it right?

And sure, program logs are not necessarily the same as issues-programs lists . . . but the FCC's rules no longer specify the contents of program logs (indeed, the Commission doesn't even require such logs), and the inspectors appear never actually to have seen exactly what information the program logs in question contained. So how can the inspectors be so sure that the logs would not have satisfied the issues/programs list requirement?

It's always best to be sure that you are 100% confident, based on your own personal knowledge, of the accuracy of any factual statement you make to the FCC.

In other words, the facts as reported in *NAL II* seem to support the conclusion that the FCC has the licensee dead to rights on a violation of the public file rule on the date of the October inspection. But it's far from clear that the facts as reported support the Commission's conclusion that the August statement was factually incorrect or that it lacked a reasonable basis. The licensee's statement said only that "in coordination with [an independent consultant], all missing materials" had been placed in the public file and that the file was complete as of the date of the statement.

What are the main take-home lessons here? First, just because you tell FCC inspectors that your house is in order doesn't mean that they won't bother to check for themselves. Second, don't count on program logs as a substitute for issues-programs lists. And third, reliance on consultants may not be enough to avoid a notice of apparent liability for violation of Section 1.17(b).

And the most important lesson: It's always best to be sure that you are 100% confident, based on your own personal knowledge, of the accuracy of any factual statement you make to the Commission in any context. The Commission relies on representations made by its licensees, and if it determines that a licensee's assertions are not reliable, that licensee can find itself in deep trouble, quick. As this case demonstrates, Section 1.17(b) provides the Commission with a way of penalizing mere inaccuracy, even if no deceitful intent underlies the inaccuracy. So any time you write anything to the FCC, watch what you say, and be careful if you're relying on what others tell you, or you too could find yourself in the jaws of the FCC's enforcement machine.

(Blood from a Stone - Continued from page 3)

payment from a guy who doesn't have the resources?

Probably not, but that's irrelevant. Our hunch is that this is really about respect. The FCC doesn't like being crossed. As they see it, stiffing the Commission on a consent decree commitment "demonstrates bad faith and a complete disregard for Commission and Bureau authority". So upping the forfeiture even when collection is likely futile is justified to send a message. And that message is clear: If you make any promise to the FCC to do anything, especially a promise to pay, do what you said you would do. If you know – or even suspect – that you won't be able to follow through on your promise, don't make the promise in the first place.