FLETCHER, HEALD & HILDRETH, P.L.C.

Memorandum to Clients

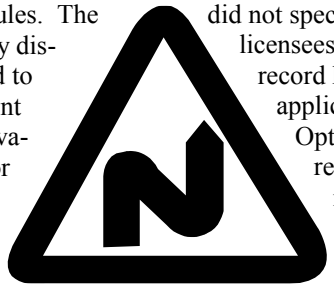
November, 2002 *News and Analysis of Recent Events in the Field of Communications* No. 02-11

Once More, With Filing (Redux)

The Three R's of EEO 2002: Recruiting, Record-keeping, Reporting

By: Ann Bavender

The FCC has adopted new EEO rules which closely resemble "Option A" of the FCC's prior EEO rules. The new rules again require broadcasters to widely disseminate notice of full-time job vacancies and to participate in a specified number of recruitment activities. Stations must maintain records of vacancies filled, the recruitment sources used for the vacancies, and the number of referrals received from the sources, with the information placed in station public files and on station websites. All stations must submit this information to the FCC at renewal time and most stations must also submit the information mid-way through their license terms. Stations need not maintain records of the gender and ethnicity/nationality of persons interviewed or hired. According to the FCC, it will evaluate stations based on their recruitment efforts only and not on the gender and ethnicity/nationality of employees.



As broadcasters may recall, in 2000 the FCC adopted completely new EEO rules. The new rules offered two options. Option A was a complex set of recruitment requirements which did not specifically reference minorities. Option B allowed licensees to design their own recruitment plans, but required record keeping and reporting with respect to minority job applicants. In 2001, the U.S. Court of Appeals found Option B unconstitutional because it focused more on results than efforts by requiring stations to report the race of job applicants. In addition, the Court stated it was impossible to sever Option B from Option A in order to allow Option A to remain in place.

Responding to the court's decision, the FCC has now in effect reinstated Option A.

The new recruitment rules impose three requirements. Licensees must:

- widely disseminate notices of all full-time (30 hours or more) job vacancies, except for rare emergency hiring situations;
- provide notices of all full-time job vacancies to organizations which have requested to receive vacancy notices; and
- participate in a specified number of recruitment activities every two years, including job fairs and scholarship and internship programs. Station employment units with 5-10 full-time employees or which are located in smaller markets must participate in two such activities, while station employment units with more than 10 full-time employees located in larger markets must participate in four such activities. (A station "employment unit" is one or more stations operated by the same staff.)

In addition, the new rules impose a number of detailed record keeping and reporting requirements. Licensees must:

- maintain station records of:
  - all full-time job vacancies filled, identified by job title;
  - the recruitment sources used for each vacancy, identified by name, address, contact person, and telephone number, with a separate list of the sources required to be notified because they requested vacancy notices;

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The Scoop Inside

Court Rejects Video Description Requirement

FCC Lacks Congressional Say-So, According to Court

By: Jennifer Wagner

A federal court has struck down FCC rules requiring commercial TV broadcasters and operators of large cable television systems and other multichannel video programming distributors ("MVPDs") to provide video descriptions for some of their programs in order to make information more accessible to the visually impaired.

The FCC's rule had mandated that commercial TV broadcasters affiliated with any of the top four commercial networks (ABC, CBS, FOX and NBC) provide 50 hours of video description per quarter during either prime time or children's programming. The rules also required MVPDs that serve 50,000 or more subscribers to provide 50 hours of video description per quarter in prime time or children's programming on each channel that carried one of the top five nonbroadcast networks. The video descriptions consist of audio narrated descriptions of a television program's key visual elements, inserted into natural pauses in the program's dialogue. Video descriptions are usually transmitted over a secondary audio programming channel, a subcarrier that allows video distributors to transmit additional soundtracks.

The video description rules were born of the Telecommunications Act of 1996, where Congress enacted rules regarding program accessibility for those with hearing and visual disabilities. Congress told the FCC to prescribe closed captioning rules for the hearing impaired and to prepare a report for Congress on video description technology which could be used to assist the visually impaired.

Following its Congressional marching orders, the Commission adopted closed captioning rules and gave Congress its report on video technology. But then -- and here lies the problem -- the FCC kept on going, issuing video description rules that the U.S. Appeals Court for the D.C. Circuit found earlier this month were not within the Commission's Congressionally authorized bailiwick. The Motion Picture Association of America and the National Federation of the Blind both had petitioned the Court for review of these new video description rules.

The Commission argued to the Court that the video description requirements were (1) akin to required closed captioning rules and (2) justified by the Commission's need under the Communications Act to make broadcast service "available, so far as possible, to all the people of the United States."

The Court instead found that, although the Commission's road to attempted compliance may have been paved with good intentions, the Commission simply didn't have the power, the authority to go that far. As to the FCC's first argument (analogizing video description to closed captioning), the Court said that the two technologies are very different. Closed captioning rules are verbatim transcriptions of a program's spoken words. Video descriptions, on the other hand, entail messing with program content because they require additions to program scripts that subjectively describe props, characters, and goings-on in particular scenes of a program. The fact that program content was at issue in turn raised First Amendment concerns. The Court found that the FCC has no authority to promulgate regulations that significantly implicate program content.

As to the Commission's second point, the Court said that the mandate to serve "all the people of the United States" is a reference to the geographic availability of service, not to individuals with specific disabilities. The Court added that nothing in the Act gives the Commission the right to promulgate rules that are related to program content because such rules, including those inspired by broad interpretations of Congressional mandates, could lead to excessive government oversight of program content.

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Focus on FCC Fines

By: R.J. Quianzon

FCC Establishes $10,000 as Baseline Fine for Excessive RF - Six years ago, the FCC changed its rules and established guidelines for the level of Radio Frequency (RF) radiation exposure which would be permitted. Basically, the Commission wanted to make sure that members of the public who happened to find themselves near a transmitter would not get zapped by excessive RF. But while the Commission set the substantive RF limits back then, it did not announce how much you could get fined for violating those limits. The FCC has now taken the opportunity to fill in that gap. In a recent case the FCC announced that the standard fine for RF violations will be $10,000. The facts of the case in question were pretty egregious. The licensee had strapped its eight-bay FM antenna to the side of a U.S. Forest Service fire lookout tower, with the top bay of the antenna level with the lookout platform. The tower was near a well-traveled road, and the platform was staffed by forest service rangers and was accessible to the public. Commission field agents determined that the RF levels in and around the tower and platform exceeded FCC limits by as much as 1500% in some places with the station operating at less than half its authorized power. As a result, the Commission had no difficulty determining that a fine was in order, and it set $10,000 as the cost of that particular transgression. There were some add-ons, too. The licensee didn't have EAS equipment installed and operating. Ka-ching. It didn't have a main studio. Ka-ching. It had no way to monitor or remotely control its transmission system. Ka-ching. The bottomline fine was $28,000.

Readers should ensure that all of their RF emissions and exposure areas comply with the FCC's guidelines. Those guidelines are found at section 1.1310 of the FCC's Rules. If you have any questions about the Commission's RF standards or how to assure compliance with them, contact the FHH attorney with whom you normally work.

FCC Calls Off Call-In Fine - As reported in this column in the February 2002 issue, the FCC fined a radio station $4000 for broadcasting a mistaken call to its studio call-in line. The caller misdialed the phone number and called the station rather than an acquaintance. The station's staff told the caller that she was on a call-in line and then broadcast an extended conversation with the caller. Citing unique circumstance that the caller had called into the station (albeit by mistake), the FCC has changed its mind and will not fine the station $4000 for the broadcast. The FCC does not require prior consent to the broadcast or recording of a telephone conversation under an exception for "call-in" lines that are part of a broadcast in which it is obvious that the call may be broadcast.

Copafeel Cuts a Deal - Orlando area radio pirate Benjamin Carter, a/k/a Malik Abdul -- better known to some by his alias, "Copafeel" (presumably he is a Dickens fan with a spelling problem) -- has pled guilty to seven counts of unlicensed operation of a radio station and will be sentenced next February. In connection with his plea, the government has confiscated the pirate's equipment and released him without a cash bond. Carter/Abdul/Copafeel faces fines of up to $11,000 per violation. Listeners and broadcasters in Orlando began complaining of interference to local stations in February of 1999. In response, the FCC investigated the matter and the G-men made the collar.

FCC to Raceway: "Buddy, Gonna Shut You Down" - And on the left coast, we have another unlicensed operation situation -- but more unusual than the Copafeel item, above. A California speedway has been fined for improperly operating a low power FM transmitter. Readers may be familiar with small FM devices often used by real estate companies or businesses to transmit extremely low power FM signals to radios in passing cars or on headphones. The FCC allows such low power devices to be operated, but only up to a maximum field strength limit of 250 microvolts/meter at three meters. Responding to a complaint, the FCC's LA office investigated. Whether the transmitter in question had been souped up, chopped and channeled, tricked out, and/or turbo-charged is not clear. What is clear is that the speedway was managing to operate the transmitter at 254 times the maximum output power. The FCC black flagged the speedway's FM operation and hit it with an $8000 fine to boot.

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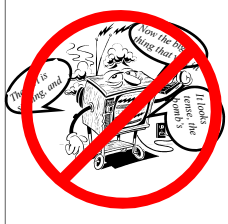

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Meanwhile, organizations that represent viewers with visual impairments report plans to appeal the Court's decision and hope that networks will voluntarily maintain video descriptions of at least some of their programs. Other interested bystanders have expressed concern that the Court's decision may lead to revisions of other Commission rules that affect program content not specifically mandated by Congress, such as the prime time access rule, children's programming rules, and possibly even the Commission's EEO rules.

If you would like more information on this decision, or on the state of video description and closed captioning rules, please contact the FHH attorney with whom you normally work or Jennifer Wagner at wagner@fhhlaw.com.

(Continued from page 1)

- dated copies of all advertisements, bulletins, letters, faxes, e-mails, etc. announcing vacancies;
- documentation necessary to demonstrate participation in the required recruitment activities;
- the total number of persons interviewed for each vacancy and the referral source of each person interviewed;
- the date the job was filled and the referral source of the person hired;

- annually place in the station's public file and post on the station's website a report containing lists of:
  - all full-time vacancies filled during the proceeding year, identified by job title;
  - all recruitment sources used for the vacancies, identified by name, address, contact person, and telephone number;
  - the recruitment sources that referred the people hired for each vacancy;
  - the total number of persons interviewed for each vacancy and the total number of interviewees referred by each referral source;
  - the required recruitment activities in which the station participated, together with a brief description of those activities;

- file with the FCC at renewal time (television stations with five or more employees and radio stations with ten or more employees must also file the information mid-way through their license terms) the reports placed in the station's public file for the past two years; and

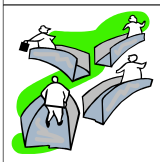
- beginning in September 2003, file annually with the FCC a report on the gender and race/ethnicity of the station's employees. The FCC expects to officially adopt this requirement in the next few months. The information will be used only for statistical purposes and not to evaluate a station's compliance with the EEO rules.

The FCC also commenced a further rulemaking proceeding to determine whether and how to apply the EEO rules to part-time jobs. The date for filing comments has not yet been announced. Please contact us if you are interested in filing comments or joining with other stations to file comments.

By effectively adopting the former Option A which had been approved by the court, the FCC presumably is hoping to avoid any further trips to the court in defense of its EEO rules.

By effectively adopting the former Option A which had been approved by the court, the FCC presumably is hoping to avoid any further trips to the court in defense of its EEO rules. Whether that hope will be realized remains to be seen. The fact that the Commission still plans to collect gender and race information will doubtless raise concerns about the constitutionality of the new rules. Despite the Commission's claim that the gender and race information it collects will be used for statistical purposes only, a number of critics are openly skeptical about the reliability of that claim. And even if the Commission really means what it says, some critics of the EEO rules are concerned that the fact that gender and race data have been compiled at all gives rise to the potential for gender and race-based decision-making at some future point -- that is, the type of decisionmaking which the courts have held to be unconstitutional.

As of press time for the Memorandum to Clients, the full 120-page text of the Commission's decision had just been released. We will study it and report on additional details in next month's issue. For more information regarding the rules and their impact on your station, please contact the Fletcher Heald & Hildreth attorney with whom you normally work or Ann Bavender at (703)



FHH - On the Job, On the Go

Gene Lawson recently participated in the 33rd Annual Advanced Business Law Seminar at The Tides Inn in Irvington, Virginia. This year's topics included emerging issues relating to the Sarbanes-Oxley Act and new responsibilities for boards of directors and audit committees. Also discussed were new rules and expectations about disclosure controls and procedures, including those applicable to small businesses and privately-held entities.

Gene also recently attended a conference in Lewes, Delaware, sponsored by the Supreme Court of Delaware as part of its mediator/arbitrator certification program. Mediation techniques and procedures were covered during practice sessions based on actual cases.

If you have any questions about business law matters, alternative dispute resolution, or related issues, contact Gene at 703-812-0404 or lawson@fhhlaw.com.

DTV Licensees Beware!!!

Reports on (and Fees from) Ancillary and Supplementary Services Due

By: Anne Goodwin Crump

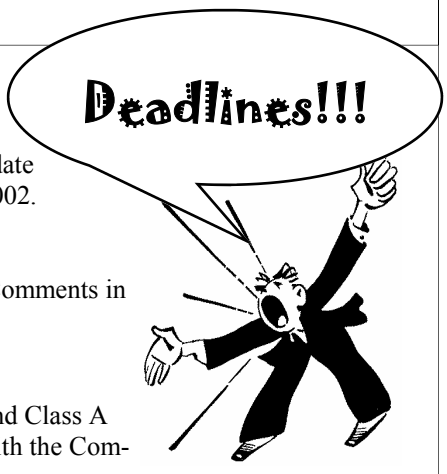
One of the Commission's more obscure and easily overlooked requirements is that each DTV station licensee must annually file a report with regard to whether it offers any ancillary or supplementary services together with its broadcast service. The report must be filed on FCC Form 317 and is due by December 1 each year. This year, however, since December 1 falls on a Sunday, the report must be filed by December 2.

The ancillary services which must be reported would include such services as data transmission, aural messages, paging, subscription video, and the like which would be carried together with the DTV signal. The Commission has indicated that any video broadcast signal for which there is no direct charge to viewers would ***not*** be included in this category.

If a station has offered such services, and has charged a fee for them, then it must separately submit a payment equal to five percent of the gross revenues received and an FCC Remittance Advice (Form 159) to the Commission. The report on Form 317 specifically asks for a list of any ancillary services, whether a fee was charged, and the gross amount of revenue derived from those services.

The reporting requirement currently is applicable only to DTV licensees, ***not*** permittees. This distinction will limit the number of stations required to file a report this year, as stations operating with reduced facilities pursuant to Special Temporary Authority ("STA") remain permittees rather than licensees. Only when a station's DTV facilities have been built in accordance with its construction permit, and a license application has been filed and granted, does a permittee become a licensee. Naturally, this distinction may be subject to change once the nickel drops and the Commission recognizes the large number of stations which are operating and will continue to operate with STA's for a considerable period of time -- and which, because they are still classified as "permittees", will not be pouring revenues into the FCC's coffers. At the time that the rule and underlying statute were adopted, it was anticipated that DTV stations would follow the normal course and file license applications immediately upon completing construction of DTV facilities. At least for the time being, however, only DTV licensees are subject to the reporting requirement.

Should you require any assistance or further information regarding this matter, please contact the attorney in our office with whom you normally deal or Anne Goodwin Crump at 703-812-0400, e-mail crump@fhhlaw.com.



December 5, 2002
Effective Date of New Schedule of Charges for Application Fees - Last July the FCC announced a new schedule of application fees. Because of a snafu (reported in last month's Memo to Clients) the originally-announced effective date was delayed. The new effective date has now been announced: December 5, 2002.

January 2, 2003
Comments in Broadcast Ownership Rulemaking (MB Docket No. 02-277) - Comments in the FCC's ownership rulemaking are currently due on January 2, 2003.

January 10, 2003
Children's Television Programming Reports - For all commercial television and Class A television stations, the 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.

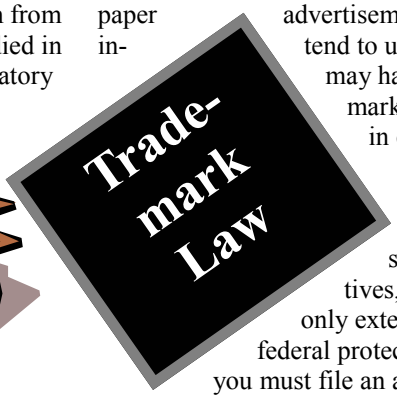
Issues/Programs Lists - For all commercial and noncommercial radio, television, and Class A television stations, a listing of each station's most significant treatment of community issues must be placed in the station's local public inspection file. The list should include a brief narrative describing the issues covered and the programs which provided the coverage, with information concerning the time, date, duration, and title of each program.

PROTECTING YOUR MOST VALUABLE ASSET: YOUR STATION IDENTITY

By: Alison J. Shapiro and Lee G. Petro

You have fought hard to create a distinct, recognizable identity in your local market. Your promotions, on-air, and sales staff spend every day pitching this distinct, recognizable identity in the local market. What could be more important than protecting that identity from its use by others that would confuse the public and reduce its impact and ultimate value to you?

With this in mind, many broadcasters file for state and federal protection of their trademarks. With a servicemark or a trademark, a licensee secures protection from confusing or diluting uses of its identity as embodied in the registered servicemark or trademark. (Explanatory note: A trademark generally covers goods or things, while a servicemark covers non-tangible services. The two terms are treated the same for registration purposes, notwithstanding that distinction.) And the public is placed on notice of that protection through the registration process. The filing of an application with your state's trademark office, or with the United States Patent and Trademark office, affords a valuable method for protecting your identity.



The first step in the filing of a trademark application is determining what you want or need to protect. Many stations have slogans or graphics that they use with their promotional material. For example, your radio station may call itself "St. Louis Christian Rock Alternative", or "Detroit's Bulldog", and accompanying the slogan might be a graphic that is associated with the slogan. Alternatively, you may be seeking to roll out an innovative new format or sales promotion that you seek to protect. Such distinctive logos, graphics, and the like are generally subject to trademark protection.

Second, you will need to confirm that the proposed mark -- or a mark so similar as to be potentially confused with your proposed mark -- is not already registered. A number of research services are available to run comprehensive reviews of the state and federal trademark databases. Even if the mark is already registered, you may still be able to register your mark based on distinctions among the services offered, or the geographic location of your proposed services. For example, the registration of "McDonalds" with respect to an auto repair service would likely be permissible, even though "McDonalds" is already registered for restaurant services. Thus, a careful review of the preexisting registrations is necessary to determine if there is a reasonable basis for applying to register a new mark.

The next step is to gather examples (or "specimens") of how the mark is used in commerce. If you have already been using the mark for ten years, it is likely that you will have valuable specimens, such as rate cards, newspaper advertisements, and posters. If you intend to use the mark in the future, you may have mock-ups of the new mark which have yet to be used in commerce.

The final step is the filing of the application. Many states have low-cost alternatives, but their level of protection only extends within the state. For federal protection of an existing mark, you must file an application with three separate specimens of prior use. For the prospective use of a proposed mark, you must file an application, along with the certification that you have a bona fide intent to use the mark in commerce.

The trademark office will review the application to make two separate determinations. First, the staff will review the proposed mark to ensure that it is not confusingly similar to any other mark. Next, the staff will consider whether the proposed mark is "distinctive". For example, the trademark office might reject the registration of the phrase "rock radio" as a separate mark, since it is not distinctive. However, if accompanying the term "rock radio" there were a distinct graphic, or if there were other terms that could be added to make the proposed mark more distinctive, the proposed mark may pass this review. Assuming the mark passes this review, the proposed mark would be published for public comment.

There are many points in this process where the registration of your mark could face problems. We advise contacting this office at the beginning of this process, so that an effective and efficient strategy can be developed. We have years of experience in:

- the development of distinctive marks;
- the review of existing trademarks and the trade

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Commission, Heal Thyself

FCC Adopts Mechanism to Allow Public to Propose Database Corrections

New System Mandated by Data Quality Act

By: Jennifer Wagner

Much as Captain Renault was shocked, shocked to find gambling going on at Rick's, you may be equally shocked to learn that wrong information pops up in the FCC's databases now and again. Not to worry, though. The FCC has issued a new form intended to fix database typos and bad information, as well as errors released through FCC documents.

This wasn't the Commission's idea, though. The form was created and released in response to the direction of the federal Office of Management and Budget, which is charged with implementing the Treasury and Government Appropriations Act for Fiscal Year 2001, a.k.a. the Data Quality Act. The Data Quality Act requires each government agency, including the FCC, to establish "administrative mechanisms" allowing people to seek and obtain correction of information maintained and disseminated to the public by that agency.

Whatever the FCC's motivation for the new processes may have been, those processes are now in place. As of October 1, complaints about inaccuracies in the database may be filed electronically by completing and submitting the form, which is available at the Commission's website. Commission staff is required to respond to each complaint within 45 days of its filing and take any corrective action within 60 days of that response.

Not every inaccuracy in every item generated by the Commission can be corrected, as the FCC makes clear in its list of exempt information. For example, press releases aren't subject to correction, nor are speeches. Rulemaking proceedings don't count either because correction comparable procedures are already in place.

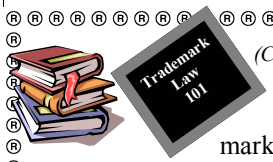
Still, the new form ***can*** be used to correct information on the Commission's website and in its databases, where it may be needed most.

Ideally, the form may lead to more efficient database information entry and timely corrections. It may prevent requests for corrections from falling through the cracks and allow broadcasters to keep their regulatory ducks all in a row, reducing inquiries from FCC staff and speeding due diligence searches. There is a danger, however, that this may be a case of meet-the-new-boss, same-as-the-old-boss. Illustrating this point nicely is the fact that, when the Commission first announced the adoption of its Information Quality Guidelines, it had to issue a correction to that announcement within 24 hours. Oops. Further illustrating this point, the website address needed to access the Data Quality Comment form is incorrect in the Information Quality Guidelines notice. Oops again. It's these types of errors that give pause as to the information quality under the Information Quality Guidelines. To the FCC's credit, it lists the correct website address in the guidelines themselves: www.fcc.gov/omd/dataquality/complaint.

> *As of October 1, complaints about inaccuracies in the database may be filed electronically . . . FCC staff is required to respond to each complaint within 45 days of its filing and take any corrective action within 60 days of that response.*

If you happen to run across some error in one or another FCC database, you should feel free to give the new system a test drive. The form asks for your name; preferred method of response (mail or e-mail); the "title of the information product you wish to comment on" (that's government-speak for "tell us where we messed up." Sample answers include "CDBS," "ULS," etc.); the date the information was disseminated; the problem with the information; and how the information should be corrected. Complete the form online and either e-mail it directly to the FCC or print it and mail to the FCC Data Quality Comment office, the address listed on the form.

If you would like more information on the Data Quality Comment form and filing, or if you need the FCC to correct a mistake in its database or elsewhere and you would like to either use the new form or write an old-fashioned letter to the Commission, please contact the FHH attorney with whom you normally work or Jennifer Wagner at 703-812-0511 or wagner@fhhlaw.com.



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mark search reports;

™ the preparation and filing of trademark applications; and

™ the prosecution of applications, including the preparation of corrective amendments and supplementary information;

Please feel free to contact the FHH attorney with whom you normally work or either of the authors: Ali Shapiro at 703-812-0478 or shapiro@fhhlaw.com, or Lee Petro at 703-812-0453 or petro@fhhlaw.com.

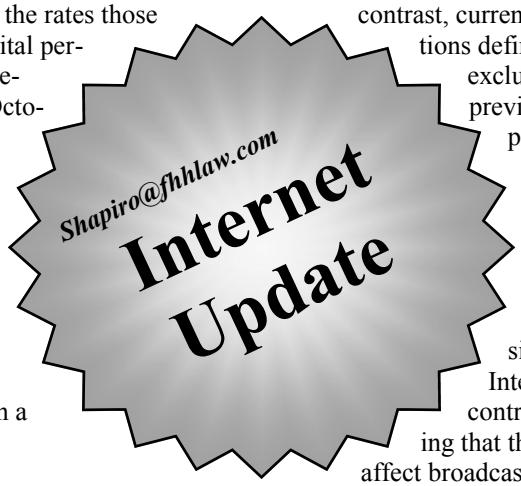
On the Copyright Royalty Front

Congress Provides Possible Relief For Small Webcasters

By: Alison J. Shapiro

In mid-November, Congress passed the "Small Webcaster Settlement Act of 2002", which permits the recording industry, represented by SoundExchange, to enter into voluntary settlement agreements with certain Webcasters regarding the rates they must pay for transmitting copyrighted sound recordings on the Internet. Such agreements would cover royalties for both past and future transmissions.

Specifically, the legislation authorizes SoundExchange, on behalf of record companies, to enter into settlement agreements with noncommercial Webcasters and "small" commercial Webcasters, regarding the rates those Webcasters must pay for their "digital performances" of copyrighted sound recordings on the Internet between October 28, 1998 and December 31, 2004. These negotiated rates could differ from the royalty payment schedule adopted by the Librarian of Congress ("Librarian") earlier this year. However, these negotiated rates will still be based upon a percentage of the Webcasters' revenue or expenses, or both, and must contain a minimum fee.



Any voluntary settlement agreement must then be submitted to the Copyright Office, published in the Federal Register, and made available to all qualifying Webcasters. However, if SoundExchange does not complete negotiations with "small" commercial Webcasters by December 15, 2002, or with noncommercial Webcasters by May 31, 2003, then those parties will remain subject to the Librarian's royalty payment schedule.

The legislation does not ***require*** SoundExchange to enter any settlement. Rather, the law merely opens the possibility that such settlements ***may*** be entered into.

The legislation also defers until June 20, 2003, payments otherwise due from ***noncommercial*** Webcasters for royalties which have not already been paid for transmissions during the period between October 28, 1998 and May 31, 2003. Existing for-profit Webcasters (*e.g.*, "hobbyist" Webcasters) would be allowed to file for non-profit status and take advantage of the extended negotiation deadline and the payment suspension if they have a "reasonable expectation" that their application for non-profit status will be granted by the IRS. The legislation also authorizes SoundExchange to delay the payment obligations of "small" commercial Webcasters until December 15, 2002.

It is still unclear whether (and if so, the extent to which) traditional broadcasters might benefit from passage of this legislation. The bill defines a "Webcaster" as an entity which utilizes the compulsory license under federal law in making Internet transmissions of copyrighted music -- a definition which appears broad enough to include broadcast radio stations streaming their signals. In contrast, current U.S. Copyright Office regulations define a "Webcaster" to expressly exclude radio streaming, as did a previous version of this legislation passed by the House last month. Senate Judiciary staff responsible for the Senate's bill suggest that the statutory definition of "Webcaster" ***does*** include ***both*** internet-only ***and*** traditional broadcasters (*i.e.*, simulcasters) streaming on the Internet. We understand that, by contrast, the NAB appears to be taking that the position that the bill does not affect broadcasters at all. Accordingly, we understand that the NAB will not be participating in the settlement negotiations with SoundExchange.

The legislation does not define what constitutes a "small" commercial Webcaster. That determination appears to be left to SoundExchange's judgment. The previous version of the bill defined a "small" Webcaster as a non-broadcast entity with under $1 million in Webcasting revenues to date.

The NAB's appeal of the Librarian's royalty rates remains pending in Federal Court. Oral arguments are scheduled for December 2, 2002. The legislation recent expressly provides that the Court should ***not*** take into account the new law or any private settlement reached in deciding that appeal. Stay tuned for developments.

If you have any questions about the Small Webcasters Settlement Act of 2002, please contact the FHH attorney with whom you regularly work or Alison Shapiro at 703-812-0478 or shapiro@fhhlaw.com.

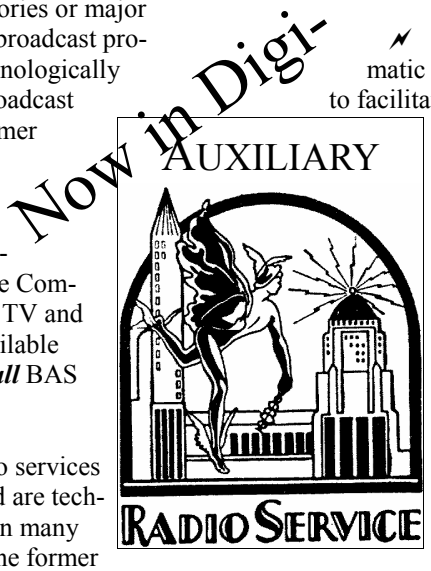
Broadcast Auxiliary Rules Overhauled

FCC OK's Digital Across the Auxiliary Band

By: Jennifer Wagner

Broadcast Auxiliary Service ("BAS") licensees may now migrate into the digital realm hand-in-hand with their broadcast brethren. Rules adopted by the FCC this month conform certain technical rules so that broadcasters may have an end-to-end digital broadcasting system using any BAS frequency band.

Because BAS stations are used by television and radio stations and networks to transmit program material from the locations of breaking news stories or major events to studios for inclusion in broadcast programs, BAS stations must be technologically compatible with the rest of the broadcast industry. However, under the former rules, digital modulation could only be used in specified BAS bands, which was slowing the overall broadcast industry's transition to digital. For that reason, the Commission adopted rules that permit TV and aural BAS stations to use ***any*** available digital modulation techniques in ***all*** BAS frequency bands.



Additionally, BAS and other radio services share several frequency bands and are technically and operationally similar in many respects. Yet, inconsistencies in the former rules forced BAS and other radio systems to operate under different technical rules, which led to confusion when licensees in different services tried to operate in the same geographic areas. The new rules conform technical rules that were previously at odds, including transmitter power and emission limits, for services including BAS, Cable Television Relay Service (CARS), and Fixed Microwave Services (FS). Further, the new rules require aural and TV BAS stations to coordinate shared frequency use in order to minimize instances of harmful interference that may otherwise occur when a station begins transmitting.

Specifically, to conform BAS, CARS, and FS rules, the new rules:

- permit TV and aural BAS stations to use any available digital modulation technique in all BAS frequency bands so that BAS stations can use the latest technological developments to transition to digital operation.
- update BAS emission masks to facilitate the introduction of digital equipment and to provide consistency with emission masks rules.
- modify the equation used by BAS and CARS services for determining the maximum effective isotropic radiated power ("EIRP") for short path lengths. This change eliminates the steep reduction in EIRP for BAS and CARS path lengths shorter than the minimum.
- allow BAS and CARS stations to use automatic transmit power control ("ATPC") in order to facilitate more efficient spectrum use.
- update transmitter power rules for BAS and CARS services to provide EIRP limits for all frequency bands.
- require TV BAS and CARS services to prior coordinate their frequency use when using shared frequency bands to minimize the potential for harmful interference occurring when a new station begins transmitting.

Other aspects of the rules designed to update the BAS rules and/or speed provision of service allow film and television producers to operate wireless assist video devices on unused VHF and UHF channels (under certain conditions designed to protect current users of the band); permit BAS applicants to operate under temporary conditional authority; modify the Remote Pickup BAS channel plan to provide compatibility with the channel plan adopted for private land mobile radio in the Commission's Refarming proceeding; modify the BAS short-term operation rules; and make BAS application rules consistent with the FCC's Universal Licensing System (ULS).

One aspect of the auxiliary service rules that was not changed is the "automatic STA". For years licensees have been permitted to operate BAS stations for up to 720 hours per year per frequency without prior Commission authorization. This facilitates coverage of emergencies or newsworthy events. The FCC left that provision intact.

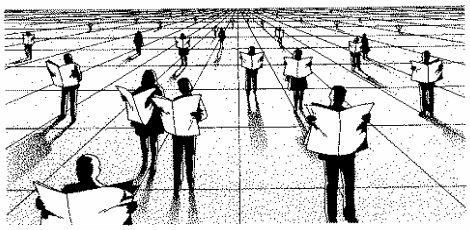
If you would like more information about the new rules, contact the FHH attorney with whom you normally work or Jennifer Wagner by phone at (703) 812-0511 or wagner@fhhlaw.com.

Stuff you may have read about before is back again . . .

Updates on the News

And Then There Were Five

At long last Jonathan Adelstein has been confirmed by the Senate as the fifth Commissioner, giving the agency a full roster for the first time in over a year. The newly-confirmed Commissioner comes from Capitol Hill, where he served as a legislative assistant to Senate Majority Leader Tom Daschle (D-SD) for the last six years. A native of Rapid City, South Dakota, Adelstein studied on both coasts, with undergraduate and masters degrees from Stanford and a stint at Harvard's Kennedy School of Government. Adelstein was nominated by President Bush in February to fill one of the Commission's Democratic seats, but wrangling among Senators over various appointments has kept his confirmation on hold until now. Ideally he will get settled in quickly -- because his term is set to expire in June, 2003, meaning that his initial tenure as a Commissioner will be shorter than his tenure as a Commissioner-in-waiting.



Underlying Information in Ownership Rulemaking Now Available

Slowly but surely the Commission is making available to the public some, but not all, of the information prepared by its working group and under consideration in the broadcast ownership rulemaking currently underway. However, if you want to check it all out, you will have to agree to the terms of a Protective Order which the Commission has also issued. That Order is designed to protect proprietary information licensed to the author(s) of some of the studies. You can find links to the studies at http://www.fcc.gov/ownership/studies.html.

(Continued from page 3)

Dirty Deeds, Not Dirt Cheap - A Chicago Area FM station has been fined $21,000 for three separate incidents of broadcasting indecent material during the morning rush hour. The first $ 7,000 fine resulted from an on-air personality rendering a ten sentence monologue about his preferences in pornographic films. The second $7,000 was tacked on to for a segment in which a female studio guest ingested a sexual stimulant and then engaged in foreplay with an unattractive (at least according to the transcript) man. Finally, as part of the same overall fine, the FCC hit the station with the last $7,000 for a lengthy conversation involving descriptions of sexual activities. As is repeated frequently in this column, a broadcaster's First Amendment protections are limited when indecent or obscene speech is involved. All clients should bear this in mind and frequently remind their on-air personalities of the FCC's vigorous enforcement.

NPR to the Rescue, Sort of - The December 2001 issue of this column reported that a noncommercial college radio station was admonished by the FCC for promoting an upcoming concert in exchange for free tickets the station promoted the concert. In its order the FCC also spent an entire paragraph stating that even if the station had not received the tickets, the station's anticipated increased membership from the promotion also would be deemed a benefit in exchange for the announcements. The station did not appeal the FCC's decision. However, National Public Radio and two other noncommercial organizations ***did*** seek review of the FCC's opinion. Specifically, NPR and its brethren complained that the extra paragraph about increased station membership was unnecessary in the Order. The FCC determined that neither NPR nor its two fellow complainants were adversely affected by the earlier ruling and therefore did not need to be heard at this stage of the matter. Nevertheless, the Commission decided on its own motion that the supposedly offending paragraph of the earlier order should be deleted. This action could be interpreted as indicating that a noncommercial station ***may*** properly promote a concert even if the station anticipates increased membership and enhanced economic benefit as a result. However, since the Commission did not offer any explanation for its deletion of the earlier paragraph, it is not clear exactly what the true meaning of that deletion is.

Antennas and Lights - From the steady stream of FCC fines for antenna and lighting problems, we pull five notable fines: (1) An encore performance of antenna problems resulted in a $13,000 fine for an AM station in Virginia. The station had been fined $3,000 in 2001 for not registering its antennas with the FCC. The fine was paid and the FCC returned the next year to find that the station continued to be in violation of the registration rules. The FCC was not amused and has issued a $13,000 fine this time around. (2) Elsewhere in Virginia, the FCC denied an antenna owner's second appeal of an $8,000 fine for failure to properly light its antenna structure.
(3) In Illinois, an AM/FM combo owner has been fined $13,000 for failure to register and properly lock its antennas. (4) A Puerto Rico AM station was fined $10,000 for failing to properly light its antennas. (5) A Pennsylvania AM station was warned it was in violation of FCC Antenna number posting and painting rules in April 2001. The FCC returned to the station six months after the warning was issued and found the problems were still there. The FCC was not pleased and has issued a $15,000 fine.

FM ALLOTMENTS PROPOSED -10/26/02-11/20/02

State	Community	Channel	Docket No.	Deadlines for Comments	Type of Proposal (i.e., Drop-in, Section 1.420, Counterproposal)
TX	Encino	283A	02-314	Cmts - 12/30/02 Reply-01/14/03	Drop-In
TX	Blanket	284A	02-351	Cmts - 12/30/02 Reply-01/14/03	Drop-In
NC	Glenville	289A	02-352	Cmts - 12/30/02 Reply-01/14/03	Drop-In
MI	Hart	231C3	02-335	Cmts - 12/30/02 Reply-01/15/03	1.420
MI	Pentwater	231C3	02-335	Cmts - 12/30/02 Reply-01/15/03	1.420
MI	Coopersville	287B	02-335	Cmts - 12/30/02 Reply-01/15/03	1.420
TX	Encinal	286A	02-349	Cmts - 12/30/02 Reply-01/14/03	Drop-In
TX	Sheffield	224C2	02-350	Cmts - 12/30/02 Reply-01/14/03	Drop-In

FM ALLOTMENTS ADOPTED -10/26/02-11/20/02

State	Community	Channel	Docket No.	Availability for Filing
TX	Hooks	231A	02-203	TBA
TX	Goliad	282A	01-155	TBA
TX	Snyder	235C3	01-144	TBA
TX	Floydada	291C3	01-144	None
TX	Dickens	294A	02-258	TBA
TX	Floydada	255A	02-259	TBA
TX	Rankin	229C3	02-262	TBA
TX	San Diego	273A	02-264	TBA
TX	Westbrook	272A	02-265	TBA
TX	Pampa	277C2	02-204	TBA
VT	Albany	233A	02-192	TBA
TX	Groom	223A	02-226	TBA
TX	Sonora	272A	02-227	TBA
TX	Spur	254A	02-228	TBA
OK	Vici	249A	02-205	TBA
TX	Big Lake	246A	02-206	TBA
TX	Leakey	275A	02-207	TBA

"TBA" means "to be announced". Newly-allotted channels are not likely to become available for filing until after the Commission has resolved certain difficulties with its broadcast auction processes. The Commission has provided no indication of when those difficulties may be resolved.

Notice Concerning Listings of FM Allotments

Consistent with our past practice, Fletcher, Heald & Hildreth PLC provides these advisories on a periodic basis to alert clients both to FM channels for which applications may eventually be filed, and also to changes (both proposed and adopted) in the FM Table of Allotments which might present opportunities for further changes in other communities. Not included in this advisory are those windows, proposed allotments and proposed channel substitutions in which one of this firm's clients has expressed an interest, or for which the firm is otherwise unavailable for representation. If you are interested in applying for a channel, or if you wish us to keep track of applications filed for allocations in your area, please notify the FHH attorney with whom you normally work.