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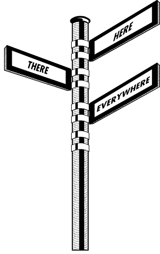
Memorandum to Clients

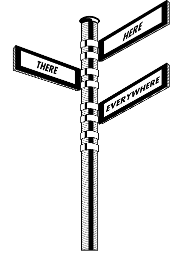
December, 2006 — *News and Analysis of Recent Events in the Field of Communications* — No. 06-12



Smooth moves II?

Revised FM/AM Mod Procedures Released

New rules take effect January 19, 2007



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Last month we reported that the Commission adopted rules to change the way in which it authorizes changes to the community of license of AM and FM stations. But, as often happens in such situations, the full text of the FCC's action had not been released at press time, so we did not have access to the full details of what the Commission had done. The text has since been released and we can now provide, in the words of Paul Harvey, the rest of the story…

First, as previously reported, the Commission will permit the submission of minor modification applications by AM and FM licensees (commercial and noncommercial alike) seeking to change their community of license *as long as the proposed daytime facilities are mutually exclusive with the station's presently authorized daytime facilities.* Such applications can be filed once the rules have become effective. As of this writing the effective date of the new rules is ***January 19, 2007***, although there is always a possibility, however slight, that that date might slip a bit. (Check with the FHH attorney you work with for updates in early January.)

> *Applicants proposing a change in community of license must demonstrate that there will be a "net service benefit" under the FCC's well-established policies on allotment priorities.*

When a minor change application proposes a change in community of license, the applicant must provide a detailed exhibit demonstrating that the change in the community of license will result in a preferential arrangement of allotments, and that there will be a "net service benefit" under the Commission's well-established policies on allotment priorities, priorities which have been in place since 1982.

The applicant will also need to demonstrate that the proposed city is a community for allotment purposes – unless, of course, the community happens to be well-established and generally recognized as a "community". A demonstration of "community-ness" typically includes such factors as a showing that the community is recognized in the U.S. Census (even if only as a "census-designated place"), that it has its own government, post office, public services, and that it includes businesses and other institutions usually found in communities.

One more consideration – as has been the case for years, the Commission is still insisting that a proposed change in community of license ***cannot*** result in the removal of a community's sole operating local service unless the proponent can demonstrate a compelling public interest benefit for such a move.

On the AM side, any AM licensee that received its license through the comparative process in an auction window – *i.e.*, by invoking a 307(b) preference – will have to include, in

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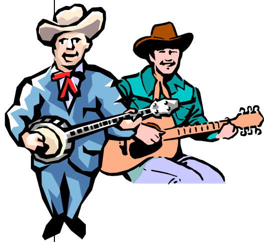

Put another nickel in the juke box . . .

Pickin' and Grinnin' in Music City

Ownershipalooza 2006: On the Road Again

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They fired up the tour bus, loaded up the gear, rounded up the roadies, and convoyed into Nashville this month, as the Commission took its Ownershipalooza 2006 Tour to Music City for its latest stop. [Editor's note to reader – insert reference to appropriate country song title here. Suggestions: *Wasted Days and Wasted Nights*, or maybe *Here's a Quarter, Call Someone Who Cares*]

As we have seen in past stops on the tour, the show tended to be more flash than substance. But there was plenty of flash. Country music luminaries cantillated sadly that today's radio is leaving their once chart-topping format behind. Big-name singers and songwriters spanning generations – from Porter Wagoner to Naomi Judd to Mr. Big's partner, John Rich – all tended to blame media consolidation for what they see as a downward spiral of country music as far as commercial radio is concerned.

The blame, according to Nashville's star-class, rests squarely on big consolidated media. Judd complained of heavy-handed playlists, reportedly imposed by Clear Channel, that limited her to the same 20 songs. Wagoner, who as host of the Grand Ole Opry, introduced Dolly Parton (who was recently honored by the Kennedy Center) to America, speculated that Parton's career could not have gotten off the ground in today's consolidated media marketplace. Several panelists bemoaned the fact that new, up-and-coming local country artists can't break through on the tight play lists said to be dictated by large multi-station conglomerates.

But at least some local station operators argued that purely local no longer makes economic sense. While most of a small station's advertisers have traditionally been local and, therefore, locally focused, one small group owner (with stations in five markets) observed that big box stores have been displacing locally owned businesses. This requires a consolidated sales force representing a cluster to effectively vie for revenues.

And so it went.

Meanwhile, back at the ranch, just before the curtain went up in Nashville, the FCC announced that it has arranged for ten "economic studies" to be conducted as part of its review of the ownership rules. According to the Commission, each of the studies will be "peer reviewed".

The studies will cover a lot of turf. Nielsen has signed on for the report on "How People Get News and Information". A gaggle of academics have been picked to study such topics as "Minority Ownership" (which will be addressed in two separate reports), "Vertical Integration", "News Coverage of Cross-Owned Newspapers and Television Stations", and "Effect of Ownership Structure and Robustness on the Quantity and Quality of TV Programming". An outside consulting group will address "Station Ownership and Programming in Radio", and inside FCC staffers will handle the rest of the topics, which include "Ownership Structure and Robustness of Media", "News Operations", and "Radio Industry Review: Trends in Ownership, Format, and Finance".

The Commission has not announced when these reports will be completed. But that seems to be the least of the questions swirling around the reports. And who's asking those questions? Why, none other than Commissioners Copps and Adelstein. Immediately after the release of the terse public notice describing the reports, the two Democratic Commissioners issued separate statements reacting with surprising, er, surprise.

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Focus on FCC Fines

By: R.J. Quianzon
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Five Commissioners confirm that RFR violations cost $10,000 - Many of the fines and enforcement actions reported on in this column are doled out by nameless FCC staffers relatively low in the bureaucratic pecking order. However, if a licensee is hit with a fine, the licensee has the option of requesting that the full Commission review the staff action – a bureaucratic gambit akin to "asking to speak to a supervisor." Several licensees did just that when they were hit with $10,000 fines for radio frequency radiation violations. The FCC Commissioners took years to review the actions and, in the end, supported their staff.

In May of 2002, Commission field inspectors checked out a tower near Carson City, Nevada. Two years later, in 2004, the FCC agents issued an order fining the Carson City station $10,000 for excessive radio frequency radiation. Similarly, in 2002, FCC agents inspected a tower farm near Los Angeles. Two years later, the agents issued $10,000 fines to four operators on the farm, based on allegedly excessive RF radiation. The Nevada operator and three of the four Los Angeles operators appealed the staff-issued fines to the full Commission. Earlier this month, after yet another two years, the Commissioners affirmed the decisions of their staff and ordered that the fines be paid. Of note, one of the three Los Angeles licensees – AMFM – simply paid the fine two years ago and was not part of the legal proceeding to get the fines reversed.

The FCC's radio frequency radiation guidelines have been in place for nearly a decade now and all licensees should ensure that they are in compliance. The recent decision by the FCC Commissioners to stand by their agents will likely serve as a green light for all agents to assess $10,000 fines for any radio frequency radiation violations. One may expect that FCC agents will soon be brandishing RF monitors like new toys during station inspections.

Use caution if trying to complete FCC forms yourself – The FCC has suggested that an Ohio man attempted to submit false certifications and made misrepresentations to the government when the man completed an on-line form incorrectly. The FCC has told the guy that he now faces a hearing before an FCC judge where he will have to explain why he used the wrong on-line computer form to try to change the name on a license from his father to his name.

The FCC tells the story of a man who kept logging into the FCC database so that he could modify his father's amateur license to specify him – *i.e.*, the son – as the licensee. Each time the guy tried to put the change through, the FCC's online system would initially accept the change but then, a couple of weeks later, would reject it, so that the online records would revert to their original form (with the father as the licensee). Almost immediately after each rejection, the son would re-submit the change. Finally, the FCC wrote the guy a letter explaining that he should not be using the form which he kept submitting. In turn, the man used the proper form to seek authority for change.

However, the FCC now claims that although the proper form eventually was used, a Judge needs to be sure of the licensee's character because he initially used the wrong forms. In addition to concerning himself with his aging father, the man now must contend with an FCC hearing on why he continued to use the wrong FCC form and whether the correct form should be accepted in light of the use of the wrong forms the first few times.

Felons need not apply – The FCC also revoked the license of a felon this month. A Louisiana man was convicted of robbery, released and convicted of another crime. After taking several years to review the matter, the FCC determined that these repeated felonies did indeed disqualify him from remaining a licensee, and his license was accordingly revoked.

Unauthorized transfer costs $8,000 per year – A tip was given to the FCC that an Arkansas station had been operated for five years by someone other than the licensee. The FCC looked into the matter and determined that an "oral time brokerage" agreement existed and that it improperly ceded control of the station to a party who was not a licensee. This month, more than two years after the original tip was received, the FCC fined the "seller" and "buyer" of the illegal transfer $20,000 each, in connection with a Consent Decree which the seller, buyer and FCC entered into. Essentially, the culprits copped a plea, paid the fine, and are back in business. Given the length of time between the report and the fine, the eventual cost for the illegal transfer works out to $8,000 per year.

Adrift in a stream of paper?

Streaming Report Forms Now Available

Filing deadlines in early 2007

By: Kevin M. Goldberg
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SoundExchange, Inc., the receiving agency for copyright royalties to be paid by radio stations streaming music or other copyrighted material (including the simulcast of a broadcast signal) over the Internet has made available all forms required to be filed by Internet radio stations in 2007 in conjunction with royalty fee payments for the year.

The first form any station streaming on the Internet needs to worry about is the "Notice of Use of Sound Recordings Under Statutory License" (*Notice of Use*) with the Copyright Office. Many streamers may already have filed this. It is a one-time-only filing which carries a $20 filing fee and simply notifies the Copyright Office, SoundExchange, and all copyright holders that the station has begun streaming and intends to participate in the statutory licensing program. Again, it is a ***one-time*** filing.

Stations that have filed the *Notice of Use* form with the Copyright Office (reflecting their intent to participate in the statutory licensing scheme for Internet radio) must in turn file two additional forms in order to comply with royalty fee payments for 2007. They are:

© A *Notice of Election* form that pertains to the station's classification as a commercial webcaster, small commercial webcaster, or noncommercial webcaster. This is due by ***January 31, 2007*** and should be filed for 2007 *even if the election was made in prior years*; and

© A monthly *Statement of Account* form that is due 45 days after the end of the month to which it pertains (in other words, by March 17 for January, April 14 for February, etc). Generally, however, only commercial webcasters will file this form on a monthly basis, as small webcasters and noncommercial webcasters have a one-time fee payment for the entire year.

The precise form to be filed will vary with the type of webcaster doing the filing, as follows:

Commercial Webcasters Transmitting Only One Channel

Most commercial radio stations streaming a broadcast signal over the Internet will fall into this category. The proper forms are:

© The "Notice of Election for Eligible Nonsubscription Transmission Service" form which must be filed by ***January 31, 2007***. This form chooses monthly payment through either the "per performance" or "aggregate tuning hour" method of calculation, with default to "per performance" or any previously elected method of calculation if not filed.

© The "Statement of Account" form which must be filed for each month of the year, within 45 days of the end of the month for which it is being filed. It is to be accompanied by a check for the amount of the royalty fee calculated for that month. The station must file one of two versions of the Statement of Account form, depending on whether it chooses the "per performance" or "aggregate tuning hour" method of calculating royalty fees in its "Notice of Election" form.

Small Commercial Webcasters Transmitting Only One Channel

A station may choose to be classified as a "Small Webcaster" if it had less than $1.25 million in gross revenues during the year 2006 and expects that to be true for 2007 as well. If the station elects to be classified as a Small Webcaster, it must file the following two forms:

© The "Notice of Election to Pay Royalties as an Eligible Small Webcaster" form which must be filed no later than the date of the station's first royalty payment for the year (likely to be the January royalty fee payment due on March 17).

© The "Statement of Account" form that must be paid according to the rates set especially for Small Webcasters (which do not offer much of a break from those paid by commercial webcasters, to be honest).

Non-Commercial Webcasters

Non-commercial webcasters, whether affiliated with an educational entity or not, are also afforded special status and reduced rates under the statutory license. This often takes the form of a one-time, flat fee payment that is independent of "per performance" or "aggregate tuning hour" rates unless the station exceeds the maximum listenership allowed for noncommercial stations under the rules. Noncommercial stations must file the following forms:

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Beat the Reaper!!!

FCC Reinstates License Despite 12-Month Silence

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From 1996 until late 2004, Section 312(g) of the Telecommunications Act was pretty much as clear cut as a statutory provision can be. The provision simply stated that if a broadcasting station failed to broadcast for a consecutive 12-month period, its license would be terminated automatically. The Commission did not have the discretion to take extenuating circumstances into account, so it didn't make any difference if the station was silenced by unforeseen personal difficulties, dramatic and extraordinary acts of nature, or any other reason – if the station was off the air for 12 consecutive months, that was all she wrote.

But, as we reported in the January, 2005 *Memo to Clients*, in late 2004 some wiggle room was carved into Section 312(g), thanks to Alaska's Senator Ted Stevens, who appeared to be trying to help a constituent who found himself subject to the unforgiving draconian sting of the law. With prodding from Stevens, the language of the statute was tweaked. While retaining the original stern language of Section 312(g), the revised version contained the convenient exception that the Commission "may extend or reinstate such station license if the holder of the station license prevails in an administrative or judicial appeal, the applicable law changes, or for any other reason to promote equity and fairness."

Only time will tell whether anything less than four hurricanes will be enough to convince the FCC to refrain from pulling the plug.

That, obviously, provided the Commission with considerable leeway to be nice guys . . . if the Commission wanted to.

In the intervening two years, however, the FCC has shown no such tendencies. Until, that is, this month, when the Commission invoked the magic phrase ("for any other reason to promote equity and fairness") to breathe the breath of life back into a station whose license had been declared expired and whose call signs had already been deleted.

The station in question – an FM that was moving to Vieques, Puerto Rico, from Christiansted, Virgin Islands – had passed from this mortal coil in December, 2000, an automatic victim of being off the air for 12 consecutive months. The licensee appealed its death sentence to the Commission, which – after the better part of six years – ultimately concluded that the station should be spared. But not for the reasons advanced by the licensee.

In fact, the Commission rejected all of the licensee's various legal arguments. But the Commission reinstated the station's authorizations nonetheless, pursuant to its discretion under the revised Section 312(g).

According to the Commission, reinstatement was justified because of the obstacles which had prevented the licensee from completing construction of certain modifications to the station's facilities during the three-year construction window for those modifications. In particular, the station is located in an area frequently within the path of hurricanes. And sure enough, four hurricanes had, in fact, damaged the station's site, with one destroying the station's tower entirely. And after that tower had been rebuilt, a trio of hurricanes roughed it up again.

In reinstating the station's license, the Commission also had to address the ineluctable truth that things happen when time passes. For example, the station's owner had passed away in the six-year period during which the station was in a kind of regulatory suspended animation. And the opportunity for Puerto Rico (or Virgin Islands) stations to file for renewal had come and gone. So the grant was subject to various conditions requiring the licensee to get its regulatory house in order. But such housekeeping chores are relatively minor concerns in comparison to the major achievement that the station has been brought back from the dead.

This case marks the third reported time that the new Section 312(g) language has been invoked. The first case, which involved the beneficiary of Senator Stevens's good offices, obviously resulted in reinstatement of the licenses in question. But the only other case (which involved an Arkansas AM station) went the other way, with the Commission declining to give the guy a break. (We described that case in the March, 2006 *Memo to Clients.*)

It would be nice to think that the most recent case re-

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Attention all you website hosts:

Defamation Dangers Decrease

Potential perils of postings petering out

By: Kevin M. Goldberg
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The Internet has evolved from Geek Heaven in the early 1990s to mainstream (and maybe even dominant) popular medium in the 2000s. Increasingly, traditional media companies, including broadcasters and print publishers, have staked out their turf on the Internet, dressing their websites up with all manner of the latest-and-greatest bells and whistles to attract and hold eyeballs that might otherwise stray elsewhere.

One feature which many websites offer is the opportunity for Joe and Loretta Netsurfer to upload their two cents' worth for posting on the site. But such uploading opportunities give rise to potential liability – for example, what if Joe and Loretta post libelous remarks? Is the site owner possibly liable and, if so, what can the site owner do to avoid liability?

In view of the "lawlessness" of the Internet (as then Attorney General Janet Reno described it in the late 1990s), such questions have tended to be a matter of considerable concern. After all, defamation might be the most prevalent violation of law which occurs on the Internet, as well as being the most dangerous. Reputations can be damaged in an instant, yet corrections, clarifications or deletions do little when the original statement is still floating through cyberspace.

Fortunately, though, it appears that the law is finally catching up with, and sorting out, questions of Internet-spawned liability. The following provides a brief history of what has happened and what is happening in this area. It is intended to provide a wake-up call and a measure of comfort to anyone whose website includes uploaded commentary from third parties.

Since the dawn of the Internet, virtual communities have brought together pundits from Australia to Alaska, Vladivostok to Valparaiso. Mainstream media have jumped on board, adding blogs, comment areas and full discussion boards as part of their Internet presence. By reaching out to readers, listeners and viewers in this way, do they also invite liability for libelous content that community posts on the paper's or station's official website? In light of a recent decision by the California Supreme Court in the case of *Barrett v. Rosenthal*, the answer has all but moved to "no", as the court continues a trend which offers legal protection for those who passively and now even actively publish unsubstantiated rumors, vitriolic opinions, and outright lies of others.

Today's discussion forums are a far technological cry from the early "bulletin boards" run by the likes of Prodigy and CompuServe. But the idea remains the same: a lot of people post a lot of things about other people, some of which is true, much of which is not. And the same problems arise: those who are the subject of untruths want to clear their name and often resort to legal means to do so. The question becomes who, beyond the original writer, can be held accountable. Much in the same way that technology has evolved, so too has legal precedent, both allowing the Internet to continue to flourish as a model of free expression.

Defamation might be the most prevalent violation of law which occurs on the Internet, as well as being the most dangerous. Fortunately, it appears that the law is finally catching up with, and sorting out, questions of Internet-spawned liability.

Prodigy and CompuServe were both sued for defamatory postings that occurred on their systems, with different results in each case. In 1991, CompuServe was sued for comments made by a contributor to its "journalism forum." CompuServe prevailed because the Court concluded it was just a "distributor" of the content on its forums.

In defamation law, the courts have traditionally distinguished between (a) "distributors", who merely hand out material over which they have no control, much like a library, or the old-fashioned newsboy standing on the corner, and (b) "publishers", who wield some measure of control over the content of what they provide to the public.

In the CompuServe case, a crucial consideration was the fact that CompuServe exercised little or no editorial control over any postings and therefore had never "adopted" them in any sense.

Four years later, a state court in New York reached the exact opposite conclusion with regard to Prodigy. Though also a relatively passive host for the statements

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of others, Prodigy was held liable for one of those statements that was proven to be defamatory. Rather than likening Prodigy to a "distributor" of content, the court held that Prodigy was akin to a "publisher" because it actively screened and edited postings, even though most of this screening and filtering was through automatic means. Still, Prodigy employed people who could exercise a manual, emergency delete function and Prodigy had held itself out as family-friendly and "safe".

So there was a definite difference of opinion. Were website hosts "publishers" (or, more accurately "republishers") or were they simple "distributors"? Could an active editing function transform a distributor into a publisher?

By 1996, Congress got into the act. It passed the Communications Decency Act (CDA), most of which was aimed at preventing minors from accessing pornography on the World Wide Web. While those provisions were eventually struck down by the United States Supreme Court, Section 230(c)(1) of the CDA survives to this day. It states:

> No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider. (230(c)(1)).

So Congress clearly acted to provide to ***both*** distributors ***and*** publishers immunity against defamation claims.

Lingering questions still remained, however, the most prevalent of which was "who is a provider of an interactive computer service." Many believed that this was simply the passive content providers, the Prodigies and CompuServes of the world, while others believed it included anyone who included a discussion area alongside its own content.

Prodigy and CompuServe were replaced by America Online as the venue for online exchange of information, so it is no surprise that the first major lawsuit over the meaning of Section 230 of the CDA was *Zeran v. America Online* in 1997. In that case, the court held that Section 230 created a "federal immunity", as a result of which "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions – such as deciding whether to publish, withdraw, postpone or alter content – are barred." The court's reasoning was simple: if only those website operators who actively screened or edited content could be subject to lawsuits, no one would undertake that function.

But even after *Zeran*, many still restricted their editing functions, believing that website operators who were fully engaged in editorial oversight of discussion areas would transform themselves into publishers. They often remained passive until notified of a potentially defamatory statement and only then acted to remove the posting.

Enter the California Supreme Court in *Barrett v. Rosenthal*, decided in November 2006. In this case, the plaintiffs owned web sites related to health fraud. The defendant ran an Internet discussion group. The plaintiffs alleged that the defendant libeled them by reposting defamatory statements on the defendant's discussion group, some of which occurred *after* the defendant was notified that the statements were false and defamatory.

> *What does this mean for the newspaper or broadcast station that hosts (or wants to host) discussion on the Internet? Basically: "Go for it."*

The court extended the reach of Section 230's immunity to protect even the most active of web hosts and – for the first time – those who repost a defamatory statement in part or in whole on the Internet. The court noted that "distributors" often become "publishers" rather quickly – after all, the second that a passive website host is notified of a potentially defamatory statement, he or she is transformed into a publisher. In the court's view, immunity must be provided to *all* website operators in order for the Internet to continue to flourish. Any other interpretation would result in excessive deletion of messages, willful ignorance of content by website operators and the manufacturing of defamation claims by potential plaintiffs who feel they have been unduly aggrieved.

What does this mean for the newspaper or broadcast station that hosts (or wants to host) discussion on the Internet? Basically: "Go for it." Though *Barnett v. Rosenthal* is technically only applicable in California, it reflects a logical extension of the law as it has evolved since 1996 which holds that only the original speaker – if that person can be found – can be held liable for defamation. Any other "users" of the site that become involved with the statement after its original utterance or writing are immune. This includes those who repost the statement on an interactive computer site. It also includes the host of that site, regardless of whether the site operator chooses to remain completely hands off or chooses to actively screen, delete or edit those posts.

Perhaps the most interesting effect, though, is that it means a media entity could, both in traditional format and on the Internet, publish a letter to the editor or broadcast a

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Another good reason to avoid litigation

New Court Rules Address Preservation, Disclosure of Electronic Files In Litigation

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After seven years and one major revision, the latest amendments to the Federal Rules for Civil Procedure became effective on the first of December. So what, you ask? As it turns out, the new rules could affect you if you ever wind up involved in litigation in a federal court.

Included in the revisions are new rules for dealing with electronically stored information during discovery, so-called "e-discovery." Of particular concern here is the fact that the new e-discovery rules set out a roadmap for how electronically stored information can be used during the "discovery" portion of litigation.

As any of you who have had the misfortune to find yourselves in litigation probably know, one of the most burdensome aspects of that process involves "discovery". "Discovery" is the pre-trial phase of the proceeding during which each side has the right to ask the other side to cough up all information, documents, witnesses, etc. that might be relevant to the issue(s) to be litigated. Contrary to the mythical trial process depicted on *Perry Mason* and innumerable other TV series, the real-world trial process is designed to prevent any sudden surprises popping up during the trial. "Discovery" is the main device through which that goal is accomplished. The idea is that each side of the litigation should know what cards the other side is holding before the trial starts, so that the issues can be narrowed and the trial process streamlined as much as possible.

As a result, when litigation is commenced, one of the first major chores is answering the other side's discovery requests, which normally include requests for all relevant documents of any kind that a party (including the party's employees, agents, etc., etc.) may have anywhere in their files.

Historically the search for responsive documents involved a tedious review of all paper files. But with the advent of electronic data storage, courts have had to grapple with a variety of new issues. For example, we all know (from the Enron episode, and before that, the Ollie North/Fawn Hall episode) that shredding documents can get you into trouble. But what about erasing electronic files (for example, pesky emails) – isn't that pretty much the same type of conduct?

It is important to keep up-to-date contact information for former IT managers, as they may be required to give evidence of what the routine business practice was for overwriting or storing electronic data at some previous time which happens to be relevant to discovery in an ongoing lawsuit.

The newly revised federal rules reflect an effort to begin to address such questions. While this is an area which is still evolving, here are some considerations which businesses should bear in mind, even if they are not currently involved in any litigation.

Businesses should have a general policy relating to electronic document retention and storage. A key provision of the new e-discovery rules is the limited "safe harbor" provision in Rule 37(f) that shields a litigant from sanctions for overwriting electronically stored information. The rule acknowledges that it is impossible to store every bit of electronic data that a firm creates in its day-to-day operations, and that electronically stored information is inevitably overwritten in a routine manner. An example of discoverable, but routinely overwritten, electronic information is "metadata." (Metadata is the information that a computer stores about a document such as the last person who used it, the date it was last modified, etc.) This information, which can be highly relevant to litigation, is often times automatically overwritten every time the document is accessed, and this usually cannot be prevented.

Another example of routinely overwritten electronic data is that which is stored on backup tapes. In general, businesses do ***not*** have a duty to preserve backup tapes for all electronic information related to their business dealings, ***unless*** they are aware of potential litigation. Therefore, if it is the general practice of a business to overwrite their backup tapes, or drives, on a weekly basis, there is no

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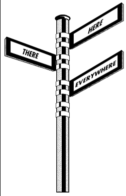

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any change-of-community-of-license application, a showing that the city it is moving to would have also been the dispositive choice among the mutually exclusive parties.

The Commission will continue to use the *Tuck* analysis to determine if the proposed community can be considered to be sufficiently independent under established precedent.

Parties with pending petitions for rulemaking will be permitted to withdraw their petitions and file minor modification applications instead.

Finally, the Commission will require that notice of any requested change in community of license first be published in the Federal Register. The Media Bureau will then be prohibited from processing the application for at least 60 days thereafter.

In light of these changes, the Commission decided to delete the FM Table of Allotments from the Commission's rules, and, instead, will maintain a list of vacant allotments on its website. Parties will still be required to file petitions for rulemaking to propose new "drop-in" allotments, but all other technical parameters will be maintained in the Commission's Consolidated Data Base Search system (CDBS). The Commission will also now permit petitions to be filed through its electronic filing system (ECFS).

As noted above, the new rules won't become effective until mid-January, at the earliest. Since the FCC has had FM modifications in a freeze mode for some time, it is reasonable to assume that there is considerable pent-up interest among FM licensees intent upon modifying their facilities. As a result, it is also reasonable to assume that there will be a flood of minor modification applications once the rules become effective, and that some of those applications may, and probably will, contain conflicting proposals.

It is also reasonable to assume that there will be a flood of minor modification applications once the rules become effective, and that some of those applications may contain conflicting proposals.

That, in turn, gives rise to a whole new set of potential problems. In adopting its auction rules, the Commission previously decided that mutual exclusivity among minor change applications would not be resolved through auctions, but would instead be resolved through technical amendments. However, it is easy to imagine that at least some mutual exclusivities will not be easily resolvable. We shall be watching closely to see how the Commission deals with this situation, and will provide on-going coverage of developments.

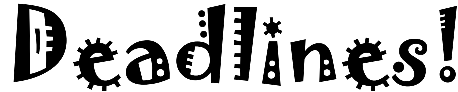
(Continued from page 5)
flects a willingness by the Commission to be more charitable when it comes to seemingly dead stations. But only time will tell whether anything less than four hurricanes will be enough to convince the Commission to refrain from pulling the plug.

Of course, the best approach for licensees is to avoid the need to rely on the Commission's good nature in this area, and that can be achieved most easily simply by staying on the air. And if, for whatever reason, your station does happen to go down, it is important to take prompt and diligent steps to get it back up and running as soon as possible and, in any event, before the 12-month death knell chimes.

(Continued from page 8)
duty to preserve the overwritten information until it becomes clear that they may be involved in a lawsuit – and consequently, a litigant will not have sanctions imposed for failing to provide properly requested electronically stored information if this information was lost because of the good faith, routine operation of the litigants IT system.

But be aware, good faith is subjective, and would likely require the litigant to suspend the routine overwriting of information once he/she reasonably becomes aware that the information could possibly be relevant to potential litigation. For instance, if a company routinely overwrites backup tapes once a week, but a contract dispute arises, the overwriting practice should be suspended so that new relevant information pertaining to that dispute is erased. Additionally, it is important to keep up-to-date contact information for former IT managers, as they may be required to give evidence of what the routine business practice was for overwriting or storing electronic data at some previous time, that happens to be relevant to discovery in an ongoing lawsuit.

In a perfect world, none of us would ever get involved in litigation and, thus, none of us would ever have to deal with discovery questions. But since we don't live in a perfect world, there is at least a reasonable chance that, at some point, we will all have to start sorting through our various files in order to answer discovery requests. As the Boy Scouts say, be prepared.



January 2, 2007

Children's Television Programming - For all *television* stations, the Commission's new rules with regard to additional core educational programming to be aired on multicast programming streams, limits on display of website addresses, change in the definition of commercial matter, and host selling restrictions based on mentions of websites during commercial time go into effect.

January 10, 2007

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

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 must be placed in the public inspection file.

Issues/Programs Lists - For all *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.

FM Auction 68 - Auction of FM construction permits previously offered but unsold will begin.

February 1, 2007

Television Renewal Pre-Filing Announcements - *Television* stations located in **Delaware** and **Pennsylvania** must begin pre-filing announcements in connection with the license renewal process. **Delaware** and **Pennsylvania** *Class A television* stations and *LPTV* stations originating programming also must begin pre-filing announcements.

Television/Class A/LPTV/TV Translator Renewal Applications - All *television*, *Class A television*, *LPTV*, and *TV translator* stations located in **New Jersey** and **New York** must file their license renewal applications.

Television Renewal Post-Filing Announcements - All *television* stations located in **New Jersey** and **New York** must begin their post-filing announcements in connection with the license renewal process, and continue such announcements on February 1 and 16, March 1 and 16, and April 1 and 16.

EEO Public File Reports - All *radio* and *television* stations with more than five (5) full-time employees located in **Arkansas**, **Kansas**, **Louisiana**, **Mississippi**, **Nebraska**, **New Jersey**, **New York**, and **Oklahoma** must place EEO Public File Reports in their public inspection files. For all stations with websites, the report must be posted there as well. Per announced FCC policy, the reporting period may end ten days before the report is due, and the reporting period for the next year will begin on the following day.

Radio Ownership Reports - All *radio* stations located in **Kansas**, **Nebraska**, and **Oklahoma** a must file a biennial Ownership Report (FCC Form 323 for commercial stations or Form 323-E for noncommercial stations). All reports must be filed electronically.

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

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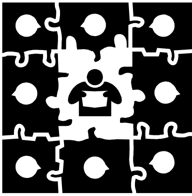
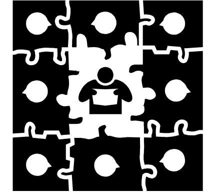


"Cell-a-vision" gets a real world test

FCC OKs DTV DTS STA



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In early December, the FCC granted a Reading, Pennsylvania, television station special temporary authority to begin operating a "distributed transmission system" (DTS) for its digital television (DTV) signal. The grant of this six-month STA is good news for proponents of this new transmission method. The FCC doubtlessly will take the experience of this station into account as it evaluates other STA requests and continues to develop policy in this area.

DTS operations use several synchronized transmitters spread around a station's service area – much like on-channel booster stations. Unlike analog booster stations, which can generate a significant amount of self-interference, DTS operations rely on "adaptive equalizer" circuitry in DTV receivers to cancel or combine the multiple signals to produce a single signal. Proponents of DTS technology claim that it improves spectrum efficiency by increasing service levels while maintaining or reducing interference. The lower power levels and lower towers used by DTS transmitters allow for greater flexibility in locations, a particular boon in urban and suburban areas.

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The FCC approved the use of DTS technology in principle in the 2004 Second DTV Periodic Report and Order. (We described that action in the January, 2005 *Memo to Clients.*) In that Order, the FCC provided that DTV stations wishing to use DTS should apply for STAs, which would be evaluated on a case-by-case basis under a set of interim guidelines. In November, 2005, the interim guidelines were clarified and the FCC began a rulemaking proceeding to establish long-term rules and standards for DTS operations. This rulemaking proceeding remains pending at this time.

In this case, WTVE-DT, Channel 25, Reading, Pennsylvania, proposed to use eight transmitters within WTVE-DT's maximized construction permit contour. The transmitters ranged in power from as little as 0.11 kW to as much as 126 kW. The proposed facilities, the station claimed, would increase the DTV population served, while decreasing interference to neighboring facilities. The FCC reviewed the proposal and found that the proposed DTS operation was unlikely to generate impermissible interference. Moreover, the FCC specifically noted that information obtained from the station's STA operations would be valuable in evaluating the future use and deployment of DTS technology.

The FCC warned the station, however, that the station's DTS operations would be subject to the eventual rules produced by the DTS rulemaking proceeding. Thus, WTVE-DT may need to rebuild its DTS facilities if required to do so by the final DTS rules. And while that rulemaking is pending, any service beyond WTVE-DT's authorized maximized service contour will be considered secondary in nature (that is, it will not be protected from interference).

We will continue to monitor developments in this area. Stations interested in conducting DTS operations are encouraged to discuss the matter with qualified engineering consultants as well as their friendly neighborhood communications counsel.

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February 5, 2007

FM Auction 70 - Upfront payments for mutually exclusive short-form applicants to participate in the auction must be paid by wire transfer by 6:00 p.m. EST.

March 7, 2007

FM Auction 70 - Auction of FM construction permits begins.

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

Updates on the News

Props to the Commissioner – Oh, sure, sometimes this column raises an eyebrow or wags a finger at the foibles of the FCC and, particularly, the Commissioners. But every now and then a word of praise is in order, and now happens to be one of those times (even though it involves a non-broadcast matter which we would ordinarily not cover in these pages). We're talking about the decision of Commissioner Robert McDowell to recuse himself himself from voting on the proposed AT&T/BellSouth merger over on the telephone side of the universe. Before joining the Commission last Spring, McDowell had worked for a trade association of "telecommunications entrepreneurs", many of whom competed against AT&T and BellSouth. During his confirmation process, considerable attention was paid to that prior work – and particularly what effect, if any, it might be expected to have on any vote he might be called upon to make relative to matters concerning AT&T, including the possible AT&T/BellSouth deal. To put everyone's minds at ease, McDowell at that time assured one and all that he would operate under the highest ethical standards. We went even further and signed an "Ethics Agreement" in which he committed to disqualify himself for one year from voting on any matter in which his former employer had been a party. The AT&T/BellSouth merger was just such a matter.

McDowell's disqualification left the matter to be decided by the four remaining Commissioners, who are apparently split 2-2 on the issue (presumably along party lines). Unable to break the impasse, in early December Chairman Martin tried to rope McDowell back into the proceeding by having the FCC's General Counsel prepare a memorandum of law addressing whether McDowell's promises during his confirmation process really should be deemed a bar to his participation in the AT&T/BellSouth deliberations. Many observers figure that Martin, looking for a political (*i.e.*, Republican) ally to break the tie, expected that if McDowell (the third Republican on the Commission) were free to vote, he would side with Martin. The GC's memorandum, not surprisingly, concluded that McDowell could participate in the vote.

So the way was clear for McDowell to accept the GC's opinion, un-disqualify himself, and cast the deciding vote. But to his credit, McDowell would have none of it. Instead, in no uncertain terms he stood by his word that he had given during his confirmation, and he declined to participate.

Since Chairman Martin was clearly pressing for McDowell to join the deliberations, McDowell's resistance to that pressure required a fair amount of courage. But McDowell did it the right way. He undertook his own analysis of the ethical questions at issue, he consulted not only FCC counsel but other governmental and private ethics authorities, and he concluded that he could not participate. And then he said so, clearly, unequivocally, and with a full and forthright explanation that left nothing to doubt or speculation.

This is the way we should expect our governmental officials to act, and we commend Commissioner McDowell for it.

Return to the white open spaces – In the white space proceeding, you may recall, the FCC has preliminarily decided to allow new low power devices to be used in the broadcast TV spectrum on channels/frequencies not being used for authorized service. In connection with that decision, the Commission said that it planned to test such low power devices to "assess potential interference". Let the games begin. The Commission has now expressly invited folks to submit "prototype TV band devices" the FCC's lab for testing. The RSVP date on the invite is January 19. It's unclear when and how (if at all) the results of the testing will be announced.

Comment deadlines – If you're planning on filing reply comments in the ownership proceeding, you can breathe a bit easier. The deadline has been extended to January 16. You can use the extra time to gear up to file comments relative to the Clear Channel transfer application. As you have probably heard, Clear Channel is going through some, er, re-structuring, which requires prior FCC approval. They filed an application for that approval recently – an application which weighs in at a whopping 807 pages. If you want to take a gander at it, check it out at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-06-2531A1.pdf. And once you've taken that gander, if you feel like chipping in your two cents' worth, you can file comments about the application up to and including January 19.

(Continued from page 4)

© The "Notice of Election to Pay Royalties as a Noncommercial Webcaster and/or Noncommercial Educational Entity", which must be filed by ***January 31, 2007***. This form simply notifies SoundExchange that the station intends to be classified as noncommercial for 2007. It must be filed regardless of whether the election was made in previous years.

© The proper "Statement of Account" form, depending on whether the station is affiliated with an educational entity or not. This form will likely be filed only once – by March 17 for the month of January – unless the station exceeds the maximum limit of 146,000 aggregate tuning hours for the month (roughly 200 listeners receiving the stream for every hour of the month). No further filings are needed unless this number is exceeded in a month. If the 146,000 aggregate tuning hour maximum is exceeded, the station must, according to the "per performance" or "aggregate tuning hour" option chosen on first filing of the form for the year, pay the overage for the month. Note that there are two distinct Statement of Account forms applicable here – the one to be used depends on whether the station is affiliated with an educational entity or not.

While timely filing of these forms will keep a station in compliance with the rules governing payment of royalty fees, the forms discussed in this article have no relation to the separate (and extensive) recordkeeping rules.

We can help you sort out which forms you will have to file, depending on your particular situation, and we can provide you with links to the appropriate forms. Let us know if you would like our help.

There are two additional considerations for all Internet radio stations. First, the forms above apply only to those entities streaming a single station. If you are streaming multiple signals through the same website, you need to contact us to learn about the proper forms to use. Second, a proceeding is pending to amend the royalty rates that are now in effect. That could be completed in the Spring, 2007, and will require new filings by all stations to reflect the adjusted rates. We will of course let you know if and when this occurs.

And finally, while timely filing of these forms will keep a station in compliance with the rules governing payment of royalty fees, the forms discussed above have no relation to the separate (and extensive) recordkeeping rules (which were outlined in the October 2006 *Memo to Clients*). Those rules are scheduled to go into effect soon and stations will be required to make the proper quarterly filings as well.

We realize this is somewhat complicated, so please do not hesitate to contact a Fletcher, Heald & Hildreth, P.L.C. attorney if you have any questions about your filing status or need assistance in completing and filing these forms.

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commentary from non-station personnel , be immunized for the Internet content, but still be held liable for the traditional print or broadcast version. Does this mean that, as online becomes the featured medium for many content providers, they will also protect themselves by soliciting more content from freelancers and other independent contractors at the expense of official employees? That would seem to be one protective reaction.

For the time being, though, it does appear that the law is developing in a way intended to encourage, rather than discourage, the use of the Internet to transmit the widest range of communications.

FHH - On the Job, On the Go

On January 9, **Frank Jazzo** and **Harry Martin** will be speaking at the Tennessee Association of Broadcasters' annual convention in Nashville. Joining them on the panel will be **Roy Stewart**, Senior Deputy Chief of the FCC's Media Bureau.

From January 16-19, **Lee Petro** will be attending the WCA Symposium in San Jose, California.