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

Memorandum to Clients

November, 2007 *News and Analysis of Recent Events in the Field of Communications* No. 07-11

Let's get Marty McFly, hop into Doc Brown's DeLorean, and head

BACK TO THE FUTURE!!

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Back to the future is where the Commission appears to be taking the television industry. The FCC has announced a major overhaul of the quarterly issues/programs list requirement for TV licensees. Instead of the quarterly report which stations have been required to compile (and place in their public inspection files) for a couple of decades, the Commission will now require the completion – and submission to the FCC – of a quarterly, FCC-designed form listing "various types of programming", including: local civic programming, local electoral affairs programming, public service announcements and "independently produced programming".

It appears that we have fallen into some bizarre time-warp which has delivered us back to the pre-deregulation days of the late 1970s.

But wait, there's more.

The new form will also require "information about efforts that have been made to ascertain the programming needs of various segments of the community", as well as information "regarding closed captioning and video described content".

Over and above that new quarterly filing, the FCC is also requiring TV licensees to make their local inspection files ("with the exception of their political file") available online if they have Internet websites.

And finally, TV licensees will have to notify their audiences about the location of their public files twice daily.

And did we mention that these new rules are supposed to take effect within 60 days of their publication in the Federal Register?

It appears that we have fallen into some bizarre time-warp which has delivered us back to the pre-deregulation days of the late 1970s, with extensive program-related record-keeping and reporting combined with some kind of formalized "ascertainment" effort in which the licensee is expected to confer with representatives of various segments of the community to get their views on local needs and interests. Commissioner McDowell, expressing concern that these retrograde measures indicate that the FCC is "heading in the wrong direction", dissented.

The full text of the Commission's decision has not yet been released as of this writing, so it's impossible to know just now precisely how far the rules will drag the TV industry back in the direction of content regulation. But the public notice is ominous. In separate concurring statements, both Commissioners Copps and Adelstein rattled the regulatory saber (Copps: "no public interest performance, no license"), suggesting that the new reporting requirements may just be a first step in the direction of more extensive programming review by the agency.

Of course, before that could occur, the Commission would

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The Scoop Inside

I am LPFM, here me roar . . .

LoPo FM's Get Some Protection

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In a move which it has said is designed to enhance the long-term viability of low power FM (LPFM) stations and encourage new voices, the FCC has adopted new rules and has proposed further additional new rules which will afford LPFM stations near-primary service status and which provide certain other changes and clarifications. While these new rules will undoubtedly advance the explicitly stated goal of protecting LPFM, they also represent a significant turning away from previous policies which had established LPFM as a secondary service only.

At this point, the full details of the new rules and proposals are not known, as the item was adopted at an open meeting just before press time, and only a Public Notice is available at this point. We will be able to update readers with further details once the text is released. The Commission has summarized the changes already adopted and the further proposals made, however.

In the area of ownership, the transfer of LPFM station licenses will now be allowed, subject to certain, unspecified restrictions. This provision represents a significant liberalization of the treatment previously afforded LPFM stations. Moving in the opposite direction, the Commission also is "reinstate[ing]" the rule which requires all LPFM licensees to be local and limits LPFM ownership to one station.

Continuing with the theme of tightening regulations somewhat, the practice of airing repetitious, automated programming has been ruled out as meeting the local origination requirement for LPFM operations. Further, in a move which might alleviate problems with limited programming, the Commission also has encouraged voluntary time-sharing agreements among LPFM applicants.

These clarifications around the regulatory edges, however, pale in comparison to the more radical policy shift which limits the responsibility of an LPFM station to resolve interference caused to subsequently authorized full-service stations. In other words, if an LPFM station is in place, and either a new or modified full-power FM station is built as authorized but receives interference from an LPFM station, the LPFM licensee now will have only limited responsibility to resolve the problem. Clearly, this change is the antithesis of what is normally expected for secondary services such as LPFM, which previously have been allowed to cause interference to no primary stations and have been required to accept interference from all primary stations. In addition, the Commission has put in place a procedural framework for considering short-spacing waiver requests for LPFM stations and a going-forward displacement policy for LPFM.

In a further demonstration of the ascension of LPFM within the hierarchy of broadcast service, the Commission also imposed an "application cap" of 10 on FM translator applications filed during the 2003 window. As you may recall, some 13,000 translator applications were filed at that time, some 8,000 of which are still pending. Since FM translators use the same spectrum as LPFM stations, the pendency of those translator applications would preclude applications for LPFM stations on the same frequencies in the same locations as the translators. In an effort to clear some of that spectrum for LPFM use, the FCC apparently will require applicants with more than 10 translator applications still pending from the 2003 window to pick 10, and only 10, applications to continue to prosecute. The rest will presumably be dismissed. Because the full text of the FCC's decision is not yet available as of this writing, we don't know precisely

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Focus on FCC Fines

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CBS pays $300,000 "fine" for not suspending employees – Readers may recall that in 2004, Viacom paid a bulk fine of $3.5 million dollars to settle various indecency complaints filed against several stations that it owned. As part of that fine, Viacom agreed to adopt a company-wide policy regarding the broadcast of indecent materials. When Viacom evolved into CBS, CBS television stations were also subject to that company-wide policy and were required to follow agreed-upon employment procedures.

One such employment procedure required each station to suspend and investigate its employees under certain circumstances. Specifically, if the FCC issued a notice of apparent liability (NAL) to a CBS station regarding indecency, that station would immediately have to suspend any employee involved in the decision to air the allegedly indecent material. In addition, a suspended employee would have to undergo remedial training and could not return to work unless he or she satisfied management that he/she really does understand the FCC's indecency policies. In other words, the mere issuance of an NAL would require CBS to suspend employees and send them through training until they had "learned their lesson."

Of course, the issuance of an NAL does ***not*** reflect a final determination that the target station has in fact violated the rules. To the contrary, an NAL is an early step in the process – akin to an indictment in the criminal system. A lot has to happen after that step before actual guilt is finally determined and the ax falls. So it's a bit odd that CBS would commit itself to take such drastic personnel measures at that premature stage. But that's what it did.

And sure enough, in March, 2006, the FCC issued an NAL to certain CBS stations concerning an episode of *Without A Trace*. The NAL asserted that the nationally broadcast show contained scenes of a teenage orgy which constituted indecency; the FCC proposed a multi-million dollar fine against CBS. Three months after the notice was issued, a CBS affiliate in Utah filed to renew its television license. Two people objected to the renewal of the Utah license. Interestingly, their primary gripe was not that the station had broadcast indecent material, but rather that CBS did not suspend its employees immediately after the March 15, 2006, FCC notice was issued, pursuant to the 2004 agreement.

In response, CBS argued that its 2004 agreement applied to live programming (along the lines of the Howard Stern radio show or Imus in the Morning), but ***not*** to scripted, pre-produced programming like *Without A Trace***.** In other words, the issue did not require a determination of whether or not the programming was indecent; instead, it required a determination of whether CBS had complied with its contractual obligations (and the employment procedures which it had adopted pursuant to those obligations). The upshot here was a further settlement agreement and consent decree. CBS paid a $300,000 fine and promised to continue to use the suspension and employment procedures for another three years. In return, the FCC renewed the CBS license and stated that it would not investigate the employment matter for any other CBS affiliate.

FCC goes after manufacturers – The FCC has hit a television manufacturer with an almost $8 million fine for failing to install the V-Chip in its sets. Television stations are familiar with the program rating descriptors that are broadcast as part of their transmissions. The FCC's latest action is designed to make sure that there are actually televisions available in the marketplace capable of receiving and displaying the descriptors that stations are beaming out. As of March, 2006, most new digital televisions with 13-inch or larger screens must have V-chips installed so that diligent parents can access the program descriptors and block programs which they deem unacceptable.

As of this latest FCC decision, the fine for not having a V-Chip installed in a new television set is up to $62.50 per unit. Although the television manufacturer sought confidentiality of certain information in this proceeding, the total fine divided by $62.50 indicates that it was hit with a fine for all of the roughly 125,000 sets that it sold after March 2006. This is the first time that the FCC has issued a fine for V-Chip violations and the significant per unit fine will likely be effective in ensuring that manufacturers take notice. Alternatively, the consuming public can expect to pay an additional 63 bucks for a TV that does not have a V-Chip.

A low power radio manufacturer faces a fine of $7,000 for selling uncertified equipment. FCC staff used the Internet to sleuth about and found a fellow in St. Louis who offered to sell equipment that would broadcast on any frequency between 530 to 1700 kHz. The website suggested that all a buyer had to do was plug-and-play, no assembly required. When the feds responded to the sales pitch with an official

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presumably have to impose more specific record keeping requirements – like, f'rinstance, detailed program logging – so that licensees would have a common source from which to compile their reports. But before the Commission could impose a logging requirement, it would also have to define the various types of programming that would have to be separately logged. (From the available accounts of the new TV reporting requirements, that would include, at a minimum, "local civic programming", "local electoral affairs programming", and "independently produced programming".) And, if the Commission were going to be truly serious about threatening non-renewal based on programming performance, it would also have to announce reasonably specific quantitative and qualitative standards that would apply in such an analysis.

All of which would take the Commission perilously close to content regulation contrary to the First Amendment (and Section 326 of the Communications Act).

If it's any comfort, history strongly suggests that, despite its various fulminations and bloviations, in the end the Commission will stop short of involving itself with any depth in program content. In fact, the new rules are just the latest manifestation of a regulatory cycle that can be seen running its course since broadcast regulation began in the 1920s. (That cycle is described in some detail in a law review article by FHH attorneys Harry Cole and Patrick Murck – you can find it posted at http://www.fhhlaw.com/Articles/TheMythoftheLocalismMandate.pdf.) But the fact that the Commission is starting down that road again means that the television industry – and, more than likely, the radio industry as well, although it has momentarily dodged the bullet – can expect increased regulatory noise about programming for the foreseeable future.

We will provide more detailed information about the new rules when the full text of the FCC's action is released. Until then, hold on to your flux capacitor.

An MTC sidebar!

The Main Studio – Forgotten But Not Gone . . .Yet?

The FCC's new requirement that TV licensees post their public files on their websites (if they have websites) raises an intriguing question: if a station's public file is readily accessible online, should the station be required to maintain a "main studio"?

Back in the day, the main studio was a focus of a station's identity, serving as the place where programming was originated, and where the public could find the station's local public inspection file. The program origination requirement went away decades ago, but the Commission held onto the public file requirement – possibly because the existence of the public file rule was what appeared to convince a skeptical appeals court to uphold the FCC's deregulation of radio and TV in the 1980s. In the Court's view, the local availability of a public file would provide members of the local audience important information which would empower them to act as private attorneys-general, bringing below par performance to the Commission's attention at renewal time.

But now that TV public files will be available online, what regulatory purpose is served by a "main studio"? After all, members of the public will be able to access all of that incredibly important and useful information in the comfort of their homes – or in the comfort of the local Internet café, Starbucks, public library, etc., etc. Why should licensees also be required to maintain a facility which may not otherwise be necessary to their operation?

This is probably not an idea which has resonated at the Commission, but it is certainly a reasonable notion in view of the new Public File Online requirement for TV stations. Perhaps the elimination of the main studio requirement will ultimately catch fire – logically, it's really not much of a leap from the new rules – but we're not holding our breath.

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letter of inquiry, the St. Louis man replied that he wasn't actually selling the equipment – rather, he was just "assembling" it. According to the man, he ordered the equipment from elsewhere, provided an assembly service to his customer and, therefore, was not responsible for FCC regulations. This would be akin to your local Chevy dealer claiming that he had nothing to do with cars and that all questions regarding automobiles should be directed to Detroit, since the local dealer only stores cars and collects money from people who pick them up from his dealership. The argument did not fly with the FCC who proposed fining the man $7,000 for marketing uncertified transmitters. At press time, the website, www.ontheair3.com, was still offering equipment.

Succumbing to temptations, looking for miracles, FCC goes to Supremes

Situation Normal On The Indecency Front

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Earlier this month, the FCC requested that the U.S. Supreme Court review the decision of the U.S. Court of Appeals for the Second Circuit, which overturned the FCC's ruling that even "fleeting expletives" may be penalized under the FCC's indecency rules. When contemplating what this development may mean to the state of the FCC's indecency rules, one might stop and consider the word "snafu."

By and large, snafu is an innocuous word, regularly used in major newspapers throughout the country. Merriam-Webster's defines snafu as "1. n. a situation marked by errors or confusion; 2. adj. snarled or stalled in confusion." This innocent-sounding term was an acronym, coined by American GIs during World War II, which became so widespread that the War Department eventually sponsored a series of educational cartoons featuring "Private Snafu," written by Theodor "Dr. Seuss" Geisel and directed by Frank Capra. The acronym's original meaning – situation normal: all fucked up (although Webster's does offer "fouled up" as a bowdlerized secondary alternative).

The FCC argues that the Second Circuit dismissed the FCC's entire approach of taking context into account in deciding indecency cases.

Regardless of whether you favor the modern or antique definition of the word snafu, it remains an apt way to sum up the state of the FCC's indecency rules as illustrated by the FCC's filing with the Supreme Court.

As our readers will remember, the FCC's 2006 "omnibus" order covering several indecency cases reversed the FCC's long-standing policy of exempting "isolated" or "fleeting" expletives from penalty. In June, 2007, the Second Circuit reversed the FCC's decision and returned the case to the FCC for further consideration. In reversing the FCC's decision, the Second Circuit found that the FCC had not adequately justified its departure from decades of prior decisions as required under the federal law. Although the Second Circuit decided the case on these somewhat technical grounds, the court's decision went on to criticize the FCC's policy on First Amendment grounds, pointing out the inconsistency of protecting children from the "first blow" of a single expletive from Cher or Nicole Richie at the Billboard Music Awards Show but not from GIs fighting World War II in "Saving Private Ryan" (which includes a lengthy treatment of another vintage military acronym: "FUBAR", the last three letters of which stand for "beyond all recognition").

After the Second Circuit issued its decision, the FCC could have simply returned to its former policy of exempting fleeting expletives, although no one seriously believed that the FCC would do so. Alternatively, the FCC could have attempted to re-assert its decision by coming up with additional arguments and evidence to support its original conclusion. But that would almost certainly have led to another trip to the Second Circuit with an appeal of the New-And-Improved policy. But since the Second Circuit had already indicated that it doesn't think much of the FCC's entire approach to indecency regulation, the conventional wisdom is that virtually no "do over" by the FCC would be upheld by the Second Circuit. Some observers believed that the FCC would wait for additional back-up from either the Third Circuit's decision in the Janet Jackson/Super Bowl case or new legislation from Congress. Ultimately, however, the FCC decided to go straight to the top and ask the Supremes to review the matter.

The FCC's request (more formally known as a "petition for a writ of certiorari") argues that Supreme Court review is needed for several reasons. First, the FCC argues that the Second Circuit's analysis did not dismiss merely the FCC's reasoning for penalizing fleeting expletives, but rather the entire approach of taking context into account in deciding indecency cases. As the Supreme Court itself considered context to be "all important" in evaluating indecency, the FCC argues, the Second Circuit's attack on the use of context (at least as perceived by the FCC) must be overturned.

In addition, the FCC argues that the Second Circuit incorrectly applied the standards for overturning FCC actions under the Administrative Procedure Act (APA). The APA requires courts to treat the judgments of federal agencies with some deference as long as the agencies provide reasoned explanations for their judgments. Because the FCC, in the FCC's view, provided a thoroughly reasoned explanation for reversing its policy on fleeting expletives, the Second Circuit should have deferred to its

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Elected officials, looking out for the little people

LoPo FM Makes Headway On Hill

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While Thanksgiving was good to LPFM proponents at the FCC (*see* story on Page 2), Halloween 2007 was awfully kind to them on Capitol Hill.

The Senate Commerce Committee approved a bill that implements some FCC recommendations, paving the way for the licensing of hundreds of additional LPFM stations. The bipartisan S.1675 Local Community Radio Act of 2007, introduced by Senators John McCain (R-AZ) and Maria Cantwell (D-WA), is similar to a companion bill introduced in the House by Representatives Mike Doyle (D-PA) and Lee Terry (R-NE) in June.

The Senate bill would abolish third-adjacent channel protection.

The bill would abolish third-adjacent channel protection, laying the foundation for the licensing of a bevy of urban and suburban LPFM stations.

According to LPFM cheerleaders, this change would trigger a significant increase in the diversity of viewpoints on the airwaves. According to the regulatory definitions adopted by the Commission when it created the service, LPFM stations are community-based, non-profit stations that operate at 100 watts or less and cover only a few miles. They are often operated by schools, religious organizations, and other local groups. There are more than 800 LPFM stations currently licensed in the U.S., but according to Prometheus Radio Project, only one of the top 50 markets in the nation has a licensed LPFM station.

The elimination of the third-adjacent channel protection would open up newly available spectrum for two types of secondary operators: (1) LPFMs – *i.e.*, stand-alone stations which originate programming; and (2) FM translator and booster stations – *i.e.*, stations which merely rebroadcast another station's signal. The bill states that the Commission "shall ensure that licenses are available to both" types of operation.

The Senate bill offered additional protection for full-power stations in the form of several amendments which were approved. Sen. Frank Lautenberg (D-NJ) proposed an amendment whereby stations in the most densely-populated metro areas would be retained. Sen. Olympia Snow (R-ME) introduced two amendments: (1) a requirement that the Commission conduct an economic study on the impact that LPFM's would have on full-power commercial FM stations; and (2) a prohibition against a pirate radio operator from obtaining an LPFM license.

According to the Senate, the proliferation of LPFM stations will lead to greater minority diversity in programming. The bill pointed to the Commission's recent data indicating that while minorities represent almost one-third of the U.S. population, only seven percent of all local television and radio stations are minority-owned. Similarly, only six percent are owned by women, despite the fact that women constitute more than half of the nation's population.

The bill also highlighted the effect LPFM stations can have during local and national emergencies, using Hurricane Katrina as an example. Of the few stations that were able to stay online during the disaster, several were LPFM stations.

With localism a hot button issue in the midst of the media ownership proceeding at the Commission, the Senate bill and its House companion could pick up considerable steam in the coming months.

FHH - On the Job, On the Go

On November 15, **Frank Jazzo** attended a meeting of the Advisory Board of the University of Albany's Nelson A. Rockefeller College of Public Affairs and Public Policy in Albany. And on November 30, **Frank J** will be conducting a political broadcasting seminar along with **Bobby Baker** of the FCC for the New Mexico Broadcasters Association in Albuquerque.

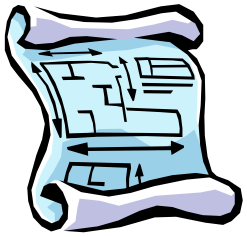
Meanwhile, **Frank Montero** (this month's Other Frank) has been elected to the Board of the National Association of Minority Media Executives. **Frank M** will also be one of three presenters at an NAB Radio Fly-In for group heads in Washington, D.C. on February 20.

And this month's *Media Darlings of the Month* are **Patrick Murck** and **Harry Cole**, whose comments (which included a photograph of a 17-year cicada) filed in the FCC's localism proceeding garnered attention in the trade press.

Deep six six (and five)?

A Modest Proposal For Spectrum Reallocation

Mullaney plan would clear TV channels for FM use



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Like young Oliver Twist in Dickens's classic tale, a plucky radio engineer recently asked the FCC for "some more." But, instead of gruel, the engineer is asking for more FM radio spectrum. In late October, Jack Mullaney, a long-time broadcast engineer, filed a "Petition for Reconsideration and/or Comment" in the FCC's digital television rulemaking proceeding. Why the digital television docket for an FM radio spectrum request? Because the additional spectrum that Mr. Mullaney is seeking to use for radio is currently allocated to television channel 6 (82 - 88 MHz). In fact, Mullaney went so far as to ask the Commission to think about converting television channel 5 to FM radio frequencies, too.

As radical as Mullaney's idea may seem to some, it is something that radio engineers have been contemplating for a long time. Currently, the FM radio band is wedged right above TV channel 6, divided into 100 FM radio channels of 200 KHz each from 88 MHz to 108 MHz. This proximity causes a lot of interference between television stations operating on channel 6 and radio stations, particularly the ones operating in the non-commercial/educational (NCE) reserved portion of the FM band operating on frequencies 88.1 to 91.9 MHz (which are immediately adjacent to channel 6), and commercial stations at 98.5 MHz. The FCC's rules require coordination between NCE reserved band radio stations operating on those frequencies and channel 6 TV stations. Despite this interference issue, there were over 3,000 applications for new FM stations in a recent FCC NCE filing window.

What sparked the filing of this proposal now? According to Mullaney, channel 6 has been unpopular as a final destination in the recent conversion of the nations' television stations from analog to digital. Apparently there are only eight DTV allotments proposed for channel 6 operation after the analog cut-off date (February 1, 2009) for full service television stations. Given the huge demand for new FM radio station licenses, not to mention low-power FM and FM translator stations, it just makes sense (to Mullaney) to reallocate channel 6 spectrum to FM radio.

> *[Oliver] was desperate with hunger, and reckless with misery. He rose from the table; and advancing to the master, basin and spoon in hand, said, somewhat alarmed at his own temerity: "Please, sir, I want some more."*
>
> *The master was a fat, healthy man; but he turned very pale. He gazed in stupefied astonishment on the small rebel for some seconds. . . "What!" said the master at length, in a faint voice.*
>
> *"Please, sir," replied Oliver, "I want some more."*

The FCC could fit 30 more channels in the spectrum that would be vacated by the television channel – and spread out across the country, that would equate to more than 2,000 new or improved FM facilities, according to Mullaney.

His proposal is not limited to new stations. Some of the other possible uses he envisions for channel 6 spectrum include: (a) "re-farming" the existing FM spectrum to eliminate pre-1964 short spacings; (b) establishing a "digital only" band; and (c) grouping FM translators and/or LPFM stations into a contiguous block(s) of channels. Mullaney even goes so far as to propose that some of the newly available frequencies be reserved for "pirate radio" operators on an open-access basis.

Reaction to the proposal thus far, though limited, has been generally supportive. A couple of other engineers have filed comments expressing their concurrence with the Mullaney plan, and there have been rumblings of other cognoscenti in the industry possibly getting together to brainstorm about similar proposals.

Who might be opposed to all of these exciting new uses of television channels as FM radio frequencies? Well, for one, the television station owners who are currently planning to use those channels for their DTV broadcasts after the analog cut-off date. Although their numbers may be relatively small (only eight, if we're reading Mullaney's petition correctly), they still represent a very valuable commodity, and presumably provide service to the communities in which they are located.

Also, what about the low-power television stations that will be the only analog TV broadcasters after the full service stations convert to digital? Their interests would also be affected by converting channels 5 and 6 to FM radio spectrum.

Finally, there are incumbent radio station owners, who would be facing increased competition from all of these

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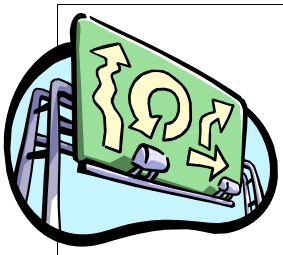

Three small steps to immunity from infringement liability

A Site Operator's Roadmap Around Copyright Problems

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This is an extension of an October 19 posting on our CommLawBlog regarding an article in that day's Washington Post.

A baby goes crazy. A Prince gets angry. Adults begin to act like children. Litigation ensues. A teachable moment results.

According to news reports in October, a woman sued Universal Music Publishing Company (Universal) which had tried to get YouTube to remove a half-minute clip she had posted. The clip showed the woman's 13-month-old baby bouncing up and down to the tune of "Let's Go Crazy", a song by Prince who, not surprisingly, is represented by Universal.

According to the woman who posted the clip, Universal was trying to stifle her right to free expression.

According to Universal, the poster's use of the snippet of the song was a copyright infringement, which opened the door for Universal to invoke the Notice and Takedown feature of the Digital Millennium Copyright Act (DMCA).

And YouTube, the website operator, was caught in the middle.

As noted in a comment we posted on our blog site (www.commlawblog.com) in October, there is a two-fold lesson to be learned here for broadcasters who operate websites which invite the public to post their own content: the bad news is that potential copyright issues abound, but the good news is that website operators can easily extricate themselves from legal action and liability by taking advantage of the "safe harbor" provisions of the DMCA.

In particular, the DMCA, passed in 1998, provides immunity from copyright infringement liability – a "get out of copyright jail free" card – for qualifying online service providers. The term "qualifying online service provider" includes (in addition to the usual, obvious suspects, like AOL, Google, or most web hosting companies) anyone who stores information on their networks, such as those who host message boards or chat rooms. An increasing number of broadcasters are falling into that category by providing: (a) comment areas where users can specifically respond to or discuss content on the station's website, and/or (b) discussion boards where station viewers or listeners can interact with each other on any topic, and/or (c) the opportunity for members of the public to post original audio or video (just like YouTube).

With all these ways for public access, the probability that some copyright infringements will make their way onto any given site is very high. Short of pre-screening every user posting or upload, a station cannot verify that its website content is free and clear of copyright problems. Fortunately, the DMCA provides a "safe harbor" for online service providers (like your basic broadcaster with a website) who follow three basic steps. You can enjoy the safe harbor protections if you:

- Notify "customers" of your policies on repeat copyright infringement offenses.
- Designate (both on the website and with the U.S. Copyright Office) an agent for service of DMCA Notice and Takedown requests and Counter-Notifications.
- Act largely as a passive conduit and jump through the proper hoops if and when you receive copyright infringement notifications and counter-notifications.

Proper Posting of Policies

To take advantage of the safe harbor provision, you must actively promote copyright compliance by announcing (*e.g.*, in the general Terms of Service posted on the site or in a separate signup contract that site users are required to agree to when registering on the site) – and implementing – a policy discouraging repeat acts of infringement by users. The specific language (which we can help you draft) can vary but, at a minimum, it should indicate that repeat infringers will not be tolerated and that recidivism will result in the user being banned from the site.

The term "repeat infringer" is not specifically defined in the law, and website operators have considerable discretion regarding decisions to ban disobedient users. Accordingly, there may not be much downside to being hard-nosed in your definition of "repeat infringer", although a tough stance could generate criticism of your commitment to "free expression". In view of the substantial leeway accorded by the law, this will largely be a business decision for the website operator.

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Designating an Agent

Every website must identify a "Designated Agent" for purposes of service with the takedown notifications and counter-notifications (*see below*). The following information must be filed with the U.S. Copyright Office and posted on the website (preferably with the copyright infringement policy in the Terms of Service):

- ☞ The full legal name and address of the online service provider, as well as all other names under which the service provider does business.
- ☞ The ***full*** mailing address of the Designated Agent for notification (this cannot be a P.O. Box unless that is the only way to mail something to the Designated Agent).
- ☞ The phone and fax numbers and email address of the Designated Agent.
- ☞ For the filing with the Copyright Office, the signature of authorized official of the online service provider.

A form is available on the Copyright Office website (http://www.copyright.gov/onlinesp/) that can be completed online and mailed to that office with an $ 80.00 fee. Another form and fee will be required if the Designated Agent changes. ***It is very important to keep this information up to date both on the website and with the Copyright Office.***

Notice and Takedown Procedures

The final hurdle to taking advantage of the safe harbor provision is to remain as neutral as possible with regard to pre-screening or passing judgment as to whether material on your website might constitute a copyright infringement. As discussed above, there is an obligation to remove repeat copyright infringers, but those persons and instances are likely to present themselves loud and clear.

With regard to specific individual claims of copyright infringement, you will avoid copyright liability if:

- 😐 you have no hand in actually posting infringing material.
- 😐 you do not financially gain from infringing material. There should be no charge for third party users to post materials on the site. (Any paid advertising on the site should be closely screened for potential copyright issues and the advertiser should agree to indemnify the website for any copyright liability.)
- 😐 you have no prior knowledge that the material infringes on another's copyright.
- 😐 you must promptly, and without passing judgment as to the validity of the posted material or the original copyrighted work, respond to a proper "Notice and Takedown" claim that is filed with the website's Designated Agent.

When a copyright holder believes, as did Prince, that his, her, or its copyrighted work has been improperly posted by a third party to a website, the copyright holder has the right to request that the material be taken down. A website operator that complies with a proper request will fulfill the final requirement necessary to secure immunity from copyright infringement liability.

A proper Notice and Takedown request is one that is sent to the website's Designated Agent and contains:

- 👍 The name, address and electronic signature of complaining party.
- 👍 A description of infringing materials and their internet location (this can simply be a link).
- 👍 Sufficient information to identify the original copyrighted work.
- 👍 A statement from the copyright owner that it has a good faith belief that there is no legal basis for the use of these materials.
- 👍 A statement that the complaining party is authorized to act on behalf of the copyright holder.

A website operator who receives a Notice and Takedown request with this information should ***not*** pass judgment on the validity of the claim; rather, it need only remove the infringing content and promptly notify the party who posted that content (the notification does not have to be before removal).

At that point the party that posted the works has the right to file a "Counter-Notification" with the website operator which must contain:

- 👎 The subscriber's name, address phone number and a physical or electronic signature.
- 👎 An identification of the material and its location before removal.
- 👎 A statement under penalty of perjury that the material was removed by mistake or misidentification.

(Continued on page 10)

(Continued from page 9)

- Consent by the subscriber to local federal court jurisdiction or, if overseas, an appropriate judicial body.

Again, the website operator should ***not*** attempt to resolve the merits of the competing arguments. Rather, it need simply notify the original complainant that a Counter-Notification has been received and that the materials will be re-posted to the website in no less than 10 days and no more than 14 days unless the website operator receives evidence that the complainant has filed a lawsuit in federal court for copyright infringement regarding this work.

Any radio or television station that invites people to post content to its website should take advantage of the safe harbor provisions of the DMCA. Copyright owners (and "fair" users) have shown themselves too litigious to ignore this easy immunization process. (Examples: The self-claimed "creator" of the Electric Slide has filed Notice and Takedown requests regarding wedding videos posted on YouTube showing Aunt Sadie or Uncle Morty getting' down with the Electric Slide. And the Church of Scientology, apparently trying to stifle criticism, has filed such requests when their own writings or photographs are used against them in articles that pop up in Google searches.) Thanks to the safe harbor provisions, the YouTubes, Googles, and other passive conduits of such content are not being held liable. In other words, when everyone else starts acting like children, the correct answer is simply to stay out of the playpen and let them work it out for themselves.

(Continued from page 7)

newly-minted FM radio station licenses. (Does anybody remember Docket 80-90?) In some major markets there is economic value associated with having just one of the scarce FM radio licenses to reach the population in that market (the "stick value"), which presumably would be lost – or at least subject to substantial potential reduction – if the pool of available licenses is diluted by adding more spectrum. Perhaps this could be offset by the opportunities to improve incumbent signals, but that would have to be worked out in a complicated rulemaking procedure. Already, the concept of HD radio has potentially doubled or tripled the number of receivable radio program sources by adding secondary and tertiary streams of digital programming, and a proposal for an expanded FM band would further exacerbate this competitive trend.

In fact, the whole notion of expanding the FM band into television channels 5 and 6 faces a lot of practical obstacles. The FCC (which has demonstrated a certain dysfunctionality of late) already has a huge backlog of other broadcast issues before it. And Mullaney's proposal faces the added (and major league) procedural problem that it is being raised late in the game (at least in the DTV proceeding in which it was filed). The FCC could reject it as an untimely submission in that proceeding, forcing Mullaney to re-file it as, say, a new petition for rulemaking. But each journey starts with a step, so perhaps this will be the beginning of a new era for FM radio.

(Continued from page 2)

how that winnowing of the translator applications is to be effected – but if you happen to have more than 10 2003 translator applications still pending, you would be well-advised to review your list and start to prioritize them.

The Second Notice of Proposed Rule Making adopted simultaneously with the rule changes described above moves further down the path of expanding the opportunities for LPFM stations to be put into place and for limiting the consequences to those stations should interference occur. For example, the Commission has tentatively concluded that full-service stations must provide both technical and financial assistance to any LPFM station that might receive interference from the implementation of new technical facilities by a full-power station. The Commission also has reached the initial conclusion that it should use a contour-based protection methodology to expand opportunities for LPFM stations to be licensed and has requested comment on other technical rule changes that expand the number of LPFM stations that could be licensed. Along those lines, the Commission also intends to recommend to Congress that it rescind the requirement that LPFM protect full-power FM stations operating on third adjacent channels.

These proposals apparently have been placed on a fast track, as the Public Notice indicates that the Commission intends to act on the further Notice of Proposed Rule Making within six months, an ambitious timeframe for any rule making proceeding. The FCC has also announced that the next auction for a "non-tabled aural licensed service" will be for LPFM permits (although no time estimate for such such an auction was given). All of the proposed and adopted changes are stated to further the goals of fostering the development of further opportunities for schools, churches, and other community groups to provide programming responsive to their communities' needs and to allow more diverse voices to be heard.

No comment date was stated in the Public Notice – it will be established when the full text of the notice of proposed rulemaking is released and published in the Federal Register. Stay tuned for further information.

A word to the wise from Joe Di Scipio

Escrows Ad Infinitum

A new (arm) twist in the tolling saga

Well, we here at *Memo to Clients* would like to report that an end to the Tolling Agreement/Escrow saga is in sight. Instead, we can report only that the Tolling regime is in place and, if you can imagine this, is getting even more out of control. Here's the latest.

We all know that, when there happen to be one or more outstanding indecency or VNR complaints pending against a station which is the subject of an assignment application, the Commission ordinarily just sits on the assignment application pending the outcome of the complaints. But let's say that you are attempting to sell your only station, with the ultimate goal of closing up and dissolving your company and moving on to something else. You want to get the deal done ASAP – maybe in the next couple of months, but for sure ***not*** in the next couple of decades, which is how long it could take the Commission to dispose of the complaints that happen to be pending. The Commission might be willing to act on your application now, rather than some time in the (likely) distant future. But to get the Commission to do so, here's what you can expect them to require of you:

This government-sanctioned, um, arrangement – "blackmail" is such an unpleasant word – is likely to continue until the indecency litigation working its way through the courts is resolved.

- You will have to enter into an *indefinite* Tolling Agreement with the FCC (which, as the adjective "indefinite" clearly indicates, gives the FCC an *indefinite* period of time to act on any indecency complaints currently pending against the station);

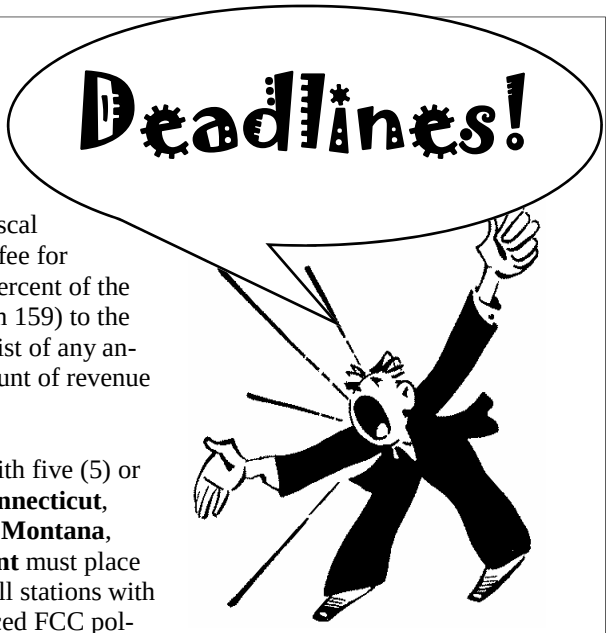
- You will have to enter into an Escrow Agreement for an *indefinite* period naming the FCC as third party beneficiary. How much money goes into the escrow? That's an easy arithmetical calculation: the total number of complaints multiplied by the total maximum forfeiture amount. For example, let's say that the FCC has four complaints pending against your station, each alleging the broadcast of indecency at a time when the maximum fine for that kind of thing was $32,500. The necessary amount to be escrowed (for an *indefinite* period, mind you) would be 4 x $32,500, or $130,000. (If you are unfortunate enough to be the target of indecency complaints relating to broadcasts *after* the maximum fine for such misbehavior was raised ten-fold – to $325,000 a pop – then the escrow amount would be inflated by the same factor per violation – ouch!) Any way you slice it, the bottom line is that you would have to place in escrow a large chunk of coin just to get the FCC to act on your sale application.

- You of course might think that after suffering this – er, how can we say this politely without using the disagreeable term "extortion"? – fiscal inconvenience at the hands of the Commission, you could then close up shop. You would be wrong. The model Escrow Agreement (which the FCC insists be used) requires that the licensee business entity stay in place during the term of the Escrow Agreement – and in case you need reminding, that term is "indefinite". If the business entity dissolves, the model Escrow Agreement calls for the escrow agent to pay the escrowed funds as directed by the FCC. (Call us crazy, but we suspect that the FCC would direct the funds right into Uncle Sam's pockets.)

- You should eventually get your money (or at least some of it) back, but only if: (a) the FCC settles with you; or (b) the FCC notifies you that it has closed the investigation and directs the Escrow Agent to release the funds; or (c) the FCC issues a forfeiture for one or more of the violations in question *and*, after you decline to pay it, the FCC convinces the Department of Justice to sue you in Federal District Court, *and* after that trial the court directs the disposition of the escrowed funds in your direction, *and* that decision is upheld if appealed.

This government-sanctioned, um, arrangement – "blackmail" is such an unpleasant word – is likely to continue until such time as the indecency litigation working its way through the courts is resolved (possibly at least two years away, as discussed in prior *Memo to Clients* issues) or until someone goes to court and successfully seeks a *writ of mandamus*, as we mentioned here last month.

We hope that our next report to you will announce the end of the Tolling/Escrow saga . . . but don't count on it.



December 1, 2007

DTV Ancillary Services Statements - All *DTV licensees* (not permittees) must file a report on FCC Form 317 stating whether they have offered any ancillary or supplementary services together with its broadcast service during the previous fiscal year. 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.

EEO Public File Reports - All *radio* and *television* stations with five (5) or more full-time employees located in **Alabama**, **Colorado**, **Connecticut**, **Georgia**, **Maine**, **Massachusetts**, **Rhode Island**, **Minnesota**, **Montana**, **New Hampshire**, **North Dakota**, **South Dakota**, and **Vermont** 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.

EEO Mid-Term Reports - All *radio* station employment units with eleven (11) or more full-time employees and located in **Alabama** or **Georgia** must file EEO Mid-Term Reports electronically on FCC Form 397. This report includes a certification as whether any EEO complaints have been filed and copies of the two most recent EEO Public File Reports for the employment unit.

Television Ownership Reports - All *television* stations located in **Colorado**, **Minnesota**, **Montana**, **North Dakota**, and **South Dakota** 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.

Radio Ownership Reports - All *radio* stations located in **Alabama**, **Connecticut**, **Georgia**, **Maine**, **Massachusetts**, **New Hampshire**, **Rhode Island**, and **Vermont** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323 or 323-E.

January 10, 2008

Children's Television Programming Reports - Analog and Digital - For all *commercial television* and *Class A television* stations, the second quarter reports on revised FCC Form 398 must be filed electronically with the Commission, and a copy must be placed in each station's local public inspection file. Once again, information will be required for both the analog and DTV operations.

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.

Website Compliance Information - *Television* station licensees must place and retain in their public inspection files records sufficient to substantiate a certification of compliance with the restrictions on display of website addresses during programming directed to children ages 12 and under.

Issues/Programs Lists - For all *radio*, *television*, and *Class A television* stations, a listing of each station's most significant treatment of community issues 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.

(Continued on page 13)

FM ALLOTMENTS ADOPTED –10/24/07-11/20/07

State	Community	Approximate Location	Channel	Docket or Ref. No.	Availability for Filing
CA	Hemet	34 miles SE of Riverside, CA	*273A	07-1	TBA (noncommercial reservation)
CO	Walden	100 miles NW of Denver, CO	226C3	07-174	TBA
NE	Humboldt	90 miles SE of Lincoln, NE	272C3	07-176	TBA
CO	Silverton	180 miles SW of Denver, CO	281A	07-130	TBA

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.

(Continued from page 12)

February 1, 2008

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

EEO Mid-Term Reports - All *radio* station employment units with eleven (11) or more full-time employees and located in **Arkansas**, **Louisiana**, and **Mississippi** must file EEO Mid-Term Reports electronically on FCC Form 397. This report includes a certification as to whether any EEO complaints have been filed and copies of the two most recent EEO Public File Reports for the employment unit.

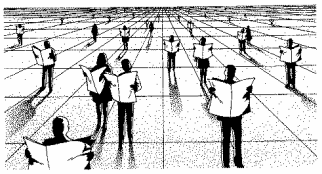
Television Ownership Reports - All *television* stations located in **Kansas**, **Nebraska**, and **Oklahoma** must file a biennial Ownership Report (FCC Form 323 for commercial stations or Form 323-E for noncommercial stations). All reports must be filed electronically.

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

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

Updates on the News

EEO mid-term reports go electronic-only – If you're one of the lucky ones required to file a "Broadcast EEO Mid-Term Report" (a/k/a FCC Form 397) in the foreseeable future, you should know that, as of September 9, 2007, such filings ***must*** be made electronically through CDBS. For some reason, the FCC didn't announce this development until mid-October, so it may have come as a bit of a surprise to those who had to file the report on October 1. Oh well.



AM on FM translators – As reported back in our August issue, the Commission has formally proposed that AM stations be permitted to rebroadcast their signals on FM translators. The Notice of Proposed Rulemaking has finally been published in the Federal Register, so the comment deadlines have now been set. If you want to chip in your two cents' worth on the proposal, your comments are currently due on or before January 7, 2008. Reply comments are due by February 4.

NCE settlement/amendment "window" opened – Following the recent filing window for new and major change NCE-FM applications, the Commission announced that it has "opened" a "window" to expedite action on at least some of the 3,000 or so applications that were filed. During the window settlement agreements and technical amendments may be filed, but be alert that, in order to qualify for consideration, any settlement has to meet certain criteria. The "window" will close on January 7, 2008, but not to worry – as the Commission acknowledges (albeit in a footnote), its rules "permit parties to settle at any time", so it's not entirely clear what effect the January 7 closing of the window might have. It's possible that folks who file by that deadline will enjoy expedited consideration, but we don't know for sure. If you are in a position to settle, there may be some advantage to filing by January 7, but it does not appear that all will be lost if you don't.

(Continued from page 5)

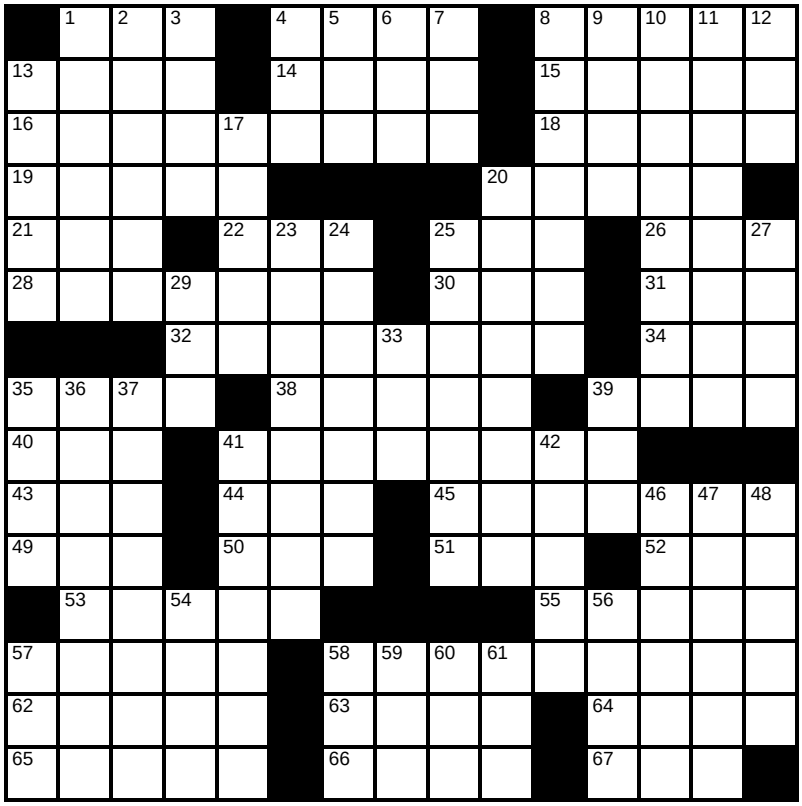
judgment.

Moreover, the FCC argues, the Second Circuit's overtly critical analysis of the FCC's indecency policies sent the clear message that any attempt to reassert the FCC's policies would be rejected. "In the meantime," the FCC complains, "the Commission is left in the untenable position of having a grant of authority that the public expects it to exercise … but that the Second Circuit has indicated cannot be meaningfully exercised."

Whether or not one finds the FCC's arguments convincing, there are lessons that can be drawn from the FCC's petition. First, it is very clear that the FCC is not backing off its position that (a) vigorous enforcement of indecency regulations is in the public interest and (b) even fleeting expletives should be subject to penalties. At the same time, the FCC seems to recognize that the Second Circuit's decision stands in the way of "meaningful" enforcement of the indecency rules.

Taken together, this creates a snafu for broadcasters. Several FCC officials and Commissioners have pointedly stated that broadcasters must continue to maintain absolute compliance with the indecency rules or face hundreds of thousands of dollars in penalties. At the same time, the cases to date leave broadcasters grasping to determine what is forbidden in any given circumstance, while the FCC all but acknowledges that it will not be able take any substantial enforcement action until either the Supreme Court or Congress clarifies its authority.

Several parties will no doubt come forward to oppose the FCC's petition for certiorari. Indeed, the case does not seem like one that the Supreme Court would accept. Hundreds of parties seek Supreme Court review each year but the Supreme Court typically reviews only those cases that present issues of constitutional significance that different lower courts have treated in conflicting ways. In this case, the Second Circuit specifically decided the case on administrative, not constitutional, grounds (although it did provide considerable discussion of constitutional considerations in a portion of the opinion that was expressly not part of its decisional rationale for the bottom line ruling). Moreover, the Janet Jackson case – pretty much the only one in the appellate pipeline that could possibly produce a conflicting "circuit split" (and even that is viewed by knowledgeable observers as extremely unlikely) – has not been decided yet. Nevertheless, the Supreme Court may choose to review this case, in part because of the high profile nature of the dispute and in part because the FCC's indecency cases have placed broadcasters into a situation marked by errors and confusion of Constitutional significance. The next several months will tell as the Supremes consider the petition and the Third Circuit prepares to issue the Janet Jackson decision. In the meantime, situation normal…



Land(mark) Ho!

This year we celebrate milestone FCC-related court decisions. Cases that are immediately recognizable by name alone. Cases that have become household names and that we have all benefited from, like *Miranda* – oops, that might not be a good example. How about "Bechtel"? You know, the 1993 decision that led to the elimination of comparative hearings and, ultimately, to the use of auctions to dole out broadcast spectrum. (We mention Bechtel here because, though obviously deserving, it couldn't get squeezed into the puzzle grid.) The grid contains five case names. The clue for each provides a word or phrase that should make the case name immediately recognizable, ***plus*** the formal citation to the case, so you can look it up. For crying out loud, how easy can we make it? Appropriate recognition will be given to the first solver who emails the completed puzzle to cole@fhhlaw.com.

ACROSS

1. Major or minor ____ (app. type)
4. One-time Asian kingdom
8. Mr. Moto interjections
13. Fix the pitch
14. Core prefix
15. Minority preferences (497 U.S. 547 (1990), *overruled*, 515 U.S. 200 (1995))
16. Mandatory comparative hearings (326 U.S. 327 (1945))
18. Madrid must-see
19. Great, Winfield or Randolph
20. Ring up
21. 90 degree connection
22. Nipper co.
25. Good sign for angels
26. Mathers mentor
28. Scarcity rationale (395 U.S. 367 (1969))
30. Separates millivolts and meter
31. Super ending
32. Carlin (438 U.S. 726 (1978))
34. Sister or buoy
35. Scottish uncles
38. Ammonia compound
39. Villa d'____
40. Blackberry source (abbr.)
41. Spooked by
43. Econ. indicator
44. Mil. rank
45. Presided
49. "Runaround ____"
50. Scourge of the Yankees' Iron Horse
51. Designer monogram
52. ____ roll
53. Musical syllables
55. White Sox Wynn
57. Garlic emulsion
58. Hard look for waiver requests (418 F.2d 1153 (D.C. Cir. 1969))
62. Porsche model
63. Linc Hayes's do
64. Greet the villain
65. Table-top formations
66. Type of vision
67. ___V (Chicago-based skit show)

DOWN

1. Car type
2. Waiting
3. Obligation
4. Type of fly or bunt
5. Sort
6. 19th Century U.S. or 21st Century Japanese leader
7. Spoil
8. Ancient shipping container
9. Hoagy
10. Place-holders
11. Get home delivery
12. "Barnie Miller" Det. Yemana
13. Police behavior control device
17. Heart chambers
20. Comes earlier
23. J.S. Pemberton creation
24. Fauna
25. Octopedal?
27. Sea eagle
29. Vinyl music media
33. Fraser, *e.g.*
35. Work units
36. Fine points
37. Some penguins
39. Scale run
41. Nino's family
42. Edmonton athlete
46. ____ Trac ®
47. Sign up
48. Tropical refrains
54. Pond scum component
56. Sounds of relief
57. Late 20s' source
58. Grow
59. Second most-populous cont.
60. Roth ____
61. Pom or peke

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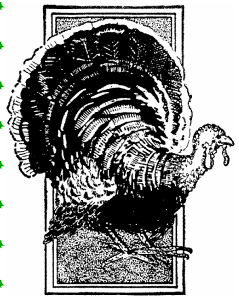
First Class



Holiday Schedule Reminder

Fletcher, Heald & Hildreth, P.L.C.
will be officially closed on
December 24-25 and January 1.

We wish you safe and happy holidays.