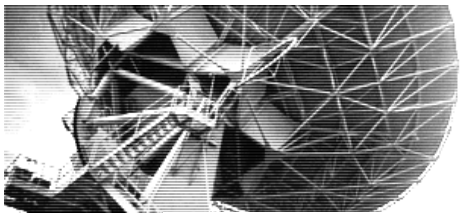

FLETCHER, HEALD & HILDRETH
Communications Law & Regulation

MEMORANDUM TO CLIENTS

News and Analysis of Recent Events in the Field of Communications

A Federal Catcher in the Rye?

FCC: The Federal Children Commission?

In two reports, FCC suggests broad, non-spectrum-based, jurisdiction — Statutory support may be lacking, but it's all about the kids

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In two separate reports issued in August and September, the Genachowski Commission has provided a glimpse into the possible regulatory approach (in its broadest sense) that the agency may undertake in the coming months and years. Unfortunately, the view from here is not particularly heartening.

The Commission was ordered by Congress to prepare the reports – one relating to parental controls on video and audio programming from virtually any source, the other about a private service providing audio programming on some school buses. Had it been left to its own devices, the FCC might not have bothered with either of these. But Congress gave the order, and the FCC has obeyed. And how.

The parental controls report is an eye-popping 87 pages long, providing a comprehensive overview of just about anything you might ever have wanted to know about parental controls. From the V-chip for over-the-air broadcasting to far more esoteric mechanisms available for MVPD service and even Internet access, the report attempts to provide the "assessment of the current state of the marketplace" which Congress asked for.

The good news is that the marketplace appears to be responding to the perceived need for effective, user-friendly parental controls. In addition to the governmentally-required (and therefore already ubiquitous) V-chip, the report identifies multiple alternatives – including at least one described itself as an "Advanced Foul Language Filtering Technology" (or "AFLFT") – currently available in the marketplace, all capable of providing some level of parental control over the programming content available to children from over-the-air TV and/or MVPD sources. There are also a wide range of rating systems and services available to assist parents in familiarizing themselves with the particulars of incoming programming. Ditto on the wireless side: an impressive array of blocking, filtering, control devices and technology designed to put the parent in the driver's seat.

The report even canvasses the options for controlling (or at least monitoring) the content of video games, DVD's and video-cassette recordings. And it's at that point that you start to wonder exactly where the FCC may be going with this inquiry. Does the FCC have jurisdiction to regulate video games, DVD's or VCR's? And while some parents may be concerned about the content available for those media, what can, or should, the FCC do about it? After all, the Commission's primary concern is the regulation of spectrum – you know, the basic "traffic cop of the airwaves" role. Since when did it assume (or was it formally given) the substantially different role of Federal Nanny?

To be sure, Congress asked the FCC to prepare the report, and the FCC may be excused if, in doing its duty, it ranged somewhat far afield of its normal responsibilities. But the bottom line the FCC reaches in its parental control report is that the agency needs more information, so it will be issuing its own Notice of Inquiry in the foreseeable future. And that NOI will apparently ask for essentially the same information that the Commission's initial NOI (issued last March in response to Congress's direction in the Child Safe Viewing Act) – including information about video games,

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A move to bury the ratchet

Rackley/Dawson Propose Deep-Sixing The "Ratchet Rule"

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Our friends Ron Rackley and Ben Dawson – high magnitude stars in the constellation of consulting engineers – have filed a petition for rule making on behalf of their firms (du Treil, Lundin & Rackley, Inc., and Hatfield & Dawson, respectively) proposing a significant change in the AM allotment rules (specifically, Footnote 1 of Section 73.182(q)). Anyone interested in AM matters should take a look at it and be prepared to throw in his/her two cents' worth at the Commission when the opportunity arises.

The petition is not for the AM neophyte. Here's a quick test designed to help you figure out whether you need to read on. Read the following "simple example" – seriously, they say that this is a "simple example" – taken verbatim from the petition, and try to answer the question we pose below:

> Station A [i]s a 5.0 kilowatt station on 1000 kilohertz with a quarterwave non-directional antenna and a nighttime interference free level of 3.0 mV/M and Station B [i]s a 5.0 kilowatt co-channel station located some distance away that has a nighttime interference-free RSS of 13.0 mV/m including a single limit from Station A of 8.3 mV/m. The Station B antenna was designed to have a null in its vertical radiation pattern protecting Station A, but Station A was there first and does not protect Station B. Both stations have 5 mS/m ground conductivity within their coverage area. If Station A makes a transmitter site change subject to the "ratchet clause" [*i.e.*, Section 73.182(q), Footnote 1] and is required to reduce its interference contribution by 10%, the single limit from station A will decrease from 8.3 mV/m to 7.5 mV/m and the nighttime interference-free RSS at Station B will decrease from 13.0 mV/m to 12.5 mV/m.

Our question: Say what now?

The focus of the petition is the "ratchet rule", a provision adopted in the early 1990s as part of an effort to reduce interference in the AM band. As we all know, unlike FM and TV, at night AM signals bounce off the ionosphere and come back to earth far away from the transmitter. (Apparently this doesn't happen during the day because the sun burns off the otherwise reflective ionospheric layer enough to let the AM signals pass through into outer space.) This leads to hellacious problems with nighttime interference, since the bounce (known as the skip effect to the *cognoscenti*) tends to be somewhat unpredictable. (In fact, the calculations are possible only statistically.) To deal with those problems, the Commission over the years devised a very complicated (to us non-engineers, at least) set of standards designed to limit the maximum nighttime interference stations could expect to encounter.

But since those rules could seek only to limit, not prevent, nighttime interference, the grim fact was that such interference remained ever-present.

The ratchet rule was intended to induce reduction of interference by making improvement in a Class A or B station's contribution to potential interference a condition to changes in that station's facilities. In other words, if you're a Class A or B AM station and you want to modify your facilities, the ratchet rule requires that your proposal result in a reduction of your contribution to any significant nighttime interference levels.

A nice idea in theory. In practice, however (as Messrs. Rackley and Dawson illustrate in their petition), the ratchet rule tends to discourage service improvements even when those improvements would appear to far outweigh any potential reduc-

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Focus on FCC Fines

By R.J. Quianzon
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The Lord may giveth, but the FCC taketh away – In two separate cases this month, the FCC fined churches for installing transmission facilities that didn't match up with the specifications in their FCC-issued authorizations. Perhaps more importantly, the FCC fined the churches for filing applications expressly stating that the station facilities as installed were, in fact, those specified in the underlying CPs. The lesson for all broadcasters is to verify that your stations are properly constructed *before* telling the FCC that that is the case.

A California church received a permit to construct an FM translator with its antenna on an existing 60-foot tower at a site where a number of towers were located. The church hired a contractor to install the transmission system. The contractor went to the site, installed the gear, took pictures of the completed project and told the church that the job was done. The church then filed an application for a covering license, telling the FCC that the station was properly up and running.

"Not so fast", said a complainant who reached out to the FCC, telling it that the Church's contractor had hung the antenna on the wrong tower. Within a few weeks of the construction, the FCC had rescinded the license.

It turns out that the contractor went to the site and looked for the 60-foot tower specified in the permit. The contractor couldn't find a 60-foot tower, figured there must have been a mistake, and instead proceeded to install the antenna on a nearby 30-foot cell phone tower. The contractor snapped a few photos, verified with local residents that they were picking up the signal and reported back to the church that the mission was accomplished.

Unfortunately, this is not one of those few situations in which "close enough" is an accepted standard. Construction permits set out very detailed specifications that must be met to the letter. Those specs include the geographic coordinates of the tower to be used, as well as the height on the tower at which the antenna is to be placed. In this case, the facilities as installed missed on both of those counts.

And when the permittee went ahead and filed its license application, it seriously compounded its problems by telling the FCC that the station's facilities did indeed conform to the CP specs. In the FCC's view, that amounted to false certification – the equivalent of lying to the agency – which can be a far more grievous sin that unauthorized construction caused by a good faith, inadvertent mistake. The government fined the church $5,000.

A Pennsylvania church was also hit with a $5,000 fine for failing to operate its directional AM station as authorized and failing to maintain a complete public file. The problems involved a veritable cornucopia of violations, including over-power operation and use of an unauthorized STL frequency.

But what really caught the FCC agent's eye were the station's towers. Or, more accurately, the station's tower. While the station was licensed to operate directionally from a two-tower array, the FCC inspectors found only a single tower throwing out a non-directional signal. Oh yeah, they also noticed the remnants of a second tower. The station readily admitted to the FCC agent that, six months earlier, both towers had been damaged, which led them simply to dismantle one of them and use the remaining one – even though that solution meant that the station was operating non-directionally and over-power. The church neglected to pass the word of its self-help solution along to the FCC; nor did it ask for Commission authorization (with, say, a mod application, or even a request for STA) to cover the modified set-up. Although the FCC initially proposed a $15,000 fine, the church found charity in the government and the fine was lowered to $5,000 because of the church's limited financial resources.

The preceding announcement was only a test, but it was brought to you by . . . – While there is no sponsorship of EAS tests, a mix-up at a Southern California station made it sound that way. The station in Orange County was a Local Primary station designated to broadcast alerts and serve as an emergency alert trigger for other stations in several nearby counties. Of course, the EAS system involves weekly and monthly tests alerts broadcast by such Local Primary stations.

It seems that last October an "operator error" resulted in the Orange County station running a required monthly test in place of the standard weekly test. While this may have otherwise gone unnoticed by the public, the operator committed another error. At the conclusion of any EAS test, the Local Primary station is required to transmit an "end of message" code and an explanation that this was only a test. That code and explanation let all other stations know that they may return to their own regular programming. In this case, though, the operator forgot to include the "end of message" code or the explanation. Instead, the Local Primary station returned to its own regularly scheduled programming and advertisements. Some of the down-

(Continued on page 7)

Live365 goes for the constitutional jugular

Show-Down In District Court

Internet radio network tries to take down Copyright Royalty Board

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"Billions of dollars and the fates of entire industries can ride on...decisions [by the Copyright Royalty Board (CRB), which] exercises expansive executive authority analogous to...FERC, the FCC, the NLRB, and the SEC [even though] unlike those similarly powerful agencies...[CRB Judges] have not been nominated by the President and confirmed by the Senate."

If these words seem familiar to you, then you're either a regular reader of www.CommLawBlog.com or a fan of Judge Brett Kavanaugh of the United States Court of Appeals for the District of Columbia. He wrote them in a concurring opinion (which was described in a post on our blog – www.CommLawBlog.com – back in July) in which he, seemingly without provocation, questioned the constitutionality of the CRB.

Those words are also found in the opening paragraph of a complaint filed in the U.S. District Court for the District of Columbia in early September by Live365 which seeks:

- a declaration that the statute providing for appointment of the CRB's judges is unconstitutional and, therefore, they really have no power or authority at all; and
- a preliminary and permanent injunction staying all further proceedings before the CRB – including the proceeding to set webcasting rates for the years 2011-2015 which is just starting up before the CRB.

Neither Judge Kavanaugh nor Live365 pulled this one out of thin air. In his opinion issued last July, he was called upon to consider challenges to the CRB's March, 2007 decision setting the 2006-2010 webcasting rates. Kavanaugh, who concurred with the majority's rejection of those challenges, wrote a separate concurring opinion suggesting serious constitutional problems with the CRB. (Kavanaugh's two compatriots on the three-judge panel elected to slide past that argument, saying that the thorny constitutional issue needn't be addressed because it hadn't been raised soon enough.)

So the table was set for this type of challenge; Live365 was just the first to answer the dinner bell.

Live365's argument, which draws from the reasoning advanced in both of the earlier cases, goes something like this.

The Constitution (Article II, to be precise) permits the President to appoint "officers of the United States", as long as such appointments are subject to the advice and consent of the Senate. The same provision also permits Congress to designate certain "inferior officers" who can be appointed without the one-two punch of presidential appointment and Senate confirmation – BUT the Constitutional power to appoint those "inferior officers" is limited to the President, the courts, and "heads of departments".

So there appear to be two types of U.S. "officers" identified in the Constitution: those which we can call "principal officers", requiring Presidential appointment ***and*** Senate confirmation; and those which the Constitution refers to as "inferior officers". But the appointment process to which CRJs are subject does not satisfy the Constitutional criteria for *either* type. CRJs are appointed by the Librarian of Congress. They thus cannot be "principal officers" (inasmuch as the President is not the appointer). And since the Librarian of Congress is not a "head of department", so the argument goes, CRJs cannot be "inferior officers", either. Accordingly, CRJs cannot be deemed to be validly-appointed U.S. "officers", and their actions – including, for example, orders establishing royalty schedules – must be deemed to have no lawful effect.

Kevin's Copyright Corner

Based on this line of argument, the Live365 case will hinge on:

- © Whether the District Court agrees that the CRJs rise to the level of "officers" of either type; and
- © The proper characterization of the Library of Congress as a "department" whose "head" (*i.e.*, the Librarian of Congress) may be given the power to appoint "inferior officers" under Article II of the Constitution.

Live365's complaint also argues that, because there is a high likelihood that the District Court will find the CRJs to be unconstitutional and without authority, the District Court should immediately order the CRB to terminate the upcoming proceeding to set the rates for 2011-2015. According to Live365, that proceeding is "a costly, intensive, year-long proceeding that may later be deemed null and void by a judicial determination that the CRB was constituted and sat in contravention of the Appointments Clause [of Article II]."

Live365 makes a very strong initial argument. But that's easy to do in a complaint. So it will be interesting to see what the government argues in response. The District Court may also be tipping its hand shortly, if it chooses to rule on Live365's request for preliminary injunction to stop the CRB webcasting proceeding. That next phase of that proceeding is currently teed up to start at the end of this month.

Drawing the line between interactive and non-interactive

"Interactive Webcasting"? The Second Circuit Weighs In

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Interactive. For webcasters, it's a word that makes a huge difference. Webcasters who provide *non*-"interactive" music services avoid a world of bureaucratic hurt when it comes to copyright royalties. Those lucky souls get to take advantage of the statutory license, which means that copyright clearance is essentially automatic – all they have to do is jump through some hoops established by the Copyright Royalty Board. But "interactive" webcasters? They have to negotiate separate copyright clearance deals with each copyright holder of each recording that they might want to play. Ouch!

Historically, it hasn't been easy to determine precisely when a webcast service crosses the line between non-interactive and interactive. But here's the good news: the U.S. Court of Appeals for the Second Circuit has recently become the first U.S. appellate court to consider, and shed definitive light on, the meaning of "interactive".

Many webcasters have a very limited view of what constitutes an interactive service. They'd have you believe a service is "interactive" *only* if it lets a listener choose the exact artist and song to be heard, much like an iTunes download. In this pleasant, if not entirely realistic, view, anything else – including services offered by the likes of TheRadio.com or Pandora, where the listener can identify an artist, or even a song, and find an entire channel with similar music – is viewed as "non-interactive".

The Second Circuit has now provided us with some guidelines to help sort this all out.

The decision was issued in a case pitting a number of record companies (think BMG, Arista, Bad Boy, Zomba) against the popular LAUNCHcast service. The record companies claimed LAUNCHcast was interactive. The court disagreed.

The Copyright Act defines an interactive service as one which "enables a member of the public to receive a transmission of a program specifically created for the recipient, or on request, a transmission of a particular sound recording . . . , which is selected by or on behalf of the recipient." The parties agreed that LAUNCHcast, in some form, generated a list of songs to be performed based on the initial song or artist choice by the listener. But was that enough to make it "interactive"? Nope.

The Court engaged in a searching review of the factors leading to the creation of the interactivity/non-interactivity distinction in the Digital Performance Right in Sound Recordings Act of 1995 and its refinement in the 1998 Digital Millennium Copyright Act – two seminal laws intended to protect sound recording copyright holders. The competing goals of the law are: (1) to increase the number of distribution channels for music and (2) to discourage rampant copying of music without compensation to the copyright holder.

The Court concluded that a major consideration – perhaps *the* major consideration – is the ability of a digital listener to capture and save a high quality copy of a sound recording with little to no effort if he or she knows it is about to be played. That is, if a listener can manipulate the webcast service in a way which permits him/her to snag his/her own digital copy of a song of his/her choosing, then it's likely an "interactive" service. Stated another way, the Court focused on whether the webcasting service offers listeners an opportunity to steal music they would otherwise purchase.

The Court focused on whether the webcasting service offers listeners an opportunity to steal music they would otherwise purchase.

Analytically, the Court reviewed factors which the Copyright Office had deemed relevant over the years. Although asked to clarify the "interactive/non-interactive" distinction, the Copyright Office has declined to take the bait, explaining that technology changes too rapidly to allow for a hard and fast rule. But it did indicate that some level of listener influence is permitted within the definition of non-interactive. In particular, the Copyright Office had even indicated that LAUNCHcast itself would qualify as "non-interactive".

How exactly does LAUNCHcast work? The short strokes are that users:

- © Must log in with a unique username/password;
- © Must enter basic information about preferences unrelated to music;
- © Must enter information regarding the user's favorite artists;
- © Must identify the user's favorite musical genres and rating them in order of preference; and
- © Are able to rate songs or artists they hear (or even instantly purchase a song they like).

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ALL accessible, ALL the time

FCC Reminds Video Distributors Of Emergency Broadcast Obligations

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In the midst of wildfire season in California and hurricane season on the coasts, the Commission has issued a public notice reminding stations *everywhere* – not just in Cali or on the coasts – of their obligation to make emergency information accessible to those with either visual or hearing impairments. As stations in the danger zones have learned from past experience, there are no exceptions to this requirement, and no excuses will be accepted. The latest public notice makes clear that this policy applies in areas well away from the zones directly affected by the emergency conditions.

The obligations in question here arise from Section 79.2 of the rules, which requires that all video distributors make "emergency information" "accessible" to those with visual or hearing disabilities (the latter by closed captioning or other visual means). "Emergency information" is defined by the Commission to mean information "about a current emergency, that is intended to further the protection of life, health, safety, and property, *i.e.*, critical details regarding the emergency and how to respond to the emergency".

The Commission has emphasized in the past that this provision allows for ***no*** exemptions, even in cases of news which is breaking quickly. Importantly, the rule reaches not only scripted presentations, but ad lib statements made in the course of live coverage. In 2005, the Commission underscored this obligation by issuing fines to a number of stations after reviewing days' and days' worth of recordings of the stations' coverage of wildfires, hurricanes and tornados. Substantial fines – north of $20,000 in some cases – have been the result of any failures in this area, even when the omissions were relatively small and infrequent, particularly in the context of extended, days-long coverage. (Example: One station was fined because, during coverage of wildfires, it aired a representative of the American Lung Association who gave the unsurprising advice that viewers should stay indoors, run their air conditioners with a filter, and avoid exercise. The station's failure to include visual presentation, by captioning or otherwise, of that advice contributed to a $20,000 fine.)

The bottom line is this: ***All*** emergency information aired by the station which includes information about what areas are affected, evacuation routes, methods of taking shelter in place, and the like, ***must*** be made available both visually and aurally, ***without exception***. The substance of even an off-hand remark, if it contains any relevant information, must be conveyed in a way that makes it accessible to the visually and hearing disabled.

The method of providing this information can be somewhat crude, such as holding up a handwritten board or reading information aloud, but regardless of how it is done, it must be done. Any crawls must be accompanied by an aural tone to alert visually impaired viewers to tune to another information source, such as the radio. Obviously, the Commission wants to be sure that everyone potentially in danger knows what to do to remain safe. While some might think that the Commission has sometimes gone a bit overboard in requiring even seemingly casual observations to be conveyed, at least most would agree that protection of life and property from imminent danger is an important goal.

The absolute accessibility requirement applies not only to areas in actual danger but also to those which might be logical evacuation areas.

The recent public notice also underscores the wide geographical range of the requirement. We are now reminded that the absolute accessibility requirement applies not only to areas in actual danger but also to those which might be logical evacuation areas. Along these lines, the concept of "emergency information" includes, for example, where evacuees from the danger zone may obtain relief assistance. (This interpretation could come as a surprise to stations located many miles away from a natural disaster, although the Commission did invoke this reading of the rule in 2005, in the case of Hurricane Katrina.)

The Commission also reminds us that some national events might be of local interest and subject to the requirements of Section 79.2, regardless of the lack of any actual local impact. It does not, however, provide any guidance to stations on figuring out when an event might fit into this category.

Network affiliates in the top 25 markets have a significantly greater burden in this area. Those stations are required, by hook or by crook, to arrange for closed captioning services. The FCC cuts such stations a little slack by allowing them time for the captioning personnel to travel to the station, but in the meantime

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The wait is over

AM On FM Translator Rules Become Effective October 1, 2009

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At long last, the Commission's Report and Order amending its FM translator rules to permit carriage of AM stations has been published in the Federal Register. So what? Well, that means that those rules now have an effective date, and that effective date is (the envelope, please – drum roll – hushed silence) – ***October 1, 2009***. As we reported last June (when the R&O was initially released), as of that effective date all outstanding special temporary authorizations (STAs) permitting AM-on-FM-translator operation will be automatically cancelled (and any still-pending requests for such STAs will be dismissed).

Those previously engaged in cross-service translator operations pursuant to an STA must file a notification formally specifying their AM primary stations.

Anyone who is currently engaged in cross-service translator operations will have to file a notification, pursuant to Section 74.1251(c) of the Commission's rules, formally specifying their AM primary stations. (Yes, we know that Section 74.1251(c) technically refers to changes in the "primary FM station being retransmitted" and makes no reference to any primary ***AM*** station. But the R&O specifically referenced Section 74.1251(c) when it specifically – that would be in Paragraph 19 – instructed folks to file notifications about their "AM primary stations", so the fact that 74.1251 doesn't mention AM's is probably not a matter of consequence.) While the R&O does not specify a deadline for those notifications, logically they would appear to be due no later than the new effective date, *i.e.*, October 1.

If you happened to read the fine print of the Federal Register item, you may have noted that the notice said that the October 1 effective date technically did not apply to one of the rule changes (relating to Section 74.1284) effected by the R&O. That's because that particular section involves an "information collection" requirement that had to be approved by OMB pursuant to our old friend, the Paperwork Reduction Act. As of the date the notice made it into the Federal Register, OMB approval still hadn't been issued – or so the FCC thought. As it turned out, OMB had concluded its review on August 31, an OMB control number was duly assigned to the FCC's information collection requirement, and any potential snag was thus avoided. (The FCC was apparently not aware of OMB's action when the FCC sent the item over to be published in the Federal Register several days earlier. A follow-up notice was issued about a week later.)

The lack of effectiveness of Section 74.1284 had also meant that revised Forms 303-S (for license renewal) and 345 (for assignments or transfers of control of translators) were themselves technically not effective, either. But now that OMB is on board with the 74.1284 changes, it has also signed off on the revised 303-S and 345. Those, too, are good to go as of October 1.

But there's still one remaining loose end: Form 349 (for new and modified FM translator/booster CP's) is still lost in OMB limbo. (It looks like the FCC didn't get around to asking for OMB approval of that revised form until September 4.) Keep your eyes out for a further notice advising of the effectiveness of revised Form 349.

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any emergency information being broadcast must be made accessible to the disabled by some method.

Additionally, depending on affiliation and market, some stations are allowed to use the electronic newsroom technique (ENT). Such stations must make sure that their ENT systems caption non-scripted materials; if the systems don't caption such materials – whether automatically or as a matter of choice by the station – the station must still make sure that all emergency information is disabled-accessible in some manner.

Perhaps most importantly, the Commission emphasizes that it is the responsibility of the local station to make sure that ***all*** emergency information is accessible, regardless of whether the station is viewed over the air or on cable or satellite.

(Continued from page 3)

stream stations, having heard no end of message code, continued to retransmit the signal from the Local Primary station, including its regular programming and advertisements.

The FCC determined that this was not an intentional effort by the station to broadcast its programming and advertisements from every radio station in the area. However, the FCC did fault the station for not sending the end of message code and explanation. As a result, the station now faces a $5,000 fine.

Insight from the Hill

Online Consumer Privacy Laws In The Works

By Catherine McCullough
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Does your business gather data about your audience – especially online? If you are thinking of engaging in behavioral advertising – widely considered the future of the industry – you should know about two new pieces of legislation in Congress that would affect the way you gather, store, and utilize the consumer data that advertisers so desire.

Yes, the long-anticipated online consumer privacy laws are coming.

Congress has repeatedly considered new consumer privacy bills for much of the last decade. But only since the 111th Congress began have all political elements necessary for passage existed at the same time: Democratic control of both houses of Congress; a supportive White House; and a new Chairman of the Senate Commerce Committee who is not afraid to make his voice heard on consumer protection.

The long-anticipated online consumer privacy laws are coming.

And thanks to a new technology on the scene, there is an additional element essential to all political dramas: a bad guy. Public, meet your new enemy: Deep Packet Inspection.

(At the risk of getting too technical: Deep Packet Inspection is the process by which Internet service providers can probe around in the contents of data packets passing through their systems. When a file – whether it's a web page, or an email, or a video, or whatever – is sent from Point A to Point B on the Internet, it first gets organized into "packets" which are then sent on their way to their common destination. Those packets don't necessarily all travel the same path through the myriad interlinked computer systems which comprise the Internet. For purposes of getting them all to the same place, the intervening systems need to know ***only*** the intended destination and a few other factoids relating to routing. The particular contents of the packets ordinarily do not come into play in the transmission. Deep Packet Inspection, however, permits detailed analysis of those contents, thus affording inquiring minds access to information which would ordinarily be thought to be private.)

There is concern that this technology is too much of a temptation for those who gather and utilize consumer data. But the bills being written don't restrict themselves to dealing only with this "extreme" type of tracking. They apply to most companies that store and use data. Here is how the legislation breaks down:

Two online privacy bills are now in different stages of development in the House. The first is being written by Rep. Rick Boucher (D-VA-9th), Chairman of the Energy and Commerce Subcommittee on Communications, Technology and the Internet, one of two House subcommittees with jurisdiction over the issue. Boucher reportedly is working with his Republican counterpart, Cliff Stearns (R-FL-6th), on language that would: (a) allow Internet sites routinely to collect *benign* information from consumers *unless* the consumers affirmatively "opt-out" of such collection; but (b) prohibit the collection of *sensitive* personal information *unless* the consumer has expressly agreed to such collection by affirmatively "opting-in". The objective of this approach seems to be to force people to jump through hoops before releasing tracking rights to their sensitive information, because it takes more effort to opt-in than out. In theory, people will therefore make informed choices about who collects the sensitive details of their lives and how they use that information. (But how do we define sensitive, you ask? We'll have to wait until the bill is introduced to see.)

The second bill has been introduced by Rep. Bobby Rush (D-IL-1st), Chairman of Energy and Commerce's Subcommittee on Commerce, Trade and Consumer Protection – the other House subcommittee of jurisdiction. Rush's bill, H.R. 2221, would require the Federal Trade Commission (FTC) to promulgate regulations to secure computerized data containing personal information. It would be no surprise if the two subcommittees' bills were to be merged into one piece of legislation regulating online privacy.

If an online privacy bill passes the House, the torch will be passed to the Senate, where Senate Commerce

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Takin' care of bid-ness

Auction 79 Limps To A Close

By R. J. Quianzon
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After 50 rounds of bidding which spanned three weeks, Auction 79, featuring 122 FM construction permits, came to an end late on the afternoon of September 15. Unlike previous auctions which raked in tens of millions of dollars for the federal coffers – like the 2007 auction that brought in $21 million or the 2006 affair that fetched $54 million – Auction 79 barely brought in a paltry $5 million.

When the FCC announced that it was going to conduct an auction in the current economic climate, several industry participants complained. Those who predicted a lack of enthusiasm were proven correct. Out of 122 construction permits on the auction block, more than half attracted only the minimum bid or no bid at all. Thirty-seven permits will have to be trotted back out in a few years for re-auction because nobody showed any interest in them this year.

A few markets did spark some spirited bidding that nudged the final bids above the initial minimums. However, there were no seven-digit pay-outs this time around, unlike auctions past. The top three priced permits were in California and Florida with Murietta, CA, and Palm Coast, FL, each commanding bids of around a half-million dollars.

Readers are reminded that the FCC's very strict anti-collusion rules remain in effect for several more weeks. Folks who submitted a Form 175 in this auction – even if they ended up not bidding at all – should refrain from communicating with one another about the auction.

(Continued from page 8)

Committee Chairman Rockefeller has made no secret of his consumer-oriented focus. On the one hand, Senator Rockefeller acknowledges the reliance of the news industry on new technology. On the other hand, his Committee position makes him responsible for drafting a law restricting how media profit from the same advertising that supports their news-gathering operations. It is unclear how Senator Rockefeller and others of like mind will resolve this tension.

While the bills will determine the principles of privacy policy, Congress will likely rely on the executive branch to determine important detail. The FCC is already shaping the online landscape as it writes its National Broadband Plan and takes its public stand on "network neutrality." The Federal Trade Commission is deeply involved in behavioral advertising and is beginning to share its thoughts with the FCC as well. Whether involved in writing online privacy law or executing and enforcing online privacy regulations, all government entities involved are now deciding how they will allow much-needed innovative online-related business to flourish while keeping consumer trust.

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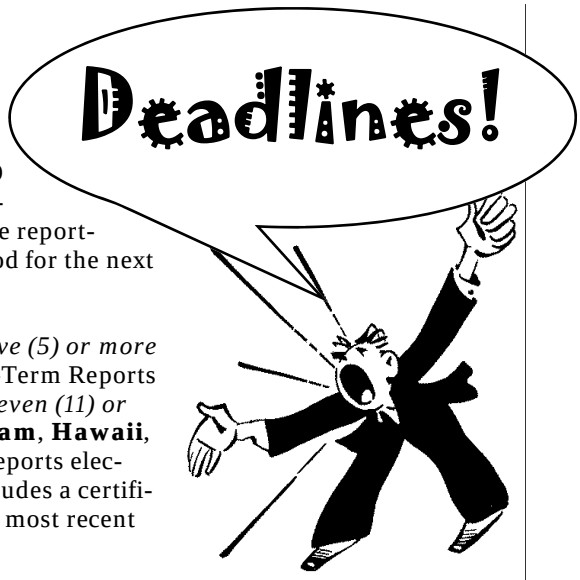
tion in nighttime interference that might be achieved through the ratchet rule. Moreover, the stations most likely to be constrained by the ratchet rule tend (again according to Messrs. Rackley and Dawson) to be older stations which originally weren't causing any interference problems to begin with. And ironically, the stations to which interference would be reduced are newer stations which had agreed to accept the existing level of interference from the get-go.

It appears from the petition that elimination of the ratchet rule would make life considerably better for a number of AM stations. We can't say for sure – to paraphrase Dr. Leonard "Bones" McCoy, "Damn it, Jim, I'm a lawyer, not an engineer" – but if you have an interest in AM allocations, you should probably take a look at the petition to see how it might affect you. The Commission has called for an initial round of comments on the proposal. Due date: October 9.

October 1, 2009



EEO Public File Reports - All *radio* and *television* stations with *five (5) or more full-time employees* located in **Alaska**, **American Samoa**, **Florida**, **Guam**, **Hawaii**, **Iowa**, **Mariana Islands**, **Missouri**, **Oregon**, **Puerto Rico**, the **Virgin Islands** and **Washington** 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 *television* station employment units with *five (5) or more full-time employee*s and located in **Iowa** and **Missouri** must file EEO Mid-Term Reports electronically on FCC Form 397. All *radio* station employment units with *eleven (11) or more full-time employees* and located in **Alaska**, **American Samoa**, **, Guam**, **Hawaii**, **Mariana Islands**, **Oregon** and **Washington** must file EEO Mid-Term Reports electronically on FCC Form 397. For both radio and TV stations, 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 *noncommercial television* stations located in **Iowa** and **Missouri** must file a biennial Ownership Report (FCC Form 323-E). All reports must be filed electronically. The filing requirement for commercial stations has been suspended, as all commercial stations are subject to the new November 1, 2009 universal filing deadline.

Radio Ownership Reports - All *noncommercial radio* stations located in **Alaska**, **American Samoa**, **Florida**, **Guam**, **Hawaii**, **Mariana Islands**, **Oregon**, **Puerto Rico**, the **Virgin Islands**, and **Washington** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323-E. The filing requirement for commercial stations has been suspended, as all commercial stations are subject to the new November 1, 2009, universal filing deadline.

October 10, 2009

Children's Television Programming Reports - Analog and Digital - For all *commercial television* and *Class A television* stations, the second quarter reports on FCC Form 398 must be filed electronically with the Commission, and a copy must be placed in each station's local public inspection file. Please note, however, that for television stations, only digital programming will be included, as all analog programming ended in June. Only Class A stations will need to use the analog programming section of the form.

Commercial Compliance Certifications - For all *commercial television* and *Class A television* stations, a certification of compliance with the limits on commercials during programming for children ages 12 and under, or other evidence to substantiate compliance with those limits, must be placed in the public inspection file.

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

November 1, 2009

Biennial Ownership Reports - Biennial ownership reports will be due for all *commercial AM*, *FM*, *TV*, *LPTV*, and *Class A Television* stations. The form must be filed electronically on FCC Form 323 – however, the precise version of the form to be used is not certain at this time. A new Form 323 has been prepared by the FCC and submitted to the Office of Management and Budget for its approval; that version cannot be used until that approval is given. While some FCC staff have indicated that OMB approval will be obtained by November 1, it is not certain that that will be the case. Check www.commlawblog.com for updates on this situation over the next several weeks. This is the first time that LPTV and Class A stations have been required to file a biennial report, and it is also the first time that sole proprietors and partnerships made up of only individuals have been required to file biennial reports. The information contained in the report must be current as of October 1, 2009.

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That final step (*i.e.*, the rating process) continually refines and changes the individual stream offered to the individual listener. Based on all these preferences and refinements, the LAUNCHcast software creates a playlist of 50 songs every time the listener logs on. The listener has no idea what those songs will be or which artists will be featured.

There is actually much more to the software, involving ratios, quotients and other mathematical formulas that aid in the refinement and ordering of the playlists. The Court of Appeals spent a good ten pages describing the process in impressive detail. Though we're glossing over the particulars, we'll note that it is this very level of detail which led the Court to conclude that LAUNCHcast is *not* an interactive service. As the Court saw it, the LAUNCHcast system does *not* allow a user either to pick a song and then immediately hear that song, or to predict whether (much less when) any particular song may be played, and or (most definitely) to engage in music piracy. (Indeed, the instant-purchase function probably promotes the legal purchase of copyrighted music.)

While LAUNCHcast may be more complex than some other few music services, the Court's discussion does highlight some key characteristics which webcasters can take note of in determining whether their services may be deemed interactive:

- In defining "interactive", Congress "intended to include bodies of pre-packaged material, such as groups of songs or playlists specifically created for the user";
- About 60 percent of the various factors used in the LAUNCHcast programming to create and modify a user's playlist are out of the listener's control (the only absolutely certain control available to a user is the "zero" rating: by giving a song a "zero" rating, the user guarantees that he or she will not hear it again);
- A new playlist of 50 songs is created every time the listener logs in, which prevents any ability to predict what will be heard during any particular session.

Emphasizing the limited involvement of the listener in the LAUNCHcast song selection process, the Court contrasted listening to LAUNCHcast to listening to radio back in the halcyon days. According to the Court, LAUNCHcast listeners do not enjoy even the "limited predictability that once graced the AM airwaves on weekends in America when 'special requests' graced lovestruck adolescents' attempts to communicate their feelings to 'that special friend'". Ah yes, the good old days. But the Court's comparison prompts this reminder to broadcasters who stream their over-the-air programming: be careful about inviting "special requests" from listeners, since granting such requests could lead the webcasting element of your operation to be deemed "interactive", with all that that entails.

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December 1, 2009

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**, **Minnesota**, **Montana**, **New Hampshire**, **North Dakota**, **Rhode Island**, **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 *television* station employment units with *five (5) or more full-time employees* and located in **Colorado**, **Minnesota**, **Montana**, **North Dakota**, and **South Dakota** must file EEO Mid-Term Reports electronically on FCC Form 397. All *radio* station employment units with *eleven (11) or more full-time employees* and located in **Connecticut**, **Maine**, **Massachusetts**, **New Hampshire**, **Rhode Island**, and **Vermont** must file EEO Mid-Term Reports electronically on FCC Form 397. For both radio and TV stations, 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.

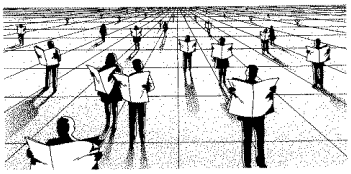
Television Ownership Reports - All *noncommercial television* stations located in **Colorado**, **Minnesota**, **Montana**, **North Dakota**, and **South Dakota** must file a biennial Ownership Report (FCC Form 323-E). All reports must be filed electronically. The filing requirement for commercial stations has been suspended, as all commercial stations are subject to the new November 1, 2009 universal filing deadline.

Radio Ownership Reports - All *noncommercial 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-E. The filing requirement for commercial stations has been suspended, as all commercial stations are subject to the new November 1, 2009, universal filing deadline.

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

Updates on the News

"Radio rescue petition" comment deadline set – Last month we reported on the 17-point "Radio Rescue Petition" filed by the Minority Media and Telecommunications Council (MMTC) last July. The FCC has now formally invited comment on that petition. You can download a copy of the Petition from MMTC's website; a link is available in our post on www.commlawblog.com (Go to: http://www.commlawblog.com/2009/09/articles/broadcast/fcc-invites-comments-on-mmtc-radio-rescue-petition/). As previously reported, the Petition presents an extraordinarily wide range of suggested steps intended (a) to jump-start the flagging radio industry and, in so doing, (b) to promote increased participation by minorities and women in the industry as well. Comments are due by ***October 23***.



Escribimos Español – Here's a heads-up from our blast-from-the-past department. Effective January 1, 2010, ***100%*** of "new" nonexempt Spanish-language programming must be closed-captioned. This applies to broadcasters, cable operators and the satellite TV services. For the past three years (since January, 2007), only 1,350 hours of such programming per channel per quarter have been subject to the captioning requirement. But come January, the obligation goes full-time. For purposes of this rule, Spanish-language analog programming is deemed to be "new" if it was first shown on or after January 1, 1998; on the digital side, it's "new" if it was first shown on or after July 1, 2002. Want to refresh your recollection of just what constitutes an "exemption"? Check out the FCC's captioning webpage at http://www.fcc.gov/cgb/consumerfacts/closedcaption.html.

Quick, let's lock that barn door – As most students of the FCC have noticed, for the last several months – pretty much since the June 12 DTV transition – the Commission's attention has been focused almost exclusively on all things broadband. We've seen FCC workshops and meetings and reports and blogs and vlogs and Twitters and just about every other conceivable form of communication, all devoted to BROADBAND. And that's against the backdrop of the government's multi-billion dollar give-away program (a/k/a the Broadband Stimulus Package) launched earlier this year and already steaming along, a program in which the FCC is a major governmental player (along with NTIA and RUS). So it came as something of a surprise when, on August 20, the FCC issued a cute little four-page public notice seeking comments on "defining 'broadband'". Since the term "broadband" had been tossed around so often in so many official pronouncements, we had kind of assumed that, you know, well, maybe, the government already had a pretty good handle on exactly what it was talking about. Foolish us. According to the notice, the Commission is looking for "targeted" comments on (among other things) "the general form, characteristics, and performance indicators that should be included in a definition of broadband". ("Targeted"? It shouldn't be that hard to hit a target as big as that.) In any event, it doesn't sound like the FCC is trying to fine-tune an existing, well-established definition, but you never know. The notice is a trove of such mixed signals. Sure, the Commission is seeking comment on "the form that a definition of broadband should take", "whether to develop a single definition, or multiple definitions", "the minimum thresholds necessary for broad classes of applications to function properly", "what criteria should be used to adjust thresholds over time" . . . and another dozen or so similar questions, all of which strike us as relatively cosmic in scope. But the Commission gave interested parties a mere 11 days to comment (and another eight days for reply comments). Maybe the FCC didn't want folks to over-think the problem.

FHH - On the Job, On the Go

Kevin Goldberg reports that you have a right to know that, on September 28, he appeared on a panel at the Third Annual International Right-to-Know Day Celebration at American University's Washington College of Law. His topic: Restoration of U.S. International Transparency Leadership During the Obama Administration.

Paul Feldman has his travellin' shoes on. On October 20, he'll be speaking on "Net Neutrality: What is it? Where is it going?" at SUPERCOMM's "Building Broadband Business" Pre-Show Summit being held at McCormick Place in Chicago. From there, he heads to Orlando, where he will attend TelcoTV 09 from November 10-12. And then back to Orlando on December 8, when he will appear on the Keynote Panel (topic: "Hype vs. Reality: The Role of Regulation in a 21st Century Digital World") at TM Forum's Management World Americas Conference.

And if Orlando isn't up your cup of tea, why not head up to Alaska, where **Frank Jazzo** will be providing a "Regulatory Update" at the annual convention of the Alaska Broadcasters Association on November 5 at the Anchorage Hilton.

(Continued from page 1)

DVD's, VCR's and the rest.

In other words, the FCC is taking the ball and running with it.

This is doubly troublesome. First, as noted, much of the inquiry appears to be well outside of the FCC's expertise, experience and jurisdiction. While the broad "public interest" standard in the Communications Act might arguably justify some FCC consideration of non-technical matters, it seems more than a stretch to conclude that that "public interest" standard authorizes the FCC to weigh in on video games or DVD content controls.

And second, what purpose will the further inquiry serve? After all, the FCC's March, 2009 NOI was extremely broad. It appears (from the FCC's ECFS site, at least) to have attracted more than 10,000 comments, including most if not all of the heavy-hitters in the parental control arena. Why does the Commission expect that it will get more or better information if it, in effect, re-issues its initial NOI a second time? And if the FCC's knowledge base is no better off after the second NOI, how can the Commission justify the dedication of its scarce resources to such a project?

Also, consider that, in the upcoming NOI, the Commission plans to "determine the pace of innovation in parental control technologies, whether it is proceeding at a pace consistent with other consumer technologies . . ., and whether evolving needs of parents, caregivers and children are being satisfied in a timely manner." With all due respect, how does one "determine the pace of innovation", or what the "evolving needs of parents", etc., might be, or whether those "evolving needs" are being satisfied at all, much less in a "timely manner" (and, of course, what is a "timely manner")? It all sounds very nice and helpful, but how could any of those questions ever be answered and what does any of that have to do with the regulation of spectrum?

Which enables us to segue nicely into the second report, about school bus programming. For reasons known only to Congress, in the Omnibus Appropriations Act of 2009 – the 2,200 page behemoth which provided for funding for the operation of the whole U.S. government – the folks on the Hill included a single paragraph ordering the FCC to issue a report on "commercial proposals for broadcasting radio or television programs for reception onboard specially-equipped school buses operated by, or under contract with, local public educational agencies." At least that order specifically referred to "broadcasting" programs.

Ah, but when the FCC investigated, it found only one service that even began to fit within the scope of Congress's directive. And that service – dubbed "BusRadio" – does ***not*** involve use of any broadcast frequencies. (The service equips school buses in participating jurisdictions with computers to which the service uploads, locally, audio programming prepared and distributed by the service at its headquarters facilities. The distribution is accomplished by secure Internet link and unlicensed wireless LAN. In other words, this is a closed circuit operation that does not involve "broadcasting" at all.)

So, as it turned out, the accurate answer to Congress's request was: "there is no such service presently in operation or publicly proposed". The Commission could have wrapped things up in, what, one page, maybe two. And indeed, by footnote 4 on page 2 of the report, the FCC acknowledges that no "broadcasting" is involved here. But does the Commission stop there, as it could and should? No. Instead, it says that BusRadio is the only service that "otherwise satisfies the description of services targeted" by Congress's direction. By casually invoking the term "otherwise", the Commission inexplicably allows itself to pretend that a core element of Congress's direction, *i.e.*, the concept of "broadcasting", may be ignored.

If it has to do with kids, count on the FCC to jump in with both feet – as if it's the Federal Children Commission.

And then, for another 23 single-spaced pages, the Commission referees a series of charges and counter-charges between BusRadio (and its supporters) and various opponents of BusRadio (and their supporters). Not that the Commission has any particular reason, or authority, to do so. But apparently it believes that its longstanding "concern with the potential impact of media content on children" is warrant enough. The results provide high irony at times. For example, in a discussion of BusRadio's "Content Guidelines", the FCC – possibly with a straight face – criticizes BusRadio by observing that "it is unclear under BusRadio's Content Guidelines precisely what types of 'swear words' or 'sexual innuendo' BusRadio would edit out of its programming." Paging Mr. Kettle, you have a call on Line One from Mr. Pot.

The FCC's conclusions in the BusRadio report are largely inconsequential, mainly because the Commission recognizes up front that the BusRadio service is a matter to be addressed by the local school jurisdictions which may or may not choose to engage that service. But the take-away message of this report is unmistakably similar to that of the parental control report.

And that message appears to be that this Commission will happily throw itself into any discussion relating in virtually any way to the welfare of children. Whether or not the subject at hand has anything to do with any particular regulated service over which the FCC has control, it makes no difference. If it has to do with kids, count on the FCC to jump in with both feet – as if it's the Federal Children Commission, not the Federal Communications Commission.

This paternalistic approach to kids may be heartwarming to some, but to others it reflects an inappropriate and unnecessary effort to inject the government into the role of

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First Class

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surrogate parent for our nation's children. It should be clear beyond argument that the myriad decisions involved in the process of raising a child vary from family to family, from parent to parent. That process is as personal a process as can be imagined. It is most certainly not one into which a federal agency with, at most, tenuous connection to child-raising should feel free to barge.

Interestingly, two days after the BusRadio report was released, Commissioner Baker – speaking in a different context – articulated a separate reason why the Commission should think twice about asserting jurisdiction over, or even simply inquiring into, areas which are outside the metes and bounds of the FCC's statutory authority. In Commissioner Baker's words, "If we seek information well beyond that needed to support our identified goals—and especially when we seek information about matters clearly beyond the scope of our statutory authority—we needlessly send signals to the market that can create regulatory uncertainty. When regulatory uncertainty skews business decisions to invest and innovate, it is consumers who suffer in the end. As policy makers, we must be particularly sensitive to this dynamic in the current economic environment."

Despite Baker's admirably stated restraint, it appears that the Commission may be inclined to view its authority as expanded beyond the language of the Communications Act. If that holds true, the next several years will prove to be interesting, and likely challenging, for broadcasters.