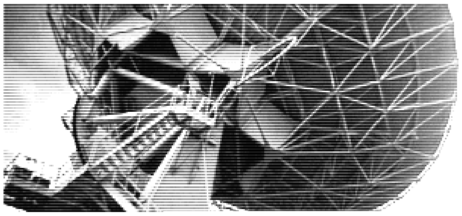

FLETCHER, HEALD & HILDRETH
Communications Law & Regulation

MEMORANDUM TO CLIENTS

News and Analysis of Recent Events in the Field of Communications

Thar she blows!

Enforcement Bureau On An Indecency Fishing Expedition

By Howard M. Weiss
weiss@fhhlaw.com
703-812-0414

Grab your rod, bait your hook, put on your floaties – and don't forget the sunscreen – it looks like we're all going on a fishing expedition, thanks to the FCC's Enforcement Bureau!

Apparently determined to make the already murky area of indecency regulation even murkier, the Bureau has: (a) issued a Notice of Apparent Liability, to the tune of $25,000, to Fox because Fox's response to a Bureau inquiry was not, in the Bureau's eyes, responsive enough; and (b) issued more than 200 *more* letters of inquiry, addressed to all Fox affiliates. With that many lines in the water, the FCC is obviously hoping to land a couple of big ones.

With so many lines in the water, the FCC is obviously hoping to land a couple of big ones.

This latest twist in the on-going indecency saga began last January, with the airing of an episode of "American Dad", a prime-time cartoon show. The episode at issue included a scene in which it was suggested, purely by implication and innuendo, that one of the animated characters was manually causing an animated horse to ejaculate. This prompted a campaign by at least one group, the Parents Television Council, to generate complaints about the show to the FCC and, sure enough, the Commission received more than 100,000 complaints.

The Bureau promptly shipped a Letter of Inquiry (LOI) out to Fox, asking a bunch of questions about the broadcast. Included with the LOI was a copy of one – and only one – complaint received by the FCC about the show. The complaint referred to the Fox O&O in Dallas. That licensee – again, it's a station owned by the Fox organization – responded to the LOI.

The Fox LOI asked for a list of all Fox affiliates that had aired the show, as well as the Nielsen audience figures (organized by age group) for the broadcast, and information about any "parental guidelines" that were displayed in connection with the show. The Fox Dallas station provided information about its own broadcast, but declined to narc on any other affiliates because the only evidence of complaints included with the LOI was the single complaint letter identifying only the Dallas station. The station did acknowledge the various questions that it wasn't answering, and explained why it wasn't answering them.

The Bureau wrote back to Fox in March, advising that the Dallas licensee's response didn't get Fox off the hook. The Bureau gave Fox a generous five days in which to get back to the FCC with all the requested information. Sticking to its guns, Fox declined to respond to the second letter, although the Dallas Fox O&O did respond, providing some additional information (including Nielsen data).

So the Bureau produced one complaint (specifying the Dallas station) and it received responsive information about that station.

But the Bureau – like Alex Forrest (the character played by

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June, 2010 **No. 10-06**

Inside this issue . . .

Hey STELA!!!!!

Congress Passes Satellite Television Extension

By Jeffrey J. Gee
gee@fhhlaw.com
703-812-0511

At the end of May, the long-delayed and much-negotiated extension of the law covering direct broadcast satellite re-transmission of television stations was signed into law. At one time or another, the Satellite Television Extension and Localism Act of 2010 (STELA) was seen as a possible vehicle for several major changes in the relationships between television stations and satellite carriers and other multichannel video program distributors such as cable and telecom services. In the end, however, STELA delivers few sweeping changes, although certain television stations may find that some elements of the new law produce significant changes in their markets.

STELA's primary purpose was to reauthorize the Satellite Home Viewer Extension and Reauthorization Act of 2004 (SHVERA), which allowed satellite operators to make use of a compulsory copyright license to transmit "distant" television signals to "unserved" households (that is, households that cannot receive a good quality over-the-air signal of a local affiliate of a particular network). SHVERA's authorization technically expired December 31, 2009, although it was extended on a stop-gap basis while STELA was finalized.

STELA extends the compulsory copyright license another five years, to December 31, 2014. In the process, however, STELA also effects changes to the definition of unserved households and other technical changes that may make it easier for the satellite companies to import distant television signals into many markets.

One such change concerns the type of antenna used by the households in question. Under SHVERA, a household was "unserved" only if it couldn't receive a qualified signal through the use of "a conventional, stationary, outdoor rooftop receiving antenna." Thus, to qualify as unserved under SHVERA, a household needed to show that it couldn't receive a local affiliate signal even through the use of an outdoor antenna. STELA, however, provides that a household may be considered unserved if it can't receive a signal using "an antenna" (any antenna). Thus, if a household can't receive a signal through the use of an indoor antenna, it would not be required to mount more effective (and expensive) rooftop antenna before being considered unserved and eligible for a distant signal.

STELA also gives households seeking to receive distant signals a choice in the method used to determine the adequacy of a local signal. And it provides that over-the-air service from stations located outside the market will no longer count in considering whether a station is unserved. These alterations to the standards for unserved households seem likely to increase the number of households able to receive distant signals.

On the other hand, STELA limits the availability of distant signals in certain circumstances in which the satellite carriage offers a "local-into-local" package that includes the affiliate of the network at issue. Unserved households lawfully receiving distant signals prior to STELA's enactment are generally grandfathered. But unserved households that sign up after STELA's enactment will, in order to maintain their eligibility for the distant signal, be required to sign up for local-into-local service that includes the local affiliate as it becomes available.

The passage of STELA will have an additional impact on one particular carrier's ability to offer distant signals. Dish Network had been prohibited from offering distant signals, even to unserved subscribers, under the terms of a court order. STELA re-opens the door to offering distant signals to unserved subscribers, as long as Dish Network offers local-into-local services in all 210 markets in the country.

STELA also makes several changes recognizing the switch to digital broadcasting

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FLETCHER, HEALD & HILDRETH P.L.C.

1300 N. 17th Street - 11th Floor
Arlington, Virginia 22209
Tel: (703) 812-0400
Fax: (703) 812-0486
E-Mail: Office@fhhlaw.com
Web Site: fhhlaw.com
Blog site: www.commlawblog.com

Focus on FCC Fines

By R.J. Quianzon
quianzon@fhhlaw.com
703-812-0424

"Penalty" en Español es "penalizacion" – A California non-commercial station faces a $12,500 fine for airing sponsorship announcements that the FCC considers to be commercial announcements. In order to build its case, the FCC recorded the station's Spanish language programming, translated the programming to English and then fined the station for what the FCC determined were advertisements.

FCC rules prohibit non-commercial stations from airing, in exchange for remuneration, material that promotes services, facilities or products of a for-profit entity. Unfortunately for the station, the Commission concluded that its announcements did, indeed, promote for-profit enterprises. The specific language at issue was not necessarily your standard "commercial" material, but it still fell within the FCC's broad concept of "promotional". For example, one announcement included the seemingly non-controversial claim that the folks at the business in question "are proud to be Mexicans". According to the FCC, that was a "favorable and qualitative" expression – and, therefore, unacceptable.

Other examples cited by the FCC were more typical of "commercial" announcements, with obvious references to price information, the attributes of the products for sale, and the lameness of their competitors. (One particularly colorful claim by a tire store: "we don't give you a cat for a rabbit here." The FCC figured that that phrase – which apparently means that the company won't try to pass off a fake item for the real thing – reflected an effort to distinguish the underwriters favorably from their competitors and was intended to entice customers to visit the underwriter's business.)

The FCC reaffirmed that its base fine for non-commercial stations that air commercial programming is $2,000. In this case, the FCC found that the station had aired these announcements more than 2,000 times. Because of the number of violations, the FCC increased the $2,000 base fine to $12,500.

Readers who operate non-commercial stations (both radio and television) should always be cautious when it comes to the verbiage of underwriter announcements. As we have written in the past, the FCC's policies in this area are vague in the first place, which gives the FCC plenty of room to be highly subjective in the enforcement of those policies. The FCC's latest decision adds more phrases to the Lexicon of the Unacceptable (or at least Problematic) in the universe of noncommercial underwriting. Underwriting announcements that reflect national pride ("proud to be Mexicans", for example) are now plainly questionable – as, apparently, are claims that you won't get a cat if you're looking for a rabbit.

Storm warnings – With the arrival of hurricane season, the Commission has reminded all video programming distributors (a/k/a "VPDs", a universe which includes TV broadcasters, cable operators, satellite TV services and other distributors of video programming for residential reception) of the need to make emergency information accessible to persons with hearing or vision disabilities. This is no small matter, as several five-figure fines issued in recent memory will attest.

While common sense dictates that VPDs should be concerned about all members of their audience, the FCC's rules impose that common sense with a vengeance. For example, the geographical area to which the rule (Section 79.2) applies includes not only the immediate area affected by the emergency, but also a vastly expanded area if, for example, the emergency has forced relocation of individuals outside of the immediate danger zone.

Additionally, any emergency-related information that is communicated in any way must be accessible to all members of the audience, regardless of any disabilities to which they might be subject. So if, during a brief conversation between, say, the anchor and the meteorologist, the latter makes an off-hand remark about one or another step that might be taken in the interest of safety, the VPD should be sure to present that information in a manner (closed captioning, crawl, scroll, etc.) which can be read by the hearing-impaired. Failure to do so could be pricey.

As we wrote in this column five years ago (on the occasion of the issuance of $48,000 worth of fines to two stations who got cross-wise with Section 79.2 during several consecutive days of hurricane coverage), it's tricky to pick sides in this particular area. On the one hand, disabled viewers are obviously entitled to the same emergency information as others. That's certainly what the law says, and from a humanitarian perspective you can't argue with it. But on the other hand, broadcast stations trying to operate during emergency conditions may find it hard to dot every "i" and cross every "t" in their efforts to keep a useful flow of information streaming to the public. So it can seem a bit nit-picky for the Commission to carp about occasional isolated incidents which occur during the course of marathon,

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Chipping in its two cents' worth

Copyright Office Weighs In On GAO PRA Report

By Kevin M. Goldberg
goldberg@fhhlaw.com
703-812-0462

It is an unfortunate truth of life generally – and life in the halls of Congress in particular – that the best idea doesn't always prevail over lesser alternatives. The merits of an idea often take a backseat to a variety of other considerations – think "it's not *what* you know but *who* you know". So it shouldn't shock you to find out that legislation and other policy-making initiatives aren't always the product of reasoned consideration and debate leading to a result that clearly has the best interests of the country in mind. Sad but true, the strength of a proposal often depends on the political "juice" each side can muster – so the side with the stronger special interests wins out.

The Performance Rights Act (PRA), which we've written about at least a dozen times in the past (both on our blog, www.CommLawBlog.com, and in the *Memo to Clients*), is no exception. But it does have a twist. While support for the bill breaks down along predictable lines, with the Recording Industry Association of America (for) facing off against the National Association of Broadcasters (against), the most recent development is a spat between the Copyright Office (which appears to be in the PRA's corner) and the Government Accountability Office (GAO) (which appears not to be in the PRA's corner).

> *The Copyright Office didn't like where the GAO appeared to be heading.*

The GAO is an office situated in the legislative branch of government – *i.e.*, Congress – which is charged with providing reports, often statistical in nature, on issues affecting pending federal legislation. At the request of several Members of the House Judiciary Committee (including its Chairman, John Conyers), the GAO issued a report on February 26, 2010 entitled "Preliminary Observations on the Potential Effects of the Proposed Performance Rights Act on the Recording and Broadcast Radio Industries".

The GAO interviewed folks who have obvious stakes in the debate underlying the PRA (*i.e.*, both the recording and broadcast industries) and reviewed economic data. In its report, the GAO reached several conclusions regarding the direct economic effect that either version of the PRA (that is, the House's – HR 848 – or the Senate's – S 379) would have on the each industry. For example:

- Both industries "face economic challenges". (There's a surprise.) The report identified an increase in piracy as a primary source of the recording industry's current woes, since that increase corresponds to a decrease in record sales. This is evidenced by a 60% decrease in the revenue from the sale of physical records (including CDs and cassettes) from 1999 through 2008. (All is not lost for recording companies: there has been an increase in digital sales – 30% in 2008 – though these often involve sales of single songs, not the more lucrative full album.)

- On the other side, broadcast radio has seen its primary revenue source, *i.e.*, advertising sales, decline as its listenership fragments across several media platforms. A key statistic cited by the GAO here is a 6.8% decrease in the number of commercial stations from March 1996 and March 2007, with a corresponding decrease of 39% in the number of station owners. The industry has also suffered a decline in advertising revenue of about 8% from 2003 through 2008.

GAO also provided the unexceptional observation that there is an existing relationship between the recording and broadcast radio industries, with the recording industry relying on broadcast airplay to promote its songs and concerts and the broadcast industry relying on the content provided by recording artists. Even the recording industry stakeholders agreed that broadcast radio is still the primary place that radio listeners find new music, though they claim that the promotional value of broadcast radio has decreased.

These are not groundbreaking revelations, of course. But then the GAO went farther with a couple of findings that may be said to be controversial. According to the GAO, the PRA would impose additional costs on broadcast stations. The precise cost would depend on the amount of music the station broadcasts, its gross annual revenues, and a little bit of administrative expense thrown in for good measure. Some stations would cope by reducing staffing while others may stop playing music – or even operating altogether. Because the current version of the PRA would affect different stations in different ways depending on their revenues (*e.g.*, the PRA would impose flat fees for lower grossing stations, while higher-grossing stations would be subject to rates set by the Copyright Royalty Board), the GAO could not bolster its prediction with specific numbers. But it did note that:

- 33 percent of all radio stations (a total of 2,598) would not know the new royalty rate that would apply;

- 33 percent (a total of 2,600) would be on the hook for $5,000.00 more per year;

- 28 percent (a total of 2,215) would pay an additional $2,500.00 per year; and

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- 6 percent (a total of 473) would qualify for the lowest flat fee of $500.00 per year.

On the other hand, the GAO figured that the PRA would raise $18.7 million per year for the recording industry. Of course, this wouldn't all go directly into the pockets of the recording artists (since the statute proposes that 50% go to the recording company, 45% to the primary musicians and performers and 5% percent to background musicians and performers). The record companies claim they "could" (note that they didn't say "would") then invest their share of these increased revenues in new talent. (As to new talent, the GAO report cites at least one major record company's statement that the number of performers it has under contract has dropped by 28% in the past five years).

Again, not entirely groundbreaking – and not final, as the GAO explicitly said its report was preliminary in nature. But the Copyright Office didn't like where the GAO appeared to be heading. So on April 16, 2010, the Copyright Office voiced its protest in comments filed with the GAO. Noting its "long history of recommending its extension of full performance rights to sound recordings" and its previously announced support for the PRA, the Copyright Office suggested that the GAO's independent review wasn't thorough or even-handed enough. That's odd since, as noted above, the GAO's review was based on reliable data)collected from both the broadcast and recording industry), as well as interviews with representatives from (a) the various sides of the debate and (b) relevant government agencies, which included the FCC and – get this – the Copyright Office. Apparently the Copyright Office felt its views may not have been given enough weight.

Broadcasters should hope that legislators recognize the relative positions of the GAO and the Copyright Office.

So the Copyright Office – which, having gone on record in support of the PRA, plainly has an unabashed bias here – suggests that the GAO – an independent, government research entity with no apparent stake in the outcome – ought to review the previously-collected data and some newly-collected data through a different lens. The Copyright Office posits that the revenue challenges faced by the broadcast industry are cyclical in nature because they are mainly attributable to the economic downturn. In other words, according to the Copyright Office, radio station advertising will bounce back in 2010 and beyond.

That would be good news, if it were reliable. But there's the rub – the Copyright Office's upbeat prognostication is based on some reports and articles, as well as the assertion that there is "no shortage of parties seeking to acquire licenses to operate broadcast stations." One wonders whether a bank would be willing to finance a radio acquisition based solely on the Copyright Office's sources.

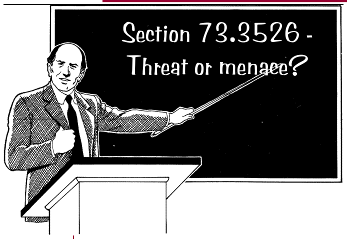
Not surprisingly, the Copyright Office finds no basis for similar optimism on the recording industry side. There, the Gloomy Gus Copyright Office describes the challenges as "permanent", with no hope for recovery likely. The problem of illegal downloading isn't going away and the growth areas of listening and purchasing – on-demand and single recordings – aren't enough to sustain the industry.

From these dubious premises, the Copyright Office – probably just wanting to lend a helpful hand to a sister agency – suggests that the GAO should:

- make note of evidence showing that illegal downloading is a growing method of music acquisition and a permanent challenge for the foreseeable future;
- elaborate on findings that not only do new media fragment broadcast listenership, but they also result in listeners obtaining music without purchasing it;
- clarify that the PRA will not go into effect – and thus not impose royalty fees on broadcast stations – for at least a year (and up to three years) after enactment, which lessens the impact on the broadcasting industry . . . and when it does go into effect, the flat fee for smaller or noncommercial stations "alleviates or even eliminates any negative impact on the broadcast radio industry";
- highlight positive effects of the PRA, including prevention of job loss in the recording industry – though the Copyright Office admits it doesn't happen to have concrete figures to support this particular point.

Why is this important? Because the GAO, on June 7, acknowledged the receipt of the Copyright Office's comments and agreed to consider them in the issuance of its final report. Broadcasters should hope that the GAO will remain true to its mission to provide Congress with an objective evaluation of the PRA's impact on affected industries, especially since the Copyright Office appears to believe the GAO's report counsels against passage of the PRA). More importantly, broadcasters should hope that legislators recognize the relative positions of the GAO and the Copyright Office in evaluating these agencies' recommendations to Congress. Maybe someone can frame the issue in the form of a question from the Copyright Office to Congress: "Who you gonna believe, us or your own independent research arm?"

But even if some legislators are swayed, broadcasters can still take heart: more than 260 Members of the House of Representatives are now co-sponsors of the "Local Radio Freedom Act", the nonbinding resolution that strictly opposes installation of this performance right. That provides a sufficient margin that should withstand even a few defectors.



Articles, by-laws and ABIP – What do they have in common?

Public File 101: A Refresher Course

By Steve Lovelady
lovelady@fhhlaw.com
703-812-0517

It's pop quiz time. Close your books and listen up. Here's today's problem.

Your station is located in a state whose broadcaster association participates in the Alternative Broadcast Inspection Program (ABIP). Being a good doo-bee, you have undergone the ABIP inspection, passing with flying colors three times in the last nine years.

Somebody, anybody, walks into your station and asks to see the licensee's by-laws and articles of incorporation . (We're assuming here that the licensee is a corporation; if you're a partnership or LLC, adjust the hypothetical to refer to your own particular organizational documents.) Those items, as it turns out, aren't in your public file. What do you do?

- (a) Tell the requester that you've passed the ABIP test and that's all you have to do.
- (b) Tell the requester that those particular items aren't available, and isn't that just too darned bad.
- (c) Tell the requester that you can't find the items, but if they turn up, you'll for sure send out copies eventually – and then forget about the whole thing, because you figure the requester will probably forget about it.
- (d) Make the requester comfortable (maybe a cup of coffee, a comfy chair, something to read) while you get the station's lawyer to email you a copy of the requested items, which you then print out and hand over to the requester with apologies for any slight delay he/she may have suffered.

As is the case with any test administered by a lawyer, the answer is, "it depends". That is, it depends on whether you want to get whacked for a $1,250 fine. If so, go with (a), (b) or (c). If not, use (d).

An FM licensee in Connecticut recently learned the hard way that (a) passing an ABIP inspection does ***not*** get you a "get out of FCC jail free" card and (b) by-laws and articles of incorporation are among those documents routinely required to be in the public file available for inspection.

We mention this because one or both of those take-home lessons may come as news to many broadcasters.

As to the ABIP, it's important to realize that that voluntary inspection program merely protects the licensee from random FCC inspections for a particular period of time. That is, when a state association participates in ABIP, the association conducts inspections and determines compliance. The results of the test – which are provided to the local FCC field office – serve as sort of a garlic clove or silver cross, preventing routine FCC inspections. But the ABIP does ***not*** protect licensees from liability for violations which are brought to the FCC's attention – even if they could or should have been uncovered during the ABIP inspections.

*An ABIP inspection does **not** get you a "get out of FCC jail free" card.*

In the recent case, the public file requester was sent away empty-handed. He later wrote the station asking again for copies of the documents, but got nothing – so he complained to the FCC which, in turn, asked the station for its side of the story. The station responded that it had not kept its corporate documents in the public file until shortly after the requester asked for them, at which time they happened to be out being reviewed by the licensee's lawyer. The station also waved its ABIP successes at the FCC.

All to no avail. The fact that the documents were missing from the public file constituted a violation. (The licensee in question also failed to come up with Plan B, which would have been to include a list of its corporate documents – instead of the documents themselves – in the public file. Under the FCC's rules, that would have done the trick, as long as copies of the docs themselves were provided to the requester within a reasonable time.) So the ABIP was irrelevant.

From what we hear from broadcasters across the country, there is little if any demand to see broadcast public files, year in and year out. That being the case, it is entirely possible that the presence or absence of such evergreen documents as corporate by-laws might escape the attention of even the most diligent licensee – and, apparently, even the occasional ABIP inspector (how else to explain the Connecticut licensee's successful completion of three separate ABIP inspections?).

The point here is not to vilify anybody whose public file might be short a document or two. That kind of stuff happens. Rather, the point is to remind one and all that they might want to take a gander through their public files sooner rather than later to confirm that *all* materials – including the kind of routine organiza-

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No more Mr. Nice Guy?

Website Operators: Their Own Worst Enemy?

By Kevin M. Goldberg
goldberg@fhhlaw.com
703-812-0462

Section 230 of the Communications Decency Act (CDA) is a statute we've written about on several occasions. For website operators, it's akin to the Gardol Invisible Shield: Section 230 effectively immunizes website operators from liability arising from most (but not all) of the bad things that visitors to their sites might say or do. (Cautionary note: Section 230 does *not* help you when you're accused of copyright or trademark infringement based on third-party posts to your site.) (Promotional note: we can offer tutorials on both Section 230 of the CDA and Section 512 of the Digital Millennium Copyright Act, which covers the copyright/trademark area. Let me know if you have any interest.)

If you like your Internet a bit raucous, you can thank Section 230. Its immunity provisions are directly responsible for the virtual absence of any decorum on most Internet discussion boards, chat rooms and comment areas. Those provisions relieve website operators of the hassle and expense involved in extensively moderating their sites for improper comments – and that, in turn, opens the doors for robust exchanges of often controversial views that might otherwise go unexpressed, or at least unposted, for fear of potential litigation. Section 230 has proven to be a rock solid protector of website operators (and, many would say, free speech).

Section 230 is alive and well – and still quite effective.

But in a couple of recent cases from the West Coast, website operators have been less than invulnerable to the reach of courts prodded by individuals unhappy about third-party-posted content. What happened to Section 230?

The good news is that Section 230 is alive and well – and still quite effective. The recent cases imposed liability on website operators ***not*** because of the content, but because of the website operator's own conduct when objections to the content were raised. Fortunately, operators should be able easily to avoid such liability because the case law, at least as it has developed thus far, provides a nice, bright line, rule.

The earlier of the two cases involved Yahoo!, which was sued by a woman whose ex-boyfriend posted Bad Stuff about her (like nude pictures, solicitations for sex, personal contact information) in Yahoo! chat rooms. She asked Yahoo! to remove the pictures. Yahoo! agreed . . . but didn't remove the pictures. She asked again, more emphatically. Yahoo! agreed again . . . but didn't remove the pictures. Finally, she sued Yahoo! to get the pictures removed – at which point Yahoo! removed the pictures. But in the lawsuit the plaintiff included claims against Yahoo! for "negligent undertaking of services" and breach of contract. In response, Yahoo! wrapped itself in the cloak of Section 230, claiming that it can't be held liable for content posted by third-parties.

A U.S. District Court bought Yahoo!'s Section 230 argument – but the U.S. Court of Appeals for the Ninth Circuit sure didn't. According to the Circuit, imposing liability on Yahoo! was not inconsistent with Section 230 if the liability was tied to Yahoo!'s actions in response to the plaintiff's request that the offending content be removed. That's different from imposing liability based solely on the mere posting of the photos themselves. In other words, this lawsuit can stand if the plaintiff can establish that Yahoo! made a promise to the woman (*i.e.*, to remove the offending content) and then broke that promise.

We come next to the case of *Scott P. v. Craigslist, Inc.*, whose facts here are very similar to the Yahoo! case. Scott P. was the subject of several harassing posts on the very popular Craigslist website. The posts included solicitations for gay sex, offers to give away personal items and the ever-popular disclosure of confidential information. Scott P. contacted Craigslist three times, asking that these posts be removed. Each time, Craigslist agreed to remove the posts in question. On the second and third times, Craiglist said it had taken steps to prevent further posts of this type. Of course, the posts hadn't been removed, and they kept occurring. So Scott P. sued Craigslist under California law for promissory estoppel (that's legal-speak for breaking a promise) and for having unacceptably weak user verification procedures.

The suit was filed in the California Superior Court (that is, *not* the federal court system) in San Francisco. Since California is in the Ninth Circuit, you've got to figure that the lawyers for both Scott P. and Craigslist were clued in to the Circuit's Yahoo! decision, even if that decision does not necessarily control in California state courts.

So when Craiglist asserted the Section 230 defense, it should not have been surprised when the court allowed the promissory estoppel claim to go forward (although the court did toss the "unacceptably weak user verification" claim).

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Glenn Close in *Fatal Attraction*) – was not going to be ignored, so it issued the *NAL* fining Fox $25K for not itself answering the Bureau's inquiries. And just to show that it really means business, the Bureau sent out LOIs to each and every Fox affiliate, asking them essentially the same questions originally posed to Fox – the new LOIs even included copies of the original Fox LOI.

The one thing the new LOIs did *not* include was any documentation establishing that the FCC had received any complaints about any station other than the Dallas station.

The Bureau's obvious fishing expedition reflects a curious step backward in the FCC's approach to indecency.

Four years ago, the full Commission – that is, the boss of the Bureau – announced that it would thereafter be taking a more "restrained" approach to indecency enforcement. In particular, the FCC would be issuing fines only to stations serving markets from which the FCC had received a complaint. The Commission has since re-stated that position several times over. (For an illustration, check out Paragraph 32 of the 2006 "omnibus" indecency decision, where the Commission referred to its "commitment to an appropriately restrained enforcement policy". Or try Footnote 1 in the 2008 "Married By America" decision.)

The Bureau's fishing expedition reflects a step backward in the FCC's approach to indecency.

Maybe the Bureau didn't get the memo.

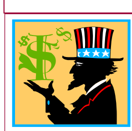
After all, if the Commission's policy is *not* to fine stations *unless* the Commission has a complaint about that station (or at least that station's market) in hand, why is the Bureau sending out letters asking which stations aired the show? Shouldn't the Bureau first check its own files to determine what markets and/or stations were mentioned in any complaints?

In the *NAL*, the Bureau did attempt to justify its inquiry by saying that the FCC has the authority to engage in this kind of unbounded fishing expedition. And while the Commission does have considerable power to investigate various goings-on, the Commission – not the Bureau – has already announced the "restrained" limit on its exercise of that authority in this particular area. How, then, can the Bureau blithely ignore a policy articulated, repeatedly, by the full Commission?

And let's not forget that the Commission's indecency policy is currently under the microscope in two separate courts of appeals – the Second Circuit (involving the Fox case) and the Third Circuit (involving CBS). Both of those courts have already demonstrated considerable hostility to the FCC's general indecency policy, and the FCC has defended itself by pointing to the restrained nature of its enforcement activities. The Bureau's sweeping dragnet approach in the "American Dad" case runs dramatically counter to such claims. Ditto for the Bureau's heavy-handed effort to slap Fox around for declining to play the Bureau's game. If the Bureau persists with its LOIs and the $25,000 Fox fine, the Second and Third Circuits may legitimately question just how "restrained" the FCC's policy really is – and, perhaps more dangerously from the Commission's perspective, the courts may wonder just how reliable *anything* the Commission says is. (As a general rule in litigation, it's not a good thing to be in court if the court doesn't believe you.)

Unfortunately, the Bureau's damn-the-torpedoes approach is representative of the arbitrariness for which the Commission's indecency policy has been criticized for years. The problem appears to arise from the Commission's seeming desire to be a kind of Catcher in the Rye, responsible for protecting everybody – and particularly kids – from all social unpleasantness. (And it bears noting that the agency's knickers get bunched up over less-than-explicit material – "American Dad" being a case in point, since even the single complaint that the FCC has released so far acknowledges that the supposedly offensive material involved only innuendo.) The Commission's authority to achieve such all-encompassing womb-like protection is, at best, doubtful – but that hasn't stopped it from trying.

Ideally, the pending Second and Third Circuit cases will be resolved relatively soon, which may likely tee up one more trip to the Supreme Court, which in turn could resolve many of the longstanding indecency questions. Until that happens, since the Commission's staff is, by most accounts, committed to stay its current course, broadcasters will continue to occasionally find themselves on the wrong end of the FCC's fishing lines.



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multi-day emergency coverage. Naturally, in a perfect world there would be no mistakes in even the most difficult of circumstances; but we don't live in a perfect world, and the broadcast stations reporting on developing emergencies face extraordinary circumstances while doing their best to serve the public.

Of course, VPDs could presumably avoid any exposure to a fine simply by declining to broadcast *any* emergency information, either aurally or visually – but is that a result that the Commission really wants?

CALM Act moves forward

Senate Committee Hits The Mute Button

By Steve Lovelady
lovelady@fhhlaw.com
703-812-0517

The chronic problem of Excessively Loud Commercials – a bugaboo to TV viewers for decades – may soon be a thing of the past. The Commercial Advertisement Loudness Mitigation Act (apparently mandatory "clever" acronym: the CALM Act) (S.2847) has been approved by the Senate Committee on Commerce, Science and Transportation and shuttled off to the full Senate for its consideration. The bill is intended to force video providers to take steps to assure that commercials (and other "interstitials") are not annoyingly louder than the programming which they interrupt. Since the full House has already passed its essentially identical version of the CALM Act, the stage appears to be set for passage of the bill, presumably in the not-too-distant future.

As we have written previously, the bill in its current form would require the Commission to incorporate by reference into its rules the "Recommended Practice" adopted by the Advanced Television Systems Committee (ATSC). The ATSC's recommendation was intended to provide the television industry "with uniform operating strategies that will optimize the audience listening experience by eliminating large changes in sound levels".

The paladin of the CALM Act for several years has been Congresswoman Anna G. Eshoo (who might want to change the spelling of her name to eSHHHHoo if the bill gets passed). She introduced a version of it two years ago, but that version (as we observed back then) suffered a number of practical problems. Those problems got cleaned up considerably this time around, largely eliminating the "wild goose chase" aspect of the earlier version.

While the viewing public may celebrate the eventual enactment of the CALM Act, the television industry as a whole may want to hold off for a while before it pops the cork on the champagne. Compliance with the requirements contemplated by the Act could be pricey. The bill itself implicitly acknowledges this when it specifically authorizes the Commission to grant up to two years' worth of waivers based on "financial hardship". It's not clear exactly what the costs are likely to be, but we can all probably agree that it's not a good sign when Congress itself starts talking about "financial hardship" before the bill has even passed.

The television industry may want to hold off before it pops the cork on the champagne.

Also, the ATSC's Recommended Practice indicates that compliance may require use of a patented invention. That could give rise to additional problems (as it has in at least one other area involving an ATSC standard for DTV).

But irrespective of these practical considerations, the American viewing public is likely to salute passage of the CALM Act with a hearty round of applause or, perhaps more appropriately, with a moment of silence.

Check on our blog (www.CommLawBlog.com) for further updates on the progress of the CALM Act through the final stages of the legislative process.

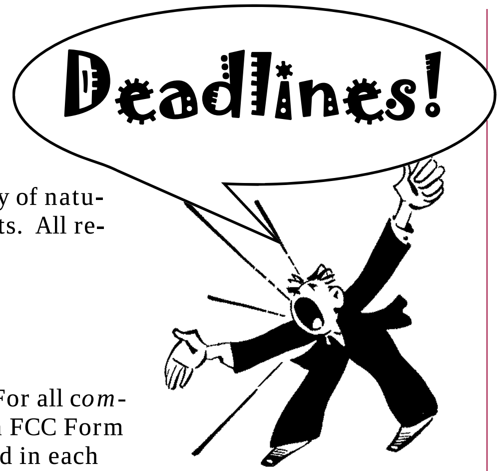
(Continued from page 7)

To be clear: the court did ***not*** hold that Craigslist had in fact broken its promises to Scott P. It just said that Section 230 is not a defense to a claim of promissory estoppel. And since Scott P. was able to produce evidence that he had reason to rely on Craigslist's promises to remove the offending posts and otherwise deal with this problem, Scott P. could proceed with his case.

From these two cases it appears that Section 230 remains as strong as ever where third party posts are concerned. As a result, website operators should feel reasonably confident that they can moderate their chat rooms, discussion boards and comment areas as little or as much as they want – or not at all. Section 230 protection should still be effective.

But if an operator begins interacting directly with a user or other third party who is feeling harassed, defamed or otherwise aggrieved in some way, and if the operator makes promises to fix the problem, then the operator darn well better fix the problem. What does "fix the problem" mean? That will depend on the particular facts of each case, including the nature of the gripe being asserted and the nature of the relief promised by the operator.

So the good news here is that Section 230 is alive, well, and still available to protect website operators. The bad (or, at least, disappointing) news is that, no matter how much an operator might want to be the good guy, the operator is on stronger legal ground by simply saying to the aggrieved complainant, "Sorry but we can't – and don't have to – help you".



July 8, 2010

Ownership Reports - All *licensees* and *entities holding an attributable interest in a licensee* of one or more *AM*, *FM*, *TV*, *Class A television*, and *LPTV stations* must file an initial biennial ownership report on the revised FCC Form 323. For the first time, sole proprietorships and partnerships composed entirely of natural persons (as opposed to a legal person, such as a corporation) must file reports. All reports must be filed electronically.

July 12, 2010

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 last year. 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.

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.

Quadrennial Review of Broadcast Ownership Rules - Comments are due to be filed. Comments may be filed either on paper or through the Commission's Electronic Comment Filing System.

July 26, 2010

Quadrennial Review of Broadcast Ownership Rules - Reply comments are due to be filed.

August 1, 2010

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

EEO Mid-Term Reports - All *television* station employment units *with five (5) or more full-time employees* and located in **California** must file EEO Mid-Term Reports electronically on FCC Form 397. This report must include copies of the two most recent EEO Public File Reports for the employment unit.

Noncommercial Radio Ownership Reports - All *noncommercial radio* stations located in **Illinois** or **Wisconsin** must file a biennial Ownership Report on Form 323-E. All reports must be filed electronically.

Noncommercial Television Ownership Reports - All *noncommercial television* stations located in **California**, **North Carolina**, or **South Carolina** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323-E.

FM ALLOTMENTS PROPOSED – 5/21/10-6/21/10						
State	**Community**	**Approximate Location**	**Channel**	**Docket No.**	**Deadlines for Comments**	**Type of Proposal (*i.e.*, Drop-in, Section 1.420, Counterproposal)**
OR	Gearhart	82 miles NW of Portland, OR	243A	10-118	Comment date: 8/5/10 Reply date: 8/20/10	Drop-in
OR	Grants Pass	26 miles NW of Medford, OR	257A	10-117	Comment date: 8/5/10 Reply date: 8/20/10	Drop-in

Notice Concerning Listings of FM Allotments

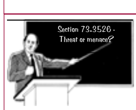
Consistent with our past practice, Fletcher, Heald & Hildreth PLC provides these advisories on a periodic basis to alert clients both to FM channels for which applications may eventually be filed, and also to changes (both proposed and adopted) in the FM Table of Allotments which might present opportunities 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 2)
and the increase of "multicast" channels. In addition to technical changes addressing the differences between analog and digital signals, STELA extends protection from duplicating distant signals to multicast channels affiliated with television networks. Network affiliated multicast channels broadcasting on or before March 31, 2010, will be protected from such distant signals as of October 1, 2010. Those multicast channels that began network programming after March 31, 2010, will be protected as of January 1, 2011. Existing subscribers who currently receive a distant network signal will be grandfathered.

Among other features, STELA also:

- requires satellite carriers to offer subscribers the high-definition (HD) signals of public broadcasting stations in local markets where the carrier provides other local stations in HD by 2011;
- extends the provisions in the Communications Act that require "good faith" negotiations for retransmission consent agreement;
- expands the area in which LPTV and Class A stations may be carried without copyright royalty payments;
- resolves the "phantom-signal" copyright royalty issue, which formerly required cable operators to calculate royalty payments on systems serving contiguous communities as though all of the subs in both were receiving the same distant signals, a requirement which cable operators have long seen as artificially increasing their copyright obligations;
- recognizes multicast channels in the determination of copyright royalty payments, providing such channels are "local" wherever the associated primary channel is local.

As finally enacted, STELA does not include some of the more controversial items that were debated over the past few years. It does not, for instance, authorize the importation of distant but in-state signals in DMAs that cross one or more state lines. Nor does it alter the retransmission consent negotiation process. As we previously reported, however, some of these issues have moved from Congress to the FCC in the form of the retransmission consent petition brought by the satellite carriers and certain cable operators. Stay tuned.



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tional documents that you seldom if ever think about – are there. An ounce of prevention can be worth about $1,250 in cure.

And just because a clean bill of health from ABIP may not be a panacea, that's no reason not to participate. ABIP inspections can provide useful insight from knowledgeable, independent third parties.

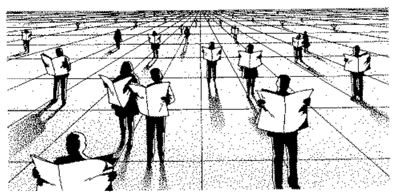
Class dismissed.

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

Updates On The News

Nationwide LPTV filing opportunity on hold, again – You can put all that LPTV engineering you've been working on back in the drawer. The long-awaited opportunity to file for new LPTV/TV Translator authorizations nationwide – including non-rural areas – is going to continue to be long-awaited. Originally slated to open in January, and then postponed to July, that opportunity has now been postponed indefinitely. The reason? Why, the National Broadband Plan, of course. (Is there any *other* reason that motivates the FCC these days?)

Since the FCC is making noises about re-purposing a boatload of spectrum from the TV band to feed the NBP monster, it's logical that the Commission wants to avoid opening a new LPTV window just now. After all, why build up expectations that new LPTV licenses might be just around the corner when, by the time we eventually get to that corner, there may not be enough TV spectrum to accommodate everybody?

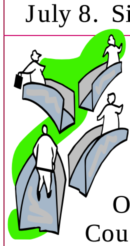


Note that, notwithstanding this latest turn of events, there may still be a somewhat Rube Goldberg-like way to get new LPTV service into non-rural areas. It involves getting a CP for a rural community, building it, then moving it. No guarantees, but we understand it's at least possible.

We'll update the LPTV filing opportunity situation as circumstances warrant, but don't be holding your breath. This could be a long and drawn-out process.

Form 323 – the struggle continues – When last we reported on the status of the revised Ownership Report (Form 323) for commercial broadcasters, the Commission had announced that the form – having been revised yet again – was available and due to be filed no later than July 8. Since then FHH, joined by a number of state broadcast associations and broadcasters, went to court, asking the U.S. Court of Appeals for the D.C. Circuit to order the Commission not to implement the form until the FCC can demonstrate that it has complied with all necessary procedures. While such a gambit is generally viewed as a long shot, the court did order the Commission to respond to FHH's petition, which is cause for some optimism. That was especially so when the FCC, in its response, admitted that it had revised Form 323 again even *after* the court had ordered it to respond. As of this writing we're awaiting a ruling from the court. For more background and continuing updates, go to our blog (www.CommLawBlog.com) and enter the search term "Form 323".

The incredible shrinking call sign? – And finally, we noted with interest a proposal submitted to the Commission recently by Ted Schober, consulting engineer. Ted suggests that the Commission amend its broadcast call sign rule to permit three-letter call signs. While there are currently a small handful of stations operating with such calls, those are grandfathered, legacy situations. But in Ted's view, the time has come to re-open the three-letter option. That would permit stations to identify with their states (*e.g.*, "WNY", "WVT", "KHI", etc.), or their owners' initials, or whatever. It's hard to imagine that it would require any serious re-jiggering of the FCC's internal systems to accommodate this suggestion, and it could result in at least a modest uptick in fees early on as licensees take advantage of the opportunity. On the other hand, many broadcasters have moved away from identifying themselves predominantly by call sign, as opposed to frequency or format (think "Mix 107.3", "93.5 The Edge", etc.). So enthusiasm for new call sign options may not be today what it might have been, say, 25 years ago. We shall see.



FHH - On the Job, On the Go

If you're in Little Rock on July 16, be sure to keep an eye out for **Frank Jazzo**. He'll be at the Doubletree Hotel, conducting a panel – along with the NAB's **Ann Bobeck** – on "Legal, Legislative and FCC Issues" for the Arkansas Broadcasters Association's annual convention.

On July 19, **Frank Montero** will serve as a Presiding Officer at the Minority Media and Telecommunications Council's 2010 Access to Capital and Telecommunications Policy Conference at the Renaissance Dupont Circle Hotel in Washington. **Frank M** will also preside at the Conference's Broadband Breakfast from 8:00-9:00 a.m. on July 19.

Looking for FHH in the trades? No problem. **Howard Weiss** got ink in *Comm Daily*, talking about the Enforcement Bureau's *American Dad* fishing expedition. Ditto for **Paul Feldman**, interviewed about program access issues. **Peter Tannenwald** was there, too – twice (waxing eloquent, as always, about such things as mobile DTV devices and rumors about the FCC's plans for LPTV conversion to digital). And then there was **Harry Cole**, showing up all over the place – in *RBR*, *TVNewsCheck*, *Inside Radio*, even on the AllAccess Music Group website. But check out **Kevin Goldberg**, whose full color headshot graced an article in the June issue of *Editor & Publisher*, which quotes Brother G extensively on shield law legislation. His photo didn't even have an identifying caption . . . presumably because *everybody* knows who **Kevin** is. Instant recognizability? You bet– and that's just one more quality that makes **Kevin** our *Media Darling of the Month*!