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Memorandum to Clients

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Form 355 – Forgotten but not gone

TV Public Files Moving (Virtually) to the Portals?

By Dan Kirkpatrick
kirkpatrick@fhhlaw.com
703-812-0432

We have some good news and some bad news.

First the good news: in an "Order on Reconsideration and Further Notice of Proposed Rulemaking" (*FNPRM*), the Commission has abandoned the dreaded "enhanced disclosure" Form 355, its 2007 attempt to bulk up the quarterly issues and programs lists for TV licensees.

Now the bad news: the Commission is still looking to impose significantly increased program reporting obligations on the television broadcasting industry (and, possibly at some time down the line, on their radio sibs as well). And the number of items required to be routinely submitted to the Commission could be increased dramatically. Oh yeah, and the notion of an "enhanced disclosure" hasn't been tossed entirely; it's merely on the backburner, apparently awaiting a notice of inquiry that is expected to be circulated in the near future.

Of course, in its *FNPRM* the Commission does not characterize its proposal as increasing any burdens. *Au contraire*, its goal here is supposedly to "modernize the way television broadcasters inform the public about how they are serving their communities." And how does it plan to do that? The *FNPRM* proposes that TV stations would no longer have to maintain all of the hard-copy local public inspection files that have been obligatory for decades.

So no more public file?

Not quite.

TV stations would ***still*** have to compile most of the same materials (including political files) currently required to be maintained in the public file – so there would be little lessening of any burdens there. The new rules would also, for the first time, include sponsorship identification information and agreements about news sharing and other shared services among the documents to be preserved, submitted and posted. Far from lessening licensees' burdens, that would increase them. And under the proposal, all those materials would have to be preserved electronically (rather than in musty old paper files) and *submitted to the Commission*, which would then post them on the FCC's own website.

So any relief the TV universe may experience from the demise of the "enhanced disclosure" Form 355 report is likely to be short-lived.

Some background. As initially adopted in late 2007, Form 355 was a quarterly report intended to replace the existing issues and programs lists – except, unlike issues/programs lists, Form 355 was to be submitted to the Commission. The form sought detailed information about a wide range of program categories (*e.g.*, national news, local news, local civic affairs, local electoral affairs, local programming, public service announcements, paid public service announcements, underserved communities programming, religious programming and independent produced programming). It was viewed by many observers as an intrusive, burdensome obligation which could (and in the eyes of some *would*) serve as a gateway to extensive content regulation by the Commission. Broadcasters voiced their objections in a number of petitions for reconsideration, as well as in comments filed pursuant to the Paperwork Reduction Act. (Appeals were preliminarily filed with the Court of Appeals for the D.C. Circuit, but they have been held in abeyance because of the pendency of the reconsideration petitions.)

For reasons the Commission hasn't bothered to announce, the FCC declined to take the steps that would have been necessary to implement the Form 355 requirement. As a result, even though Form 355 was technically on the books as of early 2008, it did not have to be filed while the Commission mulled over the reconsideration petitions.

The *FNPRM* vacates the 2007 order creating Form 355. But even as it tosses the form onto the scrap heap, the Commis-

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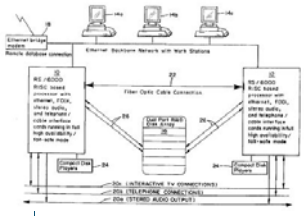

PTO tosses out major patent claims

Mission (Abstract) Impossible?

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

Bad news for Mission Abstract Data (whom we'll once again dub "MAD"). They're the folks claiming to own two patents supposedly being infringed by almost every radio broadcaster in the country. (Unclear on the background here? Read our posts on the subject on www.CommLawBlog.com, or check out last month's *Memo to Clients*. We'll wait for you.)

In this, our third installment of "As the Patent Turns", there's been a major development in MAD's quest for broadcast domination. Those patents it claims to own? Turns out MAD may have spoken too quickly.

When last we left MAD and its targets, the United States Patent and Trademark Office (PTO) had just announced that it would be reexamining the underlying patents, raising the possibility that the foundation of MAD's whole approach is nothing but, well, nothing.

We told you to stay tuned for the next exciting installment, and now here it is.

As our friends at Radio World have reported, in two separate "Office Actions" (we've provided links to both on our blog) the PTO has tossed 15 of the 29 claims supporting the first patent (number 5,629,867) and five of the ten claims supporting issuance of the second patent (number 5,809,246). At first blush that might look like a split decision that could leave MAD's lawsuit (and related efforts to negotiate deals with as-yet-unsued radio licensees) alive and kicking. BUT a closer look suggests that that lawsuit (and related efforts) are now on life support: the claims rejected by the PTO relate to the elements of the patent dealing directly with automated radio programming; the claims the PTO left standing deal with other aspects of the technology.

It's too early to gauge the real-world impact of the PTO's action: the PTO proceedings aren't over by a long shot, and there are still MAD's pending federal court case and its attempts to rope radio stations into licensing agreements. As things continue to develop, here are a few factors to keep your eye on:

> MAD has been given two months to respond to each Office Action. MAD could offer up more evidence of patentability. Once any response is filed, the PTO will mull things over and issue a final Office Action. We should know more after the first of the year. But until then, MAD has to deal with the fact that at least one PTO official doesn't think too much of MAD's claims.
>
> And don't forget that there's still a lawsuit being litigated in federal court. A hearing was scheduled for October 27 on a Motion to Stay filed by the radio licensee defendants. It's possible that the PTO's Office Actions were rushed through for release before that hearing. For sure the fact that the PTO has identified major concerns (preliminarily, at least) about MAD's core claims is likely to influence whether that lawsuit is stayed. After all, letting the case go forward would impose a serious drain on the parties and the court. Why go through all that when the primary legal issue – the validity of the patents underlying the entire matter – is clearly in question. Why put the parties and the court through a fact-based discovery process if the case will be kicked out on legal grounds? Why indeed, when staying the case for this reason would not impose an obvious hardship on MAD?

We're sticking with what we have said before: smaller broadcasters who have not been sued would be well-advised to take any communication from MAD seriously, but obviously now it should also be taken with a grain of salt. Anyone contacted by MAD should do their due diligence: have an attorney thoroughly review any proposed licensing agreement they receive; dig out any potential indemnification clause that might be invoked to require their software provider to cover legal costs and/or damages; and check to see whether their own insurance policies will cover damages if they have no indemnification.

We'll continue to follow this saga. For our money, the biggest surprise would be any ruling favoring MAD . . . but you never know.

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

Co-Editors
Howard M. Weiss
Harry F. Cole

Contributing Writers
Anne Goodwin Crump,
Christine E. Goepp,
Kevin M. Goldberg, Dan Kirkpatrick,
R.J. Quianzon and Davina Sashkin

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Focus on FCC Fines

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

FCC has a year-end blitz – A widely shared belief – maybe urban myth, maybe not – is that traffic cops write more tickets at the end of a month because they have a quota to fill. We now have evidence suggesting that some at the FCC may follow a similar philosophy.

As many readers may be aware, the 2011 federal fiscal year ended on September 30. The government and its agencies measure their budgets and performances based upon what they accomplish in a year. Keeping up its performance numbers, the FCC's Enforcement Bureau went gangbusters with its word processor during the last 48 hours of the 2011 fiscal year.

On Monday and Tuesday, September 26 and 27, the FCC released zero enforcement citations or notices from its Washington headquarters. On Wednesday the 28th, headquarters released one. Getting ready for the weekend and the end of FY 2011, on September 29 the government suddenly churned out 41 Official Citations and Notices of Violations to persons all over the nation. The next day – that would be the last day of the fiscal year – another blanket bureaucratic bombardment launched 26 Official Citations and Notices. However, perhaps because time was running out, one of the 26 Citations was addressed to 20 different companies – meaning that the Feds hit 46 targets on that Friday afternoon.

The FCC's blitzkrieg against 87 targets in a mere 48 hours was far reaching, covering small violations as well as large ones and puffing up the government's enforcement numbers for 2011.

EAS still being targeted – FCC field agents continued to target Emergency Alert System problems, possibly with an eye to ensuring success in the upcoming Nationwide EAS Test on November 9. The Enforcement Bureau caught stations in Michigan, Oregon, and Hawaii with EAS deficiencies. Some stations got off easy with a warning, others were whacked with $8,000 forfeitures. As we have repeatedly reminded our readers, EAS violations are easy for the FCC to find. Stations are required to keep logs of their EAS activity. An FCC agent need do no more than waltz into a studio and review the logs to see whether or not a station has been in compliance. Readers are strongly advised to be in compliance at all times.

No studio? No tower? Big problem – A pair of cases from Michigan and Texas demonstrated the Commission's seriousness about its rules dictating tower location and maintenance of a studio. The Texas AM was hit with a $21,000 fine for main studio and other violations and the Michigan FM was socked with a $22,000 bill.

FCC agents in Texas were tipped off to a problem that an AM in Laredo was not lowering its power at night. The agents visited the tower site and confirmed that the station's power was unchanged before and after sunset. When the agents tried to contact station representatives at the main studio, they ran into a problem – there was no studio. The agents eventually reached the station's owner who promised to send an engineer out to the tower site. The engineer and FCC agents inspected the tower and the engineer admitted that there was no main studio site.

However, the engineer did not give up. The engineer suggested to the FCC agents that, if they wanted to inspect the station's public file, the file could be viewed by the public at the temporary main studio. The FCC agents were taken to a house in Laredo and shown: a folder with a few documents; a sound board; and a microphone. The agents did not accept this as an adequate main studio. Not only was the "studio" not open to the public, but it had no capability for continuous program transmission. The agents gave the owner a $21,000 fine.

In Michigan, FCC agents encountered a different problem. The FCC agents, responding to a complaint about the station, showed up at the main studio. Fortunately for the station, the main studio was there. Unfortunately, the station did not have functioning EAS equipment (although a few pieces were found in a closet) or a complete public inspection file. More surprisingly, the station's transmitter wasn't where it was supposed to be. It seems that the station owner moved the transmitter a half mile up the road, called the move "minimal" and didn't notify the FCC of the modification. The FCC wrote the station a $4,000 fine for operating at an unauthorized location – not an insubstantial amount, but curiously less than the fines for the other two violations: the public file fine came in at $10,000 and the EAS fine at $8,000, for a grand total of a $22,000 fine.

This is only a test, but . . .

Nationwide EAS Test Handbook Released, Report Forms Now On-Line

By Harry F. Cole
cole@fhhlaw.com
703-812-0483

The Commission has updated the Nationwide EAS Test page on its website to include: (a) a new version of the EAS Handbook specially devoted to the nationwide test; and (b) the on-line forms to be used by all EAS participants to report on their experience in the Big Test.

IMPORTANT: Every EAS participant is required to have a copy of the new Handbook at "normal duty positions or EAS equipment locations where an operator is required to be on duty". It would be a good idea to click on the link to the Handbook provided on our blog – or just go straight to the FCC's website (but , given the re-designed website, you may not find the right page all that quickly), print out as many copies of the Handbook as may be necessary for your operation, and get them distributed NOW.

While you're deploying the Handbooks, you should be sure to familiarize yourself with its contents. It provides step-by-step instructions for the Nationwide Test, helpful tips to assist in preparation for the event, and directions for dealing with the unexpected. (The unexpected, in this case, includes what to do if you don't receive the alert code or can't send the code along. The instructions don't seem all that helpful, however: "Determine why you did not receive [or are unable to send] the EAN alert code, [then] Take appropriate corrective action". Looks like "Throw your hands up in frustration and move on to some other chore" is NOT an acceptable response.)

We had previewed the reporting forms on www.CommLawBlog.com, but with two weeks to go before the Nationwide Test, the Commission made them public. EAS participants may now log on to complete and submit "Form 1", which asks for some basic identifying information. Forms 2 and 3 aren't accessible yet (although we have posted screen grabs of the forms as submitted by the FCC to OMB, and they are described in the FCC's on-line instructions for electronic reporting of the Nationwide EAS Test results). According to the FCC's instructions, Form 2 is to be completed and submitted on November 9, and Form 3 is to be submitted between November 10 and December 24.

All you multi-station owners might want to get cracking on filling out Form 1 – a separate form will be required for each separate station participating in the EAS test. (Cable owners will have to file a separate form for each headend.)

While the website instructions are silent about filing these reports on paper (as opposed to the electronic alternative available on-line), the Commission's Handbook indicates that the information may be submitted on paper. However, it doesn't appear that the Commission has prepared any particular form for that purpose. Anyone choosing the paper option would simply type out the required information and send it in by December 27.

(Yes, we see that the on-line instructions call for submission by December 24, while the Handbook says December 27. We're guessing that that's because December 24 – technically the 45th day after the Test and, therefore, the deadline for submissions – falls on a Saturday this year, so the filing deadline rolls over to the next regular business day, which will be December 27 because December 26 is a Federal holiday.)

What information would be "required" in a paper filing? That's not entirely clear. Back in February, 2011, when the Commission committed to the Nationwide Test and announced that licensees would have to report on their experiences, the Commission identified the following information that would have to be included in those reports:

All you multi-station owners might want to get cracking on filling out Form 1.

- whether they received the alert message during the designated test;
- whether they retransmitted the alert;
- if they were not able to receive and/or transmit the alert, their 'best effort' diagnostic analysis regarding the cause (s) for such failure;
- a description of their station identification and level of designation (PEP, LP-1, etc.);
- the date/time of receipt of the EAN message by all stations; the date/time of PEP station acknowledgement of receipt of the EAN message to FOC;
- the date/time of initiation of actual broadcast of the Presidential message;
- the date/time of receipt of the EAT message by all stations;
- who they were monitoring at the time of the test, and the make and model number of the EAS equipment that they utilized.

The on-line forms ask for some additional information (*e.g.*, geographical coordinates of the reporting station's transmitter – in decimal form). So while anyone filing on paper could presumably just print out the on-line forms, fill them in and mail them to the Commission, it may also be enough just to provide the information specified in the February order (listed above). If you do opt for the old school approach, be alert to the fact that you have to file an original and one copy with the FCC Secretary's office in D.C. Also, each page should be marked, at the top, "CONFIDENTIAL – NOT FOR PUBLIC INSPECTION".

iHeartTranslators? Apparently not

Despite Free Smartphone Offer, FCC Kills FM Translator

By Davina Sashkin
sashk@fhhlaw.com
703-812-in0458

This just isn't the year to be in the FM translator business. First, there were setbacks in the long-running battle between translator and LPFM interests. Then there was the Audio Division's announcement that the practice of "hopping" translators from site to site is Very Very Bad Behavior (even though the Division acknowledged that that practice was not prohibited by the rules, as demonstrated by the fact that the Division had repeatedly grants such hops for years).

And now the Division has reminded translators that they really are secondary to full-power stations.

In a letter resolving a face-off between an FM station in Toledo and a co-channel translator in Detroit, the Division has come down smack on the side of Mr. Toledo – with an order to Mr. Detroit to shut down his translator *immediamente*. And adding insult to injury, the letter flatly rejects the translator operator's proposal to hand out "iHeartRadio"-equipped smartphones so that folks encountering interference to the over-the-air signal of the full-power station can receive an interference-free signal over the Internet.

iHeartRadio – maybe; iHeartTranslators – not so much.

The bottom line result should not surprise anybody. The Commission's rules prohibit interference caused by a translator to "the direct reception by the public of the off-the-air signals of any [full-power] broadcast station". But when two co-channel operations happen to be as close as these two were, interference is bound to occur. So you had to figure that the translator's days were numbered.

Still, the translator licensee came up with a novel response to his plight. Remember, while the rules bar interference, they also give the translator licensee the opportunity to try to eliminate the interference "by the application of suitable techniques". In this case, the Detroit translator proposed to give a smartphone with an "iHeartRadio" app installed to each listener complaining of interference. The Toledo station is available through the "iHeartRadio" on-line service (no shock there: "iHeartRadio" is a service promoted by Clear Channel, which – IRONY ALERT! – happens to be the ultimate owner of the Toledo station). The Internet feed of the station would not be affected by any over-the-air interference caused by the translator, so the translator licensee argued that the smartphone offer satisfied the rules.

Not so fast, said the Audio Division. Providing interference-free access to would-be listeners through a non-broadcast service is ***not*** the same as "eliminating interference". The goal of the rule is to assure interference-free over-the-air reception. The smartphone ploy may provide an end-run around the interference problem, but it does nothing to eliminate that problem. As a result, the proposed smartphone solution is "patently insufficient".

If the Division's letter had stopped there, it would have been of relatively limited interest – how many translator licensees are likely to be wanting to hand out smartphones, for crying out loud?

This should send a chill down the spines of translator operators who have tried to squeeze into tight allotment situations.

But the Division went on. It noted that, because the translator and the full-power station were co-channel and geographically close to one another, there is a "considerable likelihood" that the Commission will face a "never-ending series" of complaints. That's because the usual "suitable techniques" used to remedy interference when second- and third-adjacent stations are involved – *e.g.*, relocation of the translator, or installation of filters – just don't work in co-channel situations. (The Division could probably also have lumped first-adjacent situations in with co-channels on that score as well.) And absent remedial devices, the Division appears to anticipate essentially irremediable interference, the only answer for which is termination of the translator's operation.

This should send a chill down the spines of translator operators (or applicants) who have tried to engineer their stations to squeeze into tight allotment situations. It is possible – on paper, at least – to pick technical facilities that appear not to cause any theoretical interference: carefully reduced power, a carefully selected site, and a finely sharpened pencil in the hands of a motivated engineer can work magic. Based on such a theoretical showing, the Commission can, and often does, grant construction permits for such facilities. But once those facilities are built, the grim reality kicks in: close geographical proximity plus co-channel (and possibly first-adjacent) operation equals real world interference, both inside and outside the full-power station's protected contour.

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Tips from the NLRB

Coping With Social Media In The Workplace II

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

Back in the March, 2010 *Memo to Clients*, I pointed out that employees' use of social media can create problems for employers. Now we can thank the Acting General Counsel of the National Labor Relations Board (NLRB) for recently issuing a helpful memo summarizing 14 NLRB decisions all involving (wait for it) the use of social media in the workplace. The memo is short on analysis, much less any attempt to tie the cases together into overarching themes. But it's a good read anyway, allowing even someone like me (whose primary area of expertise runs to the First Amendment more than to arcane employment law issues) to get a sense of the general rules and come up with some dos and don'ts.

The primary focus of the NLRB decisions: negative employee commentary, usually about the employer, that shows up on Twitter, Facebook or other social media for all to see. Sooner or later, everybody has a bad day at work and snaps in some way. Take Christopher Cristwell, for example. One day the 25-year-old Starbucks barista had finally had it up to here dealing with annoying customers, so he wrote a song and uploaded it to YouTube (we've included a link to the video on our blog at www.CommLawBlog.com – check out his Starbucks apron, but try to ignore that it's pretty much all he has on). It's kinda catchy. Higher ups at Starbucks didn't think so, apparently. It kinda got him fired.

Blogs and social media like YouTube, Facebook and Twitter have created new venues for the employee rant.

While this is an extreme example of an apparently disgruntled employee publicly expressing his disgruntlement, it's clearly not unique or even rare. Blogs and social media like YouTube, Facebook and Twitter have created new venues for the employee rant. Back in the day, complaints were more confined: a couple of folks blowing off in the breakroom, or maybe an employee crying in his beer with friends, and that's the end of it: they vented, they moved on, that was that.

But when the complaint shows up in social media, there's a permanent, totally public record of the complaint. Given that, employers may wonder just how far they can go to keep their employees in line and preserve the company's image.

Some answers may be found in longstanding legal tests and principles of Section 7 of the National Labor Relations Act (NLRA). How do those tests and principles get applied to new situations? That's where the NLRB's decisions, and the acting GC's memo, come in handy.

Historically, the NLRA protects employees' speech if the employee is engaged in (a) protected activity or (b) concerted activity, as long as the activity is (c) not "opprobrious". The 14 cases shed light on what the NLRA means by each term and provide some examples of what can be disciplined and what cannot.

Protected Activity

Section 7 of the NLRA exists primarily to assure employees some manner of communicating concerns about the conditions of their employment. Ordinarily, an employee can successfully challenge disciplinary action arising from his or her expressive activities if those activities were "protected" under the accepted interpretations of the act. Speech implicating or relating to terms and conditions of employment is generally "protected". For example, if an employee chats with coworkers or speaks publicly in preparation for a discussion with employers relating to the job, that is likely to be "protected".

The NLRA has said that what constitutes "protected activity" does not change if the employee's comments are communicated via the Internet. Protests of supervisory actions in a Facebook post or Tweet? Pictures posted on-line of oneself carrying a picket sign in front of the company logo or wearing shirt with the company logo during a protest? Both activities would probably irritate an employer – but both are protected.

Concerted Activity

Concerted activity exists when an employee acts with or on the authority of other employees and not solely by and on behalf of himself/herself – think one employee trying to rally co-workers into group action. It could also include an individual employee bringing group complaints to management's attention, but only if that employee's statements are a legitimate outgrowth of a group's complaints.

The application of "concerted activity" in the context of social media is the area that may require the closest review in practice. Is that lone Tweet an idle complaint (unprotected because it is not "concerted" in nature) or is it the first attempt to gather other workers sharing similar concerns (and therefore protected)? Is activity "concerted" *per se* if others comment on your Facebook post? (Spoiler alert: not always.) It's very contextual and fact-specific.

Thankfully, the NLRA's 14 cases offer plenty to chew on. For example, the following qualified as "concerted activity":

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- An employee posting a complaint to Facebook after conversations with others about the issue or after another employee has specifically requested that management be contacted;
- Four workers posting concerns and anecdotes relating to a fifth worker's complaints in advance of a discussion with supervisors;
- An employee's post expressing the sentiment of a group after the employee tells *several employees* of the plan to take action and then following through with that action.

The following were determined ***not*** to involve "concerted activity":

- A newspaper reporter airing personal grievances and criticizing other media and companies on a work-related Twitter account;
- An employee posting a complaint when (a) the topic never previously discussed with coworkers, and (b) no coworkers responded to the post, and (c) there were no employee meetings or any attempt to initiate group action.
- A complaining Facebook post complaining of an individual where the only responsive comments are all in the nature of "hang in there".

Of course, there are limits to what an employee can say and how he or she can say it.

"Opprobrious" comments

Of course, there are limits to what an employee can say and how he or she can say it, even when engaged in protected and/or concerted activity.

One test the NLRB applies (dubbed the "*Atlantic Steel*" test) involves public outbursts by an employee against a supervisor. The test: were the employee's statements "opprobrious"? Since "opprobrious" isn't a word most of us hear in everyday conversation, here are some of the factors considered in that analysis:

? The time, place and manner of the discussion. Was it in the workplace, during work hours, in a manner that does or is likely to interrupt the work of other employees? If so, the employer is more likely to be permitted to penalize it. Of course, the development of social media has complicated this consideration. While many people use social media at work, most social media commenting use still occurs on private time – but even comments posted on any employee's own time can still create a negative buzz in the office or among customers or competitors.

(*Author's observation*: It's fair to assume – ***and I think this is important*** – that employers still have significant leeway in determining what an employee can and cannot say in a Twitter feed or blog page or on the employer's Facebook page. On the other hand, the employer's ability to discipline an employee for statements made on a personal account appears to be limited. *But one thing that seems to be unique to the media world* is the extent to which individual social media accounts aren't really individual. A recent on-line discussion focused on the extent to which some journalists are "branding" themselves. By doing so, aren't media figures – journalists, radio hosts, personalities, etc. – also holding themselves out as representatives of the media companies (and *their* brands) for which they work? Something for our core broadcast, print and Internet clients to chew on . . .)

? The subject matter of the discussion. Is it directly related to the "protected" activity (*see* above)?

? Was the protected concerted activity provoked by unfair labor practices? If so, this greatly favors the employee.

? Finally, what is the nature of the outburst? This is the one that often gets the employee in the most trouble, especially in the relatively unedited, uncensored, stream-of- consciousness social media world. Based on the NLRB's review of cases, we know that simply swearing is not enough to put someone on the wrong side of this line, nor is name calling. "Liking" someone's egregious comment probably won't do it either. In fact, at this point, verbal or physical threats are the only clear examples of opprobrious conduct that can be disciplined.

Another NLRB test (this one's called the "*Jefferson*" test) applies when an employee makes disparaging comments about an employer or product to third parties. In such cases, the employee is protected if the communication involves an ongoing labor dispute and is not excessively disloyal, reckless or maliciously untrue.

Another Look at Employment Policies

I have previously suggested that employers address issues relating to use of social media in their company handbooks and policies specific. I still think that's a good idea, especially for media companies that are actively using (or trying to use) social media to engage with listeners, readers or viewers, promote programming, events and contests, or simply distribute information through new channels. But these NLRB decisions show that company policies along these lines must be drawn precisely.

What does that mean? According to the NLRB, policies can***not*** create a "chilling effect" on employees' speech by imposing rules that:

- △ explicitly restrict protected activities;
- △ could cause employees reasonably to believe their protected activities would be limited;

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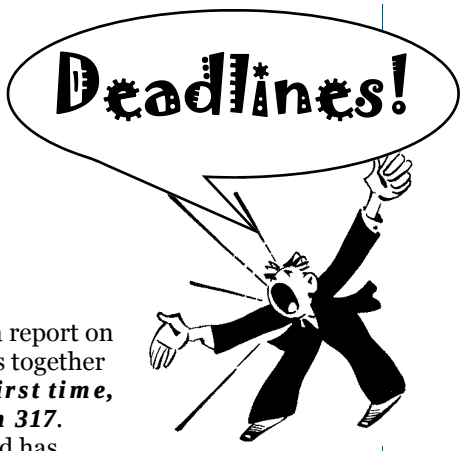

December 1, 2011

Biennial 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 a biennial ownership report on the FCC Form 323. Please recall that sole proprietorships and partnerships composed entirely of natural persons (as opposed to a legal person, such as a corporation) must file reports, as well as other licensee entities. All reports must be filed electronically. The Ownership Report must reflect information as of October 1, 2011.

DTV Ancillary Services Statements – All *DTV licensees* and *permittees* must file a report on FCC Form 317 stating whether they have offered any ancillary or supplementary services together with its broadcast service during the previous fiscal year. ***Please note that, for the first time, Class A TV, LPTV, and TV translator stations are now required to file Form 317.*** (Full power stations are still required to file it.) If a station has offered such services, and has charged a fee for them, then it must separately submit a payment equal to five percent of the gross revenues received and an FCC Remittance Advice (Form 159) to the Commission. The report on Form 317 specifically asks for a list of any ancillary services, whether a fee was charged, and the gross amount of revenue derived from those services. Ancillary services do not include broadcasts on multicast channels of free, over-the-air programming for reception by the public.

License Renewal Applications – *Radio* stations located in **Alabama** and **Georgia** must file their license renewal applications. These applications must be accompanied by FCC Form 396, the Broadcast EEO Program Report, regardless of the number of full-time employees.

Post-Filing Announcements – *Radio* stations located in **Alabama** and **Georgia** must begin their post-filing announcements with regard to their license renewal applications. These announcements must continue on December 16, January 1, January 16, February 1, and February 16.

License Renewal Pre-Filing Announcements – *Radio* stations located in **Arkansas**, **Louisiana**, and **Mississippi** must begin their pre-filing announcements with regard to their applications for renewal of license. These announcements must be continued on December 16, January 1, and January 16.

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.

Noncommercial 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.

Noncommercial 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.

December 27, 2011

Nationwide EAS Test Reports – All *EAS participants* must submit reports on the results of the first Nationwide EAS Test scheduled for November 9. (*See* the related article on Page 4.)

January 10, 2012

Children's Television Programming Reports – Analog and Digital - For all *commercial television* and *Class A television* stations, the fourth 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 that the FCC now requires the use of

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And that's the kind of interference that the Division seems to be saying will be the kiss of death, literally, for the translator.

The bad news doesn't end there. The Division's letter reflects a loss of bureaucratic patience with translators. After running through a litany of questions that the Commission might have to resolve if it were to endorse the proposed smartphone remedy, the Division throws up its regulatory hands and walks away: "The Commission cannot and need not expend such significant resources to keep a translator station on the air." Ouch.

While this may sound like bad news to some translator operators, it is no doubt great news to any full-service licensee who finds itself beset by interference from a nearby co-channel translator. All indications are that the Audio Division feels your pain, and is prepared to help you out.

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△ are promulgated in response to protected union activities.

From the NLRB, some examples of ***unduly restrictive*** provisions:

- A prohibition on posting pictures in any media (this is overbroad because it would prohibit employees from showing pictures of protected activities);
- Requiring "respectful and courteous communications", or prohibiting "sensitive", "embarrassing", "harassing", "inappropriate" or even "defamatory" statements or discussions;
- Prohibiting the posting of private or confidential information without defining those terms (this could be construed as preventing free discussion of wages and other terms and conditions of employment) or the posting of information identifying the employer in personal profiles.

And some examples of restrictive provisions that ***are*** permissible:

- A narrowly drawn and sufficiently specific provision prohibiting employees from pressuring coworkers to become Facebook "friends", if it is created with the goal of preventing harassing conduct;
- Limiting who can speak on behalf of the company, especially when further clarified with references to "crisis situations" and "timely and professional" communications.

So what are the new lessons to be learned here? My recommendations from 18 months ago are still valid. However, the recommendation that you "*protect your company's brand or image and relationships*" changes somewhat. More than ever, words matter – both the words that employees use and the words you put in your social media policies or employee handbooks. You definitely need to consult an attorney if you're going to revisit and rewrite your policies or if you're thinking about taking action against an outspoken employee.

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FRN's and passwords in order to file the reports. We suggest that you have that information handy before you start the process.

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 during the past quarter 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.

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sion indicates (in a footnote) that it is seriously considering an alternative reporting requirement that, according to the Commission, "substantially streamlines and revises" Form 355. That alternative was proposed by a coalition of "public interest" groups. Among other things, it would require the reporting of certain "core" categories of programming: Local News; Local Civic/Governmental Affairs; Local Electoral Affairs; and Closed Captioning/Emergency Accessibility Complaints. According to the FCC's latest order, we can expect to see a Notice of Inquiry seeking comments on that alternative approach "promptly".

So it's a tad premature to kiss good-bye to the notion of "enhanced reporting".

The Commission's 2007 decision also contemplated that TV station's local public inspection files would be made accessible on-line (either on each station's own respective website or on sites maintained by state broadcasting associations). That provision has also now been scrapped. But as noted above, the FCC has magnanimously agreed to host the public files of *all* TV stations. (The Commission claims that it will not review on-line public file documents for compliance with the rules "on a routine basis". Whether it might do so in the future remains to be seen.) The licensee would *still* be required to maintain its own separate "back-up" copy of all uploaded public file materials, just in case the FCC's system crashes. So licensees wouldn't be relieved of any real burdens, it would appear. (It's not clear why the Commission itself shouldn't be responsible for maintaining its own back-up system, but let's not go there just now.)

It's a tad premature to kiss good-bye to the notion of "enhanced reporting".

According to the FCC, an FCC-maintained public file would ease existing burdens on licensees because the Commission could automatically import into each station's public file the various items already filed with the Commission (*e.g.*, licenses, applications, children's programming reports, etc.). But hold on there. For many licensees, these documents make up only a small portion of the total documents included in their public files. All the rest of the materials would still have to be prepared for uploading (*e.g.*, scanned) and then uploaded by the licensee. That's not an insubstantial burden in and of itself.

The on-line public file would include all of the information currently required to be in the local public file (except for correspondence from the public – which would have to be maintained in a "correspondence file" at the station, available for public review). Importantly, this would include all political advertising information. Despite the volume of such information and the practical difficulty of keeping up with the flow of political buys in the midst of an election season, the *FNPRM* proposes that all political files be uploaded "immediately absent unusual circumstances".

Additionally, several new items would be required to be uploaded for public review – shared services agreements and sponsorship identification information. It's not exactly clear what the Commission has in mind when it comes to sponsorship ID information. The *FNPRM* proposes that licensees be required to compile and post as part of their on-line public files a list of all sponsorship identifications that it broadcast where existing rules require broadcast of a sponsorship identification.

On the positive side, the Commission is proposing to eliminate the need for TV licensees to include a copy of their contour map in their public file (woo-hoo!), but they *would* have to include express identification of their main studio location.

As the Commission envisions the transition to an FCC-maintained on-line public file, each licensee would be required to upload into its on-line file *all* materials already in its public file. The Commission doesn't think that that would pose too much of a burden – although, in an apparent effort to keep its bureaucratic fingernails clear of any dirt, the Commission has delegated to the Media Bureau the chore of figuring out precisely how (and when) the contents of several thousand public files are to be uploaded. As a result, a wide range of nitty-gritty questions – for instance, what format should the uploaded files be in? – remain unanswered.

The *FNPRM* also proposes to require TV stations to air announcements of the existence, location, and accessibility of their on-line public files at least three times per week as part of their station identification. Although a far cry from the twice-daily announcements that would have been required under the Commission's 2007 Order, the Commission requests comment on whether the proposed number of announcements would be sufficient, excessive, or just right. The Commission also proposes requiring licensees who have a website to provide a link to the Commission-hosted on-line public file.

Since the *FNPRM* is merely a collection of proposals, the Commission takes pains to solicit comments on the wide variety of questions that those proposals raise. A separate section of the *FNPRM* specifically solicits "cost/benefit" analyses relative to the various proposals. Television licensees in particular should review the *FNPRM* carefully with an eye toward providing the Commission as much detailed information as possible, particularly with respect to any burdens the proposed system is likely to impose. The *FNPRM* appears to have been drafted with the preconceived notion that any such burdens would be minimal

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Brrrr - Another FM Freeze Is On (thanks to Auction 93)

With Auction 93 fast approaching, the Commission has frozen, ***effective immediately*** (*i.e.*, as of October 24, 2011):

- ❄ All applications proposing to modify any of the 123 vacant non-reserved band FM allotments scheduled for Auction 93 (currently slated to kick off next March 27);
- ❄ All petitions and counterproposals that propose a change in channel, class, community, or reference coordinates for any of the Auction 93 Allotments; and
- ❄ All applications, petitions and counterproposals that fail to fully protect any of the Auction 93 Allotments.

Filings in any of the above categories that happen to be submitted after the release of the FCC's public notice will be dismissed. (Can't remember what channels are up for grabs in Auction 93? We've included a link to the current list on www.CommLawBlog.com.) This freeze will remain in effect until the day after the deadline for Auction 93 long form applications – which will likely be sometime in early Summer, 2012, at the earliest.

Curiously, the freeze notice does ***not*** announce a freeze on any and all minor mod applications (for commercial *or* noncommercial stations) during the filing window for short form (Form 175) applications for Auction 93. (The Form 175 filing window hasn't been announced yet – look for that announcement in early November.) Such blanket freezes barring ***all*** minor mods during the Short Form window have been standard operating procedure in the last three FM auctions (those would be Auction 70, Auction 79 and Auction 91). Given that precedent, if you have a minor mod you'd like to file that doesn't fit into any of the three freeze categories noted above, you might want to plan on getting it filed before the opening of the Form 175 filing period, just to be on the safe side. Otherwise, your ability to file could be delayed by a month or more. Check on CommLawBlog.com for updates on the auction schedule.

Freezes like this are routine when it comes to broadcast auctions. The goal is to avoid the creation of any conflicts (unforeseeable or otherwise) with auction proposals that could muck up the auction process.

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and easily absorbed. If anyone is in a position to demonstrate flaws in the Commission's presumptions, now would be a good time to let the Commission know.

While the Commission may attempt to portray its proposed FCC-maintained public file system as affording relief to TV broadcasters (who, under the now-discarded 2007 approach, would otherwise have had to maintain their own on-line public files), the Commission appears to have other goals in mind. In particular, the Commission perceives this system as a stepping stone toward an "ultimate goal". And that "ultimate goal" is the transformation of the public file into a source of data that can be "aggregated, manipulated, and more easily analyzed". (The *FNPRM* poses a number of questions concerning whether – and if so, how – the Commission might impose standardized formatting requirements to assure the consistency and searchability of all submissions, which would facilitate the aforementioned aggregation, manipulation and analysis of the data.)

Comments on the *FNPRM*'s proposals will be due 30 days after its publication in the Federal Register, with reply comments due only 15 days after comments are filed. (Check back here for updates on Register publication.) In view of the broad range and deep complexity of the questions posed, not to mention the time required to respond to the Commission's request for detailed cost/benefit analyses, those timeframes seem inadequate. If the Commission were genuinely interested in developing a solid factual record on which to proceed, it would provide considerably more time. If the Commission has already reached its conclusions and is inviting comments simply as a perfunctory nod to the requirements of the Administrative Procedure Act, then the allotted comment periods should be plenty.

While the proposals appear to be on a fast track, there remain a number of hoops for the Commission to jump through. But the direction in which the FCC is determined to steer this proceeding is clear. TV licensees should pay attention now – as should all broadcasters, since it's reasonable to assume that, if these proposals are adopted for TV, the radio side will see similar rules in short order.

Closed Captions for the Open Internet?

By Christine E. Goepp
goepp@fhhlaw.com
703-812-0478

The FCC has launched a rulemaking to implement the closed captioning sections of the 21st Century Communications and Video Accessibility Act (CVAA). The new rules will impose closed captioning requirements on certain online television programming; they will also require captioning capability for a wide variety of devices that are designed to receive or play back video, potentially including smartphones, computers, tablets, game consoles, video recorders, and set-top boxes.

Closed captioning is the text on a television screen that transcribes the audio portion of the program. ("Closed" means that viewers can turn the captioning on and off at will.) Today most television programming, whether delivered via broadcast, cable, or satellite, must carry closed captioning, and television sets 13 inches or larger must be capable of displaying the captions. But online television – think Hulu – has not been subject to these rules. And the rapidly-proliferating variety of non-television video display devices, like tablets, have not been required to have the technical capability to display captioning.

The NPRM follows the Act's propensity to play fast and easy with the term "IP-delivered".

That's about to change. Congress gave the Commission until January 12, 2012, to bring the closed captioning rules into the era of mobile and Internet television.

Online Video Captioning

The proposed rules would require captioning only for online ***television*** programming: *i.e.*, programming offered by a television broadcast station "or generally considered comparable to programming provided by a television broadcast station." This does not include "consumer-generated media," so the FCC will not require closed captioning for the funny cat videos you post to YouTube. The FCC seeks comment on the scope of the new rule, asking, for example, what would constitute IP-delivered video programming that is ***not*** comparable to programming provided by a television broadcast station.

Furthermore, and importantly, the closed captioning requirement will apply only to programming that was previously shown with captions over traditional media such as broadcast or cable. The Commission proposes to create a mechanism through which distributors can find out whether programs they intend to show online have been previously shown on television with captions.

In contrast to the current closed captioning rules (the ones that apply to 20th century media, like broadcast and cable), the proposed rules place the primary responsibility for providing closed captioning of online video on content owners – the persons or entities actually holding the copyright, rather than the distributors. Video programming owners will be required to send program files with all required captions to video provider/distributors, who will then have to pass the captioned programming through to the end user. Either the content owner or the distributor can petition for relief based on a showing that compliance would be "economically burdensome."

The NPRM follows the Act's propensity to play fast and easy with the term "IP-delivered", using it to mean, generally, "over the Internet." Of course, data transmitted over the Internet uses Internet protocol (IP). But there is an ongoing transition to networks that deliver all content via IP, regardless of the communications channel. Some providers, for example, operate "triple play" lines to the home that deliver telephone, television, and Internet access using a single IP stream. The TV component of this service could be considered "IP-delivered" video, but it's not over the Internet. To avoid unintended, duplicative, or confusing obligations, the Commission should clarify how the new rules will relate to these services.

Captioning Capability of Video Devices

The CVAA requires that, if technically feasible, any "apparatus" designed to receive or play back video programming, as well as any "interconnection mechanisms or standards," must be able to display closed captions (or transmit them, as the case may be). The only exceptions are for: (1) display-only monitors; (2) devices with a picture screen less than 13 inches for which closed captioning capability is not "achievable"; and (3) devices for which the Commission has waived the requirement because they derive their essential utility from non-video purposes.

On the one hand, this represents a stunning expansion of FCC jurisdiction over a vast host of devices it has not previously regulated (except as to stray radio-frequency emissions). Device manufacturers may well become alarmed. On the other hand, except for PCs and larger laptops, most display devices may be able to claim an "achievability" exemption, an exemption available only for devices with less-than-13-inch screens. The iPad, for example, comes in at 9.7 inches, well under the limit, and most competing tablets are smaller. Furthermore, if the industry can settle on a standard file format for IP captions, a simple software switch would be enough to toggle the captions on and off. Added requirements for hardware display devices would then be essentially zero.

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Permanent? Apparently not!

298 Closed Captioning Exemptions Reversed

By Dan Kirkpatrick
kirkpatrick@fhhlawcom
703-812-0432

What a difference five years make. Back in 2006, over the course of about a month, more than 300 video programmers were granted permanent exemptions to the closed captioning rules. But now the Commission has taken another look and – bad news for 298 of those lucky programmers – has decided that the wrong standard was applied in 2006. Good-bye "permanent" exemptions (although the Commission has invited those programmers to ask for new exemptions, which could be granted if a newly-revised standard is satisfied) – and hello to a new set of standards for determining when captioning may be deemed "economically burdensome".

The problem dates back to the 1996 Telecommunications Act, which allowed the Commission to grant two separate types of exemption to the captioning requirements. One type would exempt entire categories of programming; the other involved individual programs or program providers, assessed on a case-by-case basis. To obtain an individual exemption, a program provider had to demonstrate that providing captions would impose an "undue burden" (the language of the statute has since been revised to require a demonstration that captioning would be "economically burdensome.")

FCC: It isn't appropriate to consider whether captioning costs would curtail any other activities of the programmer.

In late 2005 the Commission's rules requiring captioning of 100% of non-exempt English and Spanish-language programming were about to go into effect. Since that would impose a significantly heavier burden on program providers, a large number of providers sought individual exemptions. Two of those providers were Anglers for Christ Ministries and New Beginning Ministries.

In September, 2006, the Consumer and Governmental Affairs Bureau (CGB) granted permanent exemptions to Anglers for Christ and New Beginning.

The CGB found that requiring them to caption programs they produced would cause "significant hardship" and would create a risk that they'd cease producing programming. The CGB relied in particular on findings that (a) the programs in question were not produced primarily for a commercial purpose – indeed, the producers either offered it for free or paid for it to be broadcast – and (b) the petitioners were both non-profit organizations.

In granting those two exemptions, the CGB announced the standard that would be applied generally to requests for individual exemptions. The standard involved a presumption: exemptions would ordinarily be granted to non-profit program providers receiving no compensation where compliance with the captioning requirement could result in termination of the programming or a "curtail[ment] of other activities important to [the petitioner's] mission." Relying on this standard, the CGB proceeded to grant an additional 301 pending exemption requests.

The captioning rules are designed primarily to benefit deaf and hard-of-hearing people. So it should not have surprised anybody when a group of advocacy organizations for the deaf and hard-of-hearing promptly asked the full Commission to overturn 298 of the CGB-granted exemptions, including the ones to Anglers for Christ and New Beginning.

Now, five years later, the Commission has determined that the CGB applied the wrong standard and didn't follow the necessary procedural steps. As a result, all 298 exemptions have been reversed (as for those lucky five petitioners whose exemptions were not appealed for whatever reason, their exemptions continue to stand). The parties who received those now-reversed exemptions (and who have presumably been relying on them for five years) must now file new requests under the newly-announced standards if those parties want to have their exemptions restored. Those new requests will be due 90 days after the order is published in the Federal Register, although the affected program providers will continue to be exempt until that time. If they file new requests for exemption, those temporary exemptions will continue until the CGB rules on their updated requests.

In overturning the CGB's 2006 decision, the Commission concluded that the CGB inappropriately focused on the claims that the programming was non-commercial and did not have any remunerative value. As the Commission sees things now, the CGB instead should have taken into account *all* of the program producer's available resources, not just those allocated for the programs. The CGB also should not have relied on the programmer's non-profit status; rather, it should have considered the provider's economic strength regardless of its for-profit or non-profit status.

The Commission also faulted the CGB for creating a presumption that closed captioning exemptions should be granted when the expense of captioning would cause the programmer to "curtail other activities important to [their] mission." In the FCC's view, creating *any* pre-

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Something missing?

Form 323 - The Fun Begins Again

By Harry F. Cole
cole@fhhlaw.com
703-812-0483

The Media Bureau has reminded commercial broadcasters that their biennial Ownership Reports (Form 323) are due to be filed by December 1, 2011 – and that the opportunity to start filing them opened up October 1, 2011.

But the Bureau's public notice doesn't mention some information we kind of hoped they might, since we reminded them of it back in September. Seeing as how the Commission seems less than clear about what it told the U.S. Court of Appeals for the D.C. Circuit just last year, let us help out here.

The question: Is it really true that anybody and everybody with any attributable interest in a reporting licensee must be identified, in the report, by a Social Security Number-based FCC Registration Number?

Short answer: No.

Longer answer: No, individuals with attributable interests may submit a non-SSN-based FRN – dubbed a "Special Use FRN" (we refer to it as a SUFRN) – under some circumstances. Just what those circumstances are remains a bit fuzzy, since the latest public notice fails to mention an important exchange between the Commission and the D.C. Circuit which shed considerable light on this very point.

According to the Court, "no individual attributable interest holder will be required to submit Social Security number to obtain an FRN" in order to respond to Form 323.

First, a brief intro to the SUFRN. The SUFRN option is not reflected in the instructions to Form 323 or in the form itself . . . BUT, if you get deep into completing the form, you get to the FRN question, which simply requires you to insert an FRN for each attributable interest holder. Immediately under the blank where you're supposed to insert that FRN, the form reads: "If Respondent is unable to provide an FRN for an individual attributable interest holder reported in this listing, press above button".

And sure enough, there's a button labeled "Special Use FRN". If you push that button, you get a pop-up message that instructs that you don't need to use an SSN-based FRN. However, according to the pop-up message, eligibility to use a SUFRN arises only "if, after diligent and good faith efforts, Respondent is unable to obtain, and/or does not have permission to use, a Social Security Number in order to generate an FRN for any specific individual whose FRN must be reported on Form 323."

The pop-up message thus limits use of an SUFRN to situations in which the respondent has made "diligent and good faith efforts" to obtain SSN-based FRNs but has been "unable to obtain, and/or does not have permission to use" such FRNs.

Omitted from the form, the pop-up message, and the FAQs found on the Bureau's website dedicated to All Things Form 323 is the fact that respondents "are not required to provide SSN-based FRNs . . . if they object to the submission of their Social Security Numbers." Nor does the Bureau acknowledge that "no individual attributable interest holder will be required to submit Social Security number to obtain an FRN" in order to respond to Form 323.

But that's precisely what the Commission and the D.C. Circuit worked out in June-July, 2010.

There's a fair amount of backstory here. You can catch up with it by reading our blog posts chronicling *L'Affaire Form 323* from 2009-2010 – go to www.CommLawBlog.com and search for "Form 323". We've also included a link to the Emergency Petition we filed with the Commission on September 14, 2011. If you don't feel like reading the entire history of the matter – entertaining though it may be – and would prefer to cut to the chase, just go to our July 12, 2010 post and check out the FCC's pleading to the Court and the Court's response, both of which are linked there.

The bottom line is that, with respect to use of SUFRNs, the Commission made a very specific representation to the Court and the Court expressly relied on that representation. According to the FCC, respondents "are not required to provide SSN-based FRNs . . . if they object to the submission of their Social Security Numbers." And according to the Court, "no individual attributable interest holder will be required to submit Social Security number to obtain an FRN" in order to respond to Form 323.

We think that all Form 323 filers are entitled to know that. For some reason, the Commission seems unenthusiastic about that prospect.

As we read all this, inability to obtain an SSN-based FRN – which is what Form 323 suggests is a prerequisite to hitting the SUFRN button in the first place – appears to be immaterial. Ditto for making "diligent and good faith efforts" to get hold of SSN-based FRNs – a duty imposed by the pop-up message when you hit the "Special Use FRN" button. The Commission appears to have told the Court in no uncertain terms that no individual attributable interest holder has to file an SSN-based FRN is he/she objects to doing so. Period. If the Commission disagrees with our interpretation, it might want to say so.

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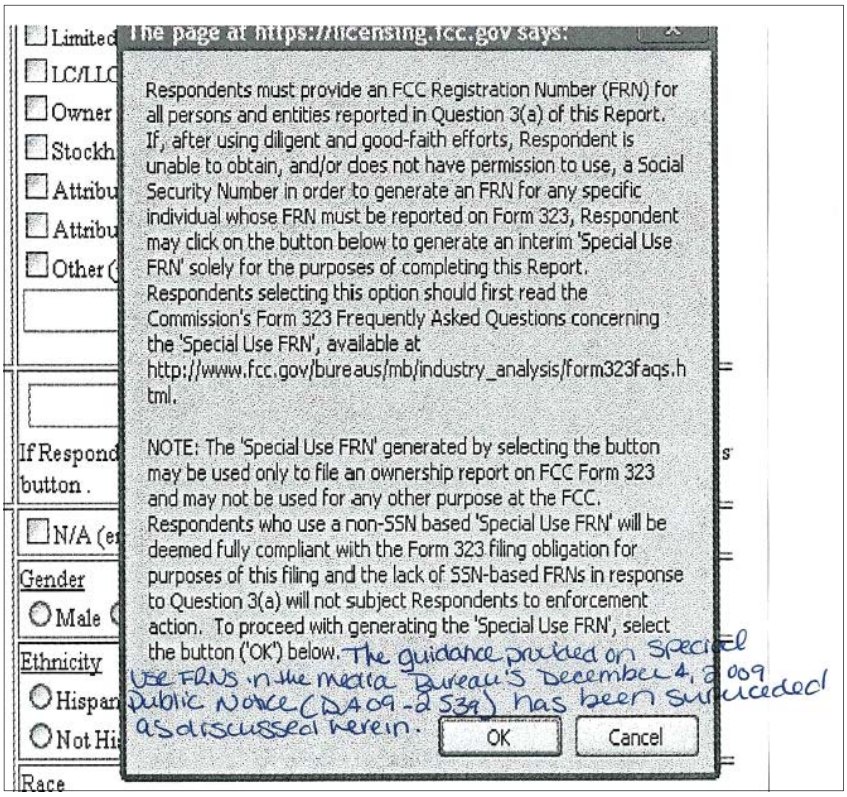
Another, less prominent, aspect of the SSN-based FRN question involves changes made to the form back in December, 2009, which have since been quietly tweaked. In December, 2009, the SUFRN pop-up message (as well as a public notice issued on December 4, 2009) insisted that reliance on a SUFRN for purposes of getting an Ownership Report on file by the then -operative deadline was only an interim measure. Respondents remained under an "ultimate duty to obtain a fully compliant FRN" for all folks identified in Form 323. According to the December 4, 2009 public notice, the Commission expected all filers relying on SUFRNs to "update their filed ownership reports with fully compliant FRNs when these are obtained."



The language about some "ultimate duty" to update after the fact was deleted from the pop-up message by the Commission in March, 2010. You may not have noticed that, since the deletion was effected without explanation or public notice from the Commission. The FCC did ask OMB for permission for the deletion, but in so doing merely characterized the change as "non-substantive", without offering any rationale. Since the Commission didn't bother to tell anybody about this change, much less explain it, there was no reason to believe that the concept of some continuing "ultimate duty" did not remain in place.

We mentioned this in our Emergency Petition, and the Commission appears to have taken our comments on this point to heart . . . sort of. On September 28, 2011 – that would be just a couple of weeks after we filed the Emergency Petition, and a mere three days before the form went "live" for the 2011 biennial filings – the Commission quietly asked OMB to authorize yet another tweak to the language in the pop-up message, and OMB obliged. Now, stuck on at the end of the pop-up message is the following sentence: "The guidance provided on Special Use FRNs in the Media Bureau's December 4, 2009 Public Notice (DA 09-2539) has been superseded as discussed herein."

"As discussed herein"? The problem is that there is no obvious discussion in the pop-up message (or on the FCC's website) referring back to the December, 2009 public notice, so anyone reading that newly-added sentence wlll be hard-pressed to know what it's supposed to mean. Our guess is that the Commission is backing away from the notion of some "ultimate duty" to follow-up with SSN-based FRNs for everybody, but the Commission sure hasn't said that expressly. By contrast, the Commission was ***very*** explicit in imposing that duty back in December, 2009 – so if it wants now to countermand that earlier instruction, you'd think that the Commission could do so with similar clarity.

Unfortunately, the Commission appears still to be trying to shore up the multiple weaknesses in its Form 323 in a piecemeal, less-than-public way. The history of Form 323 since 2009 has not been a particularly happy one, and the most recent developments don't suggest much improvement. With the filing window already opened for the 2011 round of filings, the Commission has apparently not focused on problems with the form that were identified, and should have been fixed, more than a year ago. The last-minute addition of unilluminating language in the pop-up message does not suggest that the Commission has taken the time to think through the form carefully. Indeed, the manner in which that last-minute addition was submitted to OMB suggests less than careful and thoughtful preparation, as appears evident by the illustration to the left. (This is a screen grab, taken from the OMB website, of a portion of the request for OMB approval submitted by the FCC on September 28, 2011.)

Maybe we're missing something here, but an unannounced, hand-written change to a form days before the form went "live" doesn't suggest that the folks in charge of that form have the best handle on it. That's too bad, since it's a form that all commercial broadcasters are required to file. We had hoped that the efforts we made in 2009-2010 would have assisted the Commission to get its Form 323 act together by now. We may just have to keep trying.

Reefer Madness II

Update on "Joint" Sales Advertising

The pipe dream of marijuana advertising – going up in smoke?

By Harry F. Cole
cole@fhhlaw.com
703-812-0483

What's up with broadcast advertising of medical marijuana?

It's been two years since the Department of Justice hinted that maybe, just maybe, the federal government might go easy on fiendish pushers of the evil weed, er, we mean legitimate businesspersons seeking to provide dope to patients with legitimate prescriptions for the stuff. State laws permitting use of the drug for medical treatments opened the door to this particular area of commerce. But those state laws also created a conundrum, particularly for federally-licensed broadcasters: if marijuana trafficking is illegal under federal laws but legal under state laws, should a broadcaster accept advertising for grass?

We previously expressed caution on that front. Events this year indicate that any thoughts of a federal retreat in the War on Drugs were but a pipe dream. To the contrary, if at least one U.S. Attorney has her way, broadcasters who sell time for the advertisement of medical marijuana may find themselves in federal court, and not in a good way.

Broadcasters who sell time for the advertisement of medical marijuana may find themselves in federal court, and not in a good way.

Readers with good memories will recall that, back in October, 2009, the Department of Justice had issued a letter suggesting that the Obama Administration was inclined *not* to come down too hard on the use of medical marijuana in states where such use had been legalized. The letter did not address the issue of broadcast advertising. It did acknowledge that, as a practical matter, there are probably better ways for the government to use its prosecutorial resources than beating up on patients legitimately availing themselves of medical treatments permitted by their state laws. If a particular situation involved dope use which was in "clear and unambiguous compliance" with state law, the letter seemed to say that federal prosecutors could properly look the other way.

While the October, 2009, letter was pretty limited, it at least hinted at some possible federal leniency when it came to grass use in states where such use was permitted. This of course gave rise to the notion that the feds might not mind if the sale of medical marijuana were to be advertised on radio and TV. After all, didn't we learn from our experience with lottery advertising that stuff that's legal locally can be advertised locally? (Actually, that wasn't exactly the lesson of the lottery experience, but it's close enough.)

But since the 2009 DOJ letter, the FCC has been mum on the topic of marijuana advertising. That's not an encouraging sign. The Commission has historically been down on drugs generally, of course, and without some clear prodding by DOJ, it's unlikely that the FCC would opt on its own to loosen things up.

What's worse, this year the DOJ has issued a number of items emphasizing the narrowness of the October, 2009 letter. In an April notice (issued in Washington State), a May letter (issued in Arizona), and a June notice (issued in Oregon), various U.S. Attorneys have made clear that the U.S. Government still views marijuana as a serious threat that is not to be encouraged. And hammering that point home is a June decision of the Drug Enforcement Administration (a division of the DOJ), published in the Federal Register in July, refusing even to think about "rescheduling" marijuana.

("Rescheduling" would have relaxed federal controls over grass. Why did DEA decline the opportunity? As DEA sees it, marijuana: (a) has a "high [editor's note: unclear whether the pun is intended] potential for abuse"; (b) has "no currently accepted medical use"; and (c) "lacks accepted safety for use under medical supervision". Does that sound like DEA (or DOJ) resistance to dope might be cracking [editor's note: pun intended]? We didn't think so either.)

Most recently, four U.S. Attorneys in California took a series of coordinated actions directed against "illegal operations of the commercial marijuana industry". The aggressive approach included arrests of some (supposed) Bad Guys, obviously, but it also targeted (with civil forfeiture proceedings and stern warning letters) owners and lienholders of properties where illegal marijuana sales are taking place.

Broadcasters take note: the Feds aren't going against just the marijuana marketers, but also third parties – like the folks who own the buildings where the marketers have set up shop – who may or may not be directly involved in the business, but who facilitate it nonetheless. Could that include broadcasters who sell time to marijuana dispensaries? Yup, at least according to the U.S. Attorney for the region including San Diego County. That official (Laura Duffy) has been quoted on one website as saying that "[n]ot only is [marijuana advertising] not appropriate . . . it's against the law." Ms. Duffy is looking at possibly sending out formal notices to TV, radio and print outlets giving them the formal heads up that they're

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violating the law. She was understandably vague about what might happen after that, but did mention criminal prosecution as one possibility. This may not be a direct threat that the Feds are coming, but it's pretty darned close.

As best we can tell, DOJ is concerned that even well-intended, medically-limited permissiveness toward marijuana use has led to burgeoning secondary industries. Vast grass farms, rampant marijuana stores and other such broadly commercial operations have emerged in the wake of ostensibly narrow state laws permitting limited use of the drug by patients under the care of medical professionals. DOJ seems to be figuring that, unless it starts rattling its saber really hard, the supposedly small medical marijuana exception will effectively open the floodgates to widespread dope dealing. That's understandable, particularly in light of the way that marijuana shops have sprouted like, um, weeds in California.

Where does this leave broadcast advertising of marijuana? Caution remains the watchword – far more so now than was the case in 2009. The Feds are clearly concerned about large dope distributors (although, if those distributors are legitimately dealing only to patients with bona fide prescriptions for the stuff, why should a distributor's size make a difference?). Which drug sellers are most likely to want to buy advertising time? Our guess is those same large distributors. This isn't to say that any prospective grass advertiser would necessarily be a target of federal interest. But it's probably a good bet.

So we're now looking at the impending collision of two considerable forces: from one direction, we have the Great State of California (and others), satisfied that medical marijuana is a valid, beneficial and humanitarian therapeutic resource; from the other direction, we have the Federal government, still convinced that marijuana is the killer weed in which lurks murder, insanity and death.

And located right at the collision point of these two forces will be broadcasters and their print confrères, clutching the First Amendment.

Of course, the FCC still hasn't weighed in on the issue, so you can't say with absolute certainty whether it might be inclined to wield its enforcement power in this area. But with broadcasters in the middle of a license renewal cycle, is that a chance you want to take?

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sumption was contrary to the intent of the Act and the Commission's Rules, which contemplate a case-by-case analysis. Not stopping with that, the Commission further announced that it isn't even appropriate to consider whether the costs of captioning would curtail any other activities of the programmer. To the contrary, the relevant consideration is whether the expense would curtail the production of programming. Any effect on other activities is, essentially, irrelevant.

According to the FCC, the CGB also was wrong in granting permanent, rather than temporary, exemptions of the closed captioning requirements. Particularly in light of anticipated technological advancements that make captioning cheaper, the Commission has now held that, going forward, exemptions should be limited in duration, absent compelling circumstances.

Finally, the Commission noted that, in granting the exemptions in 2006, the CGB failed to consider whether the programmers had asked the distributors of their programs for assistance with the expense of captioning. While distributors aren't required to provide such assistance (although they are ultimately responsible for providing captioning), a programmer cannot make the crucial showing that captioning would impose an undue burden if the programmer fails to ask for such assistance.

Having effectively trashed pretty much the entirety of the CGB's 2006 action, the Commission next explored what standards should be applied to individual exemption requests which are subject to the "economically burdensome" test. The FCC looked at the legislative history and the potential differences between the meaning of the statutory terms "undue [economic] burden" and "economically burdensome". (In 2006, the Communications Act included the "undue burden" standard, which has since been changed to "economically burdensome.")

Ultimately, the Commission's answer is a four-factor analysis to be applied to such requests. The factors to be considered: (1) the nature of the captions required and the cost of providing them; (2) the impact of providing captions on the operations of the program provider requesting the exemption; (3) the financial resources of the program provider; and (4) the type of operations of the program provider.

Specifically *not* included among the relevant factors are the program provider's audience or market share, its non-profit status, its geographic location, or the existence of alternatives to traditional captioning. While those may have been appropriate factors for the Commission to consider in granting categorical exceptions to the captioning rules (*e.g.*, the exceptions for certain late-night programming and for new networks), they are *not* to be considered by the CGB in evaluating case-by-case exemptions.

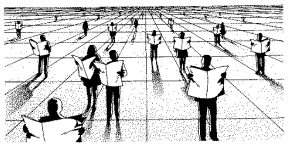
While the Commission's conclusion regarding the factors to be considered in determining what constitutes an "undue burden" are to be applied on an interim basis to both existing and new requests for individual exemptions, the Commission requests comment on whether these are in fact the correct factors, and whether any other matters should be considered in evaluating closed captioning exemption requests. Comments will be due 30 days after the Commission's order is published in the Federal Register, reply comments a couple of weeks later. Check back on www.CommLawBlog.com for updates.

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

Updates On The News

Some thoughts about delegation of chores – The lead article in this month's issue describes the FCC's proposal to require TV licensees to upload all of their public files onto a Commission-maintained server. As indicated there, the proposal is at this point a bit short on practical details, as the Commission elected to delegate to the Media Bureau the chore of figuring out just how get the job done.

While delegation of duties is a time-honored bureaucratic tradition, the FCC's recent experience with that tradition might give it pause. We're thinking, first, of what happened with the Ownership Report (FCC Form 323) for commercial broadcasters. After committing to overhaul that form in 2008, the Commission bucked the job down to the Media Bureau in April, 2009, with instructions to git 'er done by October, 2009. That didn't work out so well, as we reported extensively in 2009-2010. When the draft form was finally unveiled (by OMB) in August, 2009, it raised eyebrows by imposing substantial new burdens that many found unacceptable. The original October, 2009 roll-out of the form was missed, multiple revisions – some more public than others – occurred, and even now the form's requirements are less than clear. (*See* our related story on page 14.)



And then there's the report form for the Nationwide EAS Test. There again, the Commission announced in February, 2011 that it planned to get an on-line report form up and running "shortly". That form wasn't made public, though, until late October, 2011, a mere two weeks before the EAS Test for which the report would be needed. According to some folks who have tried to complete it, even the initial portion of the form, which should be the easiest to fill out, leaves much to be desired.

From these two very recent experiences, it's clear that tossing a major-league project (let's define that as one involving a requirement to be imposed on thousands of regulatees) to a Bureau and imposing on that Bureau an abbreviated deadline to get the job done is a recipe for disaster. This is especially true when the agency appears to have some underlying motivation that it prefers not to highlight, a motivation that leads to design elements – the initial insistence on obtaining Social Security-based FRNs through Form 323 being one example – that are both objectionable and, probably, unnecessary to the FCC's goals.

While the move to on-line public files for TV licensees does not currently have a specific deadline, it's clear that the FCC is pushing to complete that process fast. The Commission might want to slow down and think through the process more carefully now — rather than risk potentially reversible error ahead.

FHH - On the Job, On the Go

On October 27, **Kevin Goldberg** presented a webinar on legal issues affecting social networking to members of the Maryland-D.C.-Delaware Broadcasters Association.

And looking ahead, it's good to be a Frank. That's because on November 4, **Frank Jazzo** will present a "Regulatory Update" at the annual convention of the Alaska Broadcasters Association at the Anchorage Marriott Hotel. Meanwhile, the other Frank, **Frank Montero**, has been asked to serve on the Advisory Board of Radio Ink's Hispanic Radio Conference. The third such conference is scheduled for March 21-22 in San Diego. According to *Radio Ink*, the conference will bring together leaders in the Hispanic radio community and experts in Hispanic advertising and media for a comprehensive overview of opportunities and strategies within this rapidly transforming sector.

On the non-Frank horizon, on November 5, **Harry Cole** will provide a regulatory update to the Board of the Maryland-D.C.-Delaware Broadcaster Association.

Говорить "грязных" Для меня . . . On October 4, **Davina Sashkin** was interviewed for 18 minutes on the Radio Voice of Russia (an English-language service with outlets in D.C., NYC, and elsewhere around the world). Her topic? Broadcast indecency, and the regulation thereof. Does this give glasnost and perestroika a whole new meaning or what? A tip of the *MTC* ushanka to you, Davina, and with a hearty "Давайте выпьем за успех нашего дела!" we'll hoist a Stoli or two in your honor. That's because you're this month's Медиа любимцем!

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The FCC seeks comment on the definitions, terminology, and scope of the requirement, as well as the parameters of each of the exemption categories. Does "apparatus" include software? Are computer monitors exempt? How is "achievable" different from "technically feasible"? Is there a particular file delivery format that devices should support? What multi-purpose devices, or categories of devices, should be waived? And so on.

The NPRM also proposes procedures for complaint and enforcement of the new rules, including a stipulation that "*de minimis*" failures will not be treated as rule violations.

This proceeding is set to move quickly, mainly because of the Congressionally-imposed deadline (January 12, 2012) for getting the rules adopted. The Commission's Notice of Proposed Rulemaking got hustled into the Federal Register, as a result of which the opportunities for both comments and reply comments have passed already.