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Memorandum to Clients

July, 2012 | News and Analysis of Recent Developments in Communications Law | No. 12-07

Image obtained from www.aereo.com

For upstart video delivery competitor, the show goes on . . . for now

Aereo Allowed to Continue Operation During Copyright Challenge

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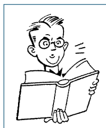
In the Aereo v. the Broadcasters smackdown, Round One has gone to Aereo. In a thorough 52-page opinion, Judge Alison Nathan, U.S. District Judge in the Southern District of New York, has rejected efforts by the broadcaster plaintiffs (*i.e.*, the major broadcast networks) to get the court to enjoin Aereo's operation. That means that Aereo can continue to serve its subscribers while the broadcasters' various substantive claims against Aereo (consisting of claims of various flavors of copyright infringement) are litigated.

That's bad news for the broadcasters. But what's worse is how Judge Nathan got to that result.

(If you're fuzzy on just what the Aereo litigation is all about, take a look at our article on the topic in the March, 2012 *Memo to Clients*.)

Judge Nathan concluded that Aereo's system is, for purposes of copyright law analysis, essentially the same as the Remote Storage DVR (RS-DVR) system that, according to the U.S. Court of Appeals for the Second Circuit, does ***not*** infringe copyrights. While her opinion grants a number of points to the broadcasters, her conclusion about the similarities between Aereo and the RS-DVR system deals the death blow to the broadcasters' injunction request – and, looking down the line, very likely also to its overall claims of infringement. We'll delve into Judge Nathan's decision a bit more below.



Inside this issue . . .

But first, a brief primer on litigation procedure may give readers not versed in the Litigation Arts an understanding of what has happened thus far and what it means going forward.

When one party (*i.e.*, the plaintiff) sues another party (*i.e.*, the defendant), the result is an evidentiary trial (assuming, of course, that the parties don't settle beforehand, or one of the two parties isn't able to convince the judge that the issues are so clear that no trial is necessary). Preparing for and then actually trying the case takes months, maybe even years. Because of that, plaintiffs who are attacking defendants' ongoing conduct often ask the court to put a halt to – or "enjoin" – that conduct pending conclusion of the trial.

When a plaintiff asks for an injunction, the court is called upon to consider a number of factors. Among those factors is the likelihood that the plaintiffs' substantive charges will ultimately stick at trial. After all, if the plaintiffs' case on the merits is weak, why should the defendants be ordered to stop what they're doing? But on the other hand, if the plaintiffs can demonstrate that they've got a seriously kick-butt case, why should the defendants be permitted to continue to engage in their alleged misconduct?

So when an injunction is requested, long before the trial itself occurs, the court conducts a hearing (like a mini-trial) to determine whether or not to grant the requested injunction. Judge Nathan's decision resolves that preliminary question in the Aereo case.

And while a decision on a stay request does not necessarily resolve the issues to be addressed in the main trial, in this instance the denial of the stay may indeed resolve the case itself.

The gist of Judge Nathan's decision is that the broadcasters are unlikely to prevail on their infringement claims. And that's because the Second Circuit (whose rulings are binding on the U.S. District Courts in New York, including Judge Nathan) has already ruled, in 2008, that use of technology akin to Aereo's does not constitute copyright infringement. The 2008 ruling – in Cartoon Network LLC, LLLP v. CSC Holdings, Inc. – involved Cablevision's RS-DVR system. The Second Circuit figured that that system was functionally equivalent to the type of private video cassette recorder that the Supreme Court had blessed way back in 1984, in the Betamax case.

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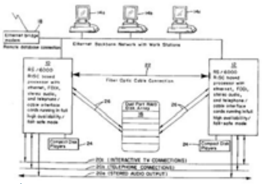

Patent troll alleges "sophisticated", "multi-pronged" "licensing blockade"

Update: Mission Abstract Replies

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As part of our commitment to try to keep our readers on top of ongoing developments in the Mission Abstract Data (MAD) patent litigation in Delaware, here's the latest: a report on MAD's most recent, somewhat paranoid, pleading in its effort to get the stay of that litigation lifted. Attentive readers will recall that the U.S. District Court in Delaware put a hold on the litigation last year at the request of the defendants, a number of Big Broadcasters. Last month MAD petitioned the court to get things moving. Not surprisingly, the Big Broadcasters opposed that petition, and now MAD has replied to that opposition.

Since (as we have repeatedly acknowledged) we here at Fletcher Heald are not patent experts, we won't opine about MAD's various arguments. They look pretty much like what you might expect. MAD generally belittles the litigation claims of the Big Broadcasters (and BEI, which has challenged MAD's patents in the U.S. Patent and Trademark Office) and bemoans the fact that its case hasn't progressed. Folks familiar with litigation probably won't be surprised by anything in MAD's reply.

Perhaps most interesting is MAD's repeated insistence that continued delay has been and continues to be prejudicial to its "licensing program". That "licensing program", of course, is the repeated, insistent effort by MAD (and its cohort, including DigiMedia and IPMG AG) to browbeat radio broadcasters into agreeing to pay for the right to use MAD's patented technology, whatever that may be. (MAD reads its patents very broadly; others disagree with MAD's interpretation. That's where the USPTO and the Delaware court come into the picture.)

MAD's business – which it describes as "non-litigation intellectual property licensing" (points for making this argument in the context of litigation with a straight face) – will be prejudiced by continued delay, according to MAD, because:

> [d]efendants and their industry appear to have taken a sophisticated and multi-pronged approach to derail [MAD's] licensing program. Apparently through coordination with state and national broadcaster associations, the Defendants have engineered a licensing blockade, worked with BEI to attack the asserted patents in the PTO, and petitioned this Court to delay the resolution of this litigation pending multiple reexamination requests. Defendants' conduct represents a calculated effort to prejudice [MAD] by stripping the asserted patents – which expire in less than two years – of their licensing value through delay.

"Sophisticated, multi-pronged approach"? "Calculated effort"? "Coordination"? "Licensing blockade"? Hoo, boy – why not "vast anti-MAD conspiracy", too? (Also, how come our blog – CommLawBlog – wasn't mentioned? As I have previously observed, MAD has identified us – and me in particular – on its website as a source of "some misconceptions" about MAD's "licensing program" and "ongoing litigation".)

So, apparently frustrated by the fact that MAD's target audience doesn't seem to be buying what MAD's selling, MAD ascribes that circumstance to some massive conspiracy. Of course, more obvious, and far less paranoid, explanations exist for the circumstances in which MAD finds itself. MAD shouldn't be surprised that parties *which MAD has chosen to sue* are defending against its claims. Nor should MAD be surprised that equipment manufacturers – who might be on the hook to their customers if MAD's patents are as broad as MAD claims – are also contesting those patents in an appropriate forum. And as the Delaware litigation clearly demonstrates, there is considerable disagreement about exactly what MAD's patents cover and, thus, exactly what MAD has to sell. Prudent businesspeople tend not to make five-figure commitments when it's not clear what, if anything, they'll be getting in return.

But we digress. With the filing of MAD's reply, the ball is now in the judge's court. Our understanding is that it could take as long as two-three months for the District Court to decide whether to lift the stay. Check back with CommLawBlog.com for updates.

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Student-Run College Radio: An Endangered Species?

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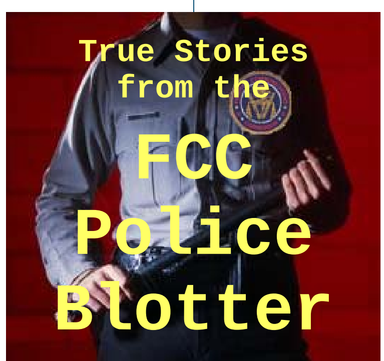
The FCC has been slapping forfeitures left and right on college-owned, student-run radio stations. Three recent examples: $6,500 to a station operated by students at Bethany College in Bethany, West Virginia, $10,000 to a Rollins College station, and another $10K to a Toccoa Falls College station.

The misconduct underlying those fines was not especially earth-shattering: a late-filed renewal, some missing issues/programs lists, occasional failures to notify the FCC when the station is off the air for more than 10 days, that sort of thing. Nothing really to write home about.

We can understand the FCC's position. Rules are rules, and when rules get broken, there are (or should be) consequences.



But there's a bigger picture here that the FCC may be missing. By imposing such fines on student-run stations that are probably already money-losers for their parent educational institutions, the Commission may be hastening the demise of such stations.

And that would be a serious loss to the broadcast industry and the listening public.

Student radio, particularly at the college level, serves an important role as an incubator for future generations of broadcasters. Student radio can serve as a conduit into the industry for a broad and diverse universe of voices – precisely the type of diversity the Commission has long sought to promote through a wide range of policies.

Against these evident benefits, the oppressively negative impact of the FCC's forfeiture policies can and should raise serious concern.

Our firm works with several student-operated stations. We know that college is a time for learning and experimentation. We also know that student-run stations are in many significant ways very different from normal commercial operations. The staff at a student station generally turns over at least 25% a year, as seniors leave and freshmen arrive. Institutional memory tends to be short, and basic lessons have to be re-taught and re-taught. Working with students is an endless instructional process. In that environment, mistakes will be, and often are, made.

The college environment is supposed to encourage learning and experimentation. That environment normally tolerates mistakes that come with learning and experimenta-

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$68K for Unlicensed STLs – Could That Be You?

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It's important not to lose sight of the Little Things. Your primary operating license? That's a Big Thing. You know where that stands, and you make sure that everything about it is in good order. But how about your auxiliary licenses – studio-transmitter links (STLs), remote pickups, that sort of thing? Those Little Things may seem like unimportant incidentals in the greater scheme of your operation, but heads up: the FCC doesn't share that perception.

One broadcaster found that out the hard way: it got spanked to the tune of $68,000 in fines arising from four STLs whose licenses turned out not to be in proper order.

This might be a good time to check up on your STLs, just to be sure.

For the uninitiated, STLs are RF devices that take a station's signal from the studio to the transmitter. All broadcast auxiliary authorizations (STL, remote pickup, intercity relay, etc.) tend to be inexpensive and low maintenance. They renew automatically with the main station license, so you don't need to file a separate renewal application for them. In the hierarchy of FCC authorizations, they rank low on a couple of scales: the filing fee for a new or modified STL is a scant $150, and the annual regulatory fee for each STL has been a paltry $10 for several years now. While the process of obtaining a new STL may entail some additional fees (for frequency coordination, engineering services, legal services, etc.), STLs are obviously not a high end investment.

But that doesn't mean you can simply forget about them. Last August, an Enforcement Bureau agent inspected a four-station group operation in Casper, Wyoming. All four stations were using STLs, but the licensee could produce only one license for any of them – and that license specified a location different from the address where that particular STL had been operating for more than a decade. Oops.

As to the other three STLs, the answer was . . . well, there wasn't any answer. No licenses could be found for any of them, even though the licensee confirmed that one of the three had been in continuous operation since 2000, and the other two since 1995. The licensee did come up with a call sign for one of the 1995-vintage STLs, but it turned out that, according to the Commission, that particular call sign belongs to an STL in Georgia, not Wyoming.

The bottom line was that this licensee had apparently not bothered to take a close look at its four STLs in recent memory, and that lapse proved costly.

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Payment deadline still TBA

2012 Reg Fees Set

It's official – or, rather, they're official. The final 2012 regulatory fees have been announced by the Commission. For those of you anxious to cut to the chase, you can check out a convenient table of the newly-adopted fees on the next page. (The table also provides a comparison between (a) the fees that have been adopted and (b) the fees the FCC proposed last May.) There are only a couple of surprises here.

First, it's good to be a VHF TV licensee in Markets 26-50, since their reg fees have dropped nearly $2,000 between the May proposals and now. And it's *really* good to be a VHF licensee in one of the top ten markets, since their fees plummeted a whopping $7,350 – about 8.4% – from the May proposals. On the other hand, it stinks to be UHF licensees in the top 20 markets. They're looking at increases over the May proposals in the range of 2%. That amounts to increases of less than $1,000, if that's any consolation. The table on the opposite page shows increases from the May proposals in red and decreases in green. (Interestingly, none of the radio-related fees changed from the May proposals.)

The Commission intends to collect these regulatory fees "during a September 2012 filing window".

The Commission has not yet announced the dates of the window period during which reg fees can be filed this year, but it does indicate (in Paragraph 1 of its order) that it intends to "collect these regulatory fees during a September 2012 filing window". So it looks like your beach plans for August are still intact.

As to the non-dollar aspects of this year's reg fees, there appear to be no surprises. The Commission has decided to use 2010 Census data in determining the fees for AM and FM stations (whose fees vary based on the population each station serves). And as was the case last year, with respect to Class A, LPTV and TV Translator stations

> a single fee will be assessed for each facility regardless of whether it transmits in analog or digital mode, digital mode, or simulcasting in both analog and digital modes.

Note that this approach may, and almost certainly will, change as more of these facilities convert to digital mode.

The Commission has decided that any request for a refund, waiver, fee reduction or deferment of any reg fee (or apparently, any application fee) must be submitted electronically, rather than the old-fashioned hard copy way. This change is part of an agency effort to improve the way it provides public information about the filing and disposition of waiver requests.

Exactly how that will work is not at all clear. The Commission's order provides absolutely zero description of what online filing system might be used for this purpose – instead, the FCC casually assigns the heavy lifting on this project to the Office of Managing Director ("We direct the Office of Managing Director to take the necessary steps to assist regulatees in transitioning to electronic filing."). Plus, the order specifies no effective date, so it's impossible to tell exactly when this new procedural tweak is intended to kick in. We'll keep an eye out for further announcements on this and pass them along to our readers here.

One last heads up: as it has previously announced (and as was the case last year), the Commission has stopped sending out bills reflecting each station's reg fee obligations. If you want to see what the FCC has calculated as the amount due for your main station license(s), you will go to www.fccfees.com, enter your call sign (or Facility ID Number) and hit the button (but note that that site will probably not be working until closer to the payment window). When the number comes up, you may still want to do your own calculation, as the FCC's system has been known to make mistakes in the past.

CAUTION: Historically, the FCC's fee calculator has ***NOT*** included fees for any auxiliary licenses that may be associated with the main license. Since separate fees are due for those auxiliaries over and above the main license reg fee, it's *very important* to doublecheck your records and the FCC's records to be sure that your payment includes the necessary fees for ***all*** applicable authorizations. Since a failure to pay even a single $10 fee for a remote pickup could result in the dreaded red light status, extreme care should be taken on this front.

Again, the specific dates for this year's reg fee window have not yet been announced. Check at www.CommLawBlog.com for updates.

Fee Category	Proposed 2012 Fees (USD)	Final 2012 Fees (USD)	Difference (USD)	Percent Change
TV VHF Commercial Stations				
Markets 1-10	87,425	80,075	7,350	8.4%
Markets 11-25	72,925	73,475	550	0.7%
Markets 26-50	41,675	39,800	1,875	4.5%
Markets 51-100	20,725	20,925	200	1%
Remaining Markets	5,800	5,825	25	0.4%
Construction Permits	5,800	5,825	25	.04%
TV UHF Commercial Stations				
Markets 1-10	34,650	35,350	700	2%
Markets 11-25	31,950	32,625	675	2.1%
Markets 26-50	21,875	21,925	50	0.2%
Markets 51-100	12,625	12,750	125	1%
Remaining Markets	3,425	3,425	NC	NC
Construction Permits	3,425	3,425	NC	NC
Low Power TV, TV/FM Translators/ Boosters	385	385	NC	NC
Other				
Broadcast Auxiliary	10	10	NC	NC
Earth Stations	275	275	NC	NC

Satellite Television Stations				
All Markets	1,350	1,425	75	
Construction Permits	890	895	5	

Commercial Radio Stations Proposed 2012 Regulatory Fees						
Population Served	AM Class A	AM Class B	AM Class C	AM Class D	FM Classes A, B1 & C3	FM Classes B, C, C0, C1 & C2
<=25,000	725	600	550	625	700	875
25,001 -75,000	1,475	1,225	850	950	1,425	1,550
75,001 -150,000	2,200	1,525	1,125	1,600	1,950	2,875
150,001- 500,000	3,300	2,600	1,675	1,900	3,025	3,750
500,001 -1,200,000	4,775	3,975	2,800	3,175	4,800	5,525
1,200,001- 3,000,000	7,350	6,100	4,200	5,075	7,800	8,850
>3,000,000	8,825	7,325	5,325	6,350	9,950	11,500
AM Radio Construction Permits	550					
FM Radio Construction Permits	700					

Useful, and surprising, light on the ins and outs of employers' social media policies

Coping with Social Media in the Workplace III

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In an article in the March, 2010 *Memo to Clients* I urged readers to consider developing, sooner rather than later, policies relating to their employees' use of social media. That's because, whether employers like it or not, their employees are using social media, and that use can put the employer's business at risk. Better to get ahead of the problem than have to play catch-up ball when an employee's careless or calculated online behavior causes problems.

Then last summer the Acting General Counsel of the National Labor Relations Board (NLRB) issued a report that shed considerable light on the types of social media activities that are protected from sanction by employers. In a follow-up article in the October, 2011 *Memo to Clients* I observed that this dovetailed nicely with my earlier piece, as it provided multiple illustrations of the limits on an employer's after-the-fact ability to sanction an employee's online activities

And now the NLRB's Acting GC has issued yet another report. (And, by the way, just how many helpful memos does Lafe Solomon have to produce before he can get "acting" removed from his title?) This latest report focuses on social network policies adopted by employers, identifying various limits to which such policies are subject. It provides useful guidance to all employers – those who have already formulated a social media policy and those who haven't but expect to be doing so soon.

The most important take-home message from the NLRB: even the most seemingly benign policies can run afoul of employees' rights. That's the lesson that some Very Familiar Corporations – companies like Target, General Motors, DISH Network, among others – learned the hard way. In fact, of the seven companies whose social media policies the NLRB reviewed, only Wal-Mart passed with flying colors.

As far as the NLRB is concerned, an employer's social media policies must be consistent with Section 8 of the National Labor Relations Act (the Act). Section 8 prohibits imposition of a rule or policy on employees if that rule/policy "would reasonably tend to chill employees in the exercise of their Section 7 rights." In this context, the term "Section 7 rights" refers to the types of "protected activities" or "concerted activities" I described in my article last October. (Feel free to check back there now to refresh your recollection. You can find it on our website at www.fhhlaw.com or on our blog at www.CommLawBlog.com. Don't worry, we'll wait for you.)

The NLRB uses a two-step inquiry to determine whether Section 8 is violated. Most obviously, a social media policy that clearly restricts Section 7 rights is impermissible. But a policy may also be unlawful if: (1) employees would reasonably construe the policy's language to prohibit Section 7 activity; or (2) the policy was promulgated in response to union activity; or (3) the policy has been applied to restrict the exercise of Section 7 rights.

Consistent with the way we treat the right to free speech in this country, the NLRB looks to encourage speech and frowns on corporate policies that punish or discourage speech. So if a company's social media policy is so broad and/or ambiguous that it could be read possibly to penalize lawful speech, the rule violates the National Labor Relations Act.

> *The NLRB looks to encourage speech and frowns on corporate policies that punish or discourage speech.*

Here are some examples:

Target's social media policy required employees not to "release confidential guest, team member or company information". It also cautioned employees not to: share confidential information with other employees unless they "need the information to do their job"; or "have discussions regarding confidential information in the breakroom, at home, or in open areas and public places".

All that may sound reasonable – after all, isn't it OK to try to keep "confidential" information "confidential"? – but the NLRB thought otherwise: "Employees would construe these provisions as prohibiting them from discussing information regarding their terms and conditions of employment." Indeed, such discussions would most likely occur in precisely the places (breakroom, home, open areas, public places) specifically singled out in the policy. So the Target policy violated Section 8.

Target's policy also advised employees that it was their "responsibility" to report "unauthorized access" to, or "misuse" of, confidential information. Again, what's not to like about that? But the NLRB decided that that provision seemed to threaten employees for not bringing to the employer's attention violations of the prohibitions discussed above. Since the NLRB had found those prohibitions to be invalid, the NLRB figured that Target's reporting requirement was equally invalid.

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GM's policy discouraged "[o]ffensive, demeaning, abusive or inappropriate remarks", and cautioned GM employees that Internet posts about GM must be "completely accurate and not misleading" and must not "not reveal non-public company information on any public site". The term "non-public company information" was defined to include such matters as GM's financial performance and personal information about other employees, such as "medical condition[s], performance, compensation or status in the company".

Again, these might look like reasonable limitations intended to protect GM and its employees. Not so, said the NLRB. The Act allows employees to say things that are not entirely accurate (not to mention "offensive, demeaning, abusive or inappropriate"), as long as they are not "maliciously false". Thus, GM's insistence on "complete accuracy" was not permitted. Similarly, broad categories like employee performance, compensation and corporate status encompass topics related to Section 7 activities, so GM couldn't properly prohibit online discussions of such matters. Nor could it generally bar the posting of photos, music, videos, and the quotes and personal information of others, or use of GM logos or trademarks – since all such postings could reasonably include Section 7 activities.

The NLRB's overall approach is clearly slanted toward protecting the rights of employees.

The NLRB also didn't like GM's admonition that its employees should "[t]hink carefully about 'friending' co-workers", since that could discourage communications among co-workers. Ditto for a provision that urged employees to check with company officials if the employees had any doubt about whether particular information should be posted. It's long been an NLRB no-no to require employees to get company permission before they can engage in Section 7 activities.

The McKesson Corporation's social media policies instructed employees to adopt a "warm", "friendly" and "professional" tone, and not to "pick fights". All nice thoughts, maybe, but all illegal, according to the NLRB. McKesson was concerned that, absent a warm, friendly, professional toe, online discussions "could become heated or controversial". Since discussions of working conditions, unionism and similar matters – all obviously Section 7 activities – could easily become "heated or controversial", the NLRB figured that employees could "reasonably construe this rule to prohibit robust but protected discussions about working conditions or unionism."

The policies adopted by Clearwater Paper Company suffered several of the problems described above. Employees were told not to reveal "confidential", "proprietary" or "material non-public information", terms which the NLRB concluded could include communications permitted by Section 7. The NLRB gave similarly short shrift to a provision forbidding employees from opining about "the workplace, work satisfaction or dissatisfaction, wages hours or work conditions". No surprise there. Likewise to a provision warning employees to "avoid harming the image and integrity of the company" – overbroad, said the NLRB.

The NLRB reviewed social media policies from several more companies – you can review the NLRB's complete memo here – but you should get the point by now: drafting a legal (and enforceable) policy governing your employees' use of social media is a complicated process requiring awareness or and sensitivity to a wide range of factors. Even seemingly innocuous and unobjectionable provisions can turn out to be quite the opposite.

The NLRB was not totally dismissive of all the various policies. Clearwater, for example, prohibited online "harassment, bullying, discrimination, or retaliation" between co-workers online if such conduct would not be permissible in the workplace, even if the online conduct were done "after hours, from home and on home computers". According to the NLRB, this prohibition is OK because it applies only to plainly egregious content.

The NLRB also gave the thumbs up to Target's admonition that employees should "[b]e suspicious if asked to ignore identification procedures". That simply encouraged vigilance without threatening disciplinary action for engaging in Section 7 activities. Similarly, the NLRB approved a provision in McKesson's policy reminding employees that statements made in the online world have consequences and that employees should exercise personal responsibility on social media. The NLRB didn't see such reminders as restricting speech in the least.

And the NLRB seemed OK with policies that are narrowly tailored to protect the company's right to speak for itself. So, for example, an employer *can* require employees to get prior authorization before posting a message *in the employer's name* or if the message can be reasonably attributed to the employer. And an employer can require an employee to expressly state that the employee's messages are the employee's own and do not represent the employer's positions, strategies or opinions.

Still, the NLRB's overall approach is clearly slanted toward protecting the rights of employees. Indeed, in several of the cases described in the NLRB's most recent memo, the agency disapproved of seemingly routine, boilerplate "savings clauses" that simply said the social media policy would be administered in compliance with all laws and regulations. The purpose of such clauses is normally to underscore the company's good faith intent to abide by the law. The idea is that, if any other provision of the policy might be thought improperly ambiguous or overbroad, the

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The standard fine for operating a transmitter (even a cute little STL transmitter) without a license is $10,000. The base fine for operating from an unauthorized location is $4,000. Taking into account the fact that these violations had been ongoing for more than 10 years, the Enforcement Bureau figured that it would be appropriate to double the standard fines, bringing the total to $68,000. It didn't help that the licensee had been on the wrong end of another $10K fine in 2003. In that case, which did not involve any of the stations targeted in the latest inspection, the licensee was operating with (you guessed it) an unauthorized STL. (You might have thought that the 2003 fine would have prodded the licensee to check its other stations for similar problems. Apparently the licensee didn't see it that way.) Each of the orders refers to that previous forfeiture (which the licensee apparently paid) in a footnote, but the doubling of the base fines appears to be the result of the extended length of the latest violations, and not the licensee's recidivism.

Anyone interested in checking the FCC's database to confirm STL-related information can, and probably should, do so. A good place to start is the FCC's General Menu (GENMEN) Reports page. There the Commission denotes each auxiliary broadcast authorization as a "child" to the "parent" full-power station it's associated with. So if you want to know what STLs the FCC thinks are associated with your main station, click on the "Parent Child" link, enter the call sign or Facility ID Number of your main station (don't forget to indicate which type of search – call sign or ID Number – you're using) and click on "Submit Query". The search results should provide you with a listing of all auxiliary licenses associated with the main station in question, as well as technical information about the auxiliaries.

If you have an auxiliary call sign and want to know what main station it's associated with, the "Parent Child" option won't help. Instead, you can go to the "Callsign" link in GENMEN and search for the auxiliary call sign. That should get you to a screen with information identifying the associated main station.

And remember, even where the "child" is associated with the proper main station, that does ***not*** necessarily that you can rest easy. For example, when a main studio is relocated to a new address, so too is the transmit site of the STL. But the change in STL site won't automatically be entered into the FCC's database even though appropriate notice of the main studio change is filed. Think of it in terms of the "Parent Child" analogy: when a family relocates, the child stays with the family, of course. But the parent is still expected to follow up with necessary paperwork to reflect the relocation – for example, the parent must take steps to transfer the child to a new school. So, too, must the "parent" station's licensee follow up to insure that any necessary modifications to the "child's" authorization are made in the FCC's records.

Now is an excellent time to double check that all your auxiliary license information is accurate and up-to-date. We say this because, as reported elsewhere in this issue, regulatory fees will soon need to be paid. Since reg fees are required for auxiliary licenses, it's always a good idea to make sure that you and the FCC are on the same page with respect to precisely what auxiliary licenses you're responsible for. A quick look-see at GENMEN should take care of that. And while you're checking your auxiliaries, it's also a good idea to confirm that the technical information in the FCC's database is consistent with the station's actual facilities. If there are any discrepancies, it's best that you find out sooner rather than later, so that you can ideally get things straightened out before the inspectors arrive.

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"savings clause" will establish conclusively that the policy is to be interpreted as necessary to make it legal.

According to the NLRB, though, such boilerplate provisions will not ordinarily save a company's social media policy where that policy contains the types of overbroad provisions described above, *i.e.*, provisions that might reasonably be seen as chilling employees' exercise of the Section 7 rights.

So here are just a few takeaways drawn from the recurring themes we saw through these cases:

- Content-based restrictions on employee speech, no matter how well-intentioned, can – and often will – step on protected speech. Such policies need to be crafted with imagination and a clear eye to the unintended consequences of those restrictions. When you think you've crafted the restriction narrowly enough, think again – and then add limiting language and clarifying examples.
- If a restriction on employee speech fails, a requirement that employees report when others violate that restriction will fail as well.
- Suggesting that employees aspire to beneficial use of social media may be OK, particularly if that aspiration includes no threat of punishment.
- You cannot require employees to get pre-approval for social media messages posted in the employee's own name, but you can require them to get such pre-approval for – or refrain entirely from engaging in – speech that purports to be on behalf of the company.
- A generalized savings clause is nothing more than a lazy shortcut that won't actually help you.

But the main takeaway is: Drafting a company's social media policy is a surprisingly difficult task, but a necessary one nonetheless. There are pitfalls galore, even for those with the best of intentions. Before wading into the deep weeds of the drafting process, a company wishing to adopt a social media policy – or revise an existing policy – should seriously consider seeking expert assistance. There are myriad subtleties and conflicting considerations that must be balanced and, as we have seen in the NLRB memo, even the biggest corporations came up short.

Department of the Inferiors?

The CRB Dodges an Appointments Clause Bullet

By Harry F. Cole
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The U.S. Court of Appeals for the D.C. Circuit has concluded that the structure of the Copyright Royalty Board (CRB) violates the Appointments Clause of the Constitution. As a result, a CRB rate determination under appeal has been vacated and the matter remanded to the CRB for further consideration.

But wait, you say – why remand it to the CRB if the CRB is unconstitutional? In a deft demonstration of judicial legerdemain, the court also concluded that the CRB's unconstitutionality could be remedied if the court were simply to write some inconvenient language out of the governing CRB statute – and that's just what the court did. So while the CRB may not have been constitutional before the court's decision, it will be constitutional as of that decision, as will CRB determinations made after the court's decision.

The case involves a challenge to the CRB's 2011 decision setting copyright royalty rates for certain noncommercial webcasters. Intercollegiate Broadcasting System, Inc. (Intercollegiate), an association of noncom webcasters unhappy about the decision, appealed.

Intercollegiate raised a number of arguments, but the one that obviously got the court's attention was the Appointments Clause claim. The Appointments Clause? Maybe not as familiar to the Great Unwashed as, say, the Commerce Clause or the First Amendment, it's still a f'real part of the Constitution – check for yourself at Article II, Section 2, Clause 2. For those of you who never bothered to memorize the Appointments Clause for your Civics Class, here 'tis:

> [The President] . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Intercollegiate argued that the CRB's members are "principal" rather than "inferior" officers and, as such, must be appointed by the President and confirmed by the Senate. Since CRB members aren't appointed by the Prez (or confirmed by the Senate), they're constitutionally invalid, as are their decisions.

This argument is not new. It surfaced three years ago in a CRB appeal. In that case the argument wasn't raised in a timely manner, so it was ignored in the Court's opinion. But Judge Kavanaugh, in a separate concurrence, specifically mentioned it with seeming approval. A couple of months later, a commercial company (Live365) raised the same argument in a U.S. District Court and lost; Live365 appealed that loss, but ultimately settled out before its appeal got too far along.

The third time's the charm. Intercollegiate properly raised the argument in its own 2011 appeal and the D.C. Circuit has now spoken. Because the Librarian of Congress (who appoints CRB members) was very limited in his/her ability to remove CRB members, and because the CRB was not subject to the direction and supervision of any "principal officer", well, then, CRB members are themselves "principal officers". Not having been appointed by the President, they cannot function consistently with the Appointments Clause.

Not to worry, though. Relying on an approach used by the Supreme Court in a similar situation in 2010, the D.C. Circuit has opted to "invalidat[e] and sever[] the restrictions on the Librarian of Congress's ability to remove" CRB members. By reading those pesky provisions out of the CRB law as Congress wrote it, the court figures that the CRB will henceforth be constitutional.

Constitutional, that is, as long as the Librarian of Congress is a "Head of Department" (as required by the last line of the Appointments Clause). No problem there, either, according to the D.C. Circuit: the Library of Congress is a "component of the Executive Branch" (meaning that it's a "department", constitutionally speaking), so the Librarian of Congress is a "Head of Department". QED. (To get to this point, the Circuit had to tiptoe around at least one earlier case that suggested that the Library of Congress was a "congressional agency".)

Bottom line: The CRB wasn't constitutional, but now (with the helpful intervention of the D.C. Circuit) it is.

Where does that leave orders issued by the CRB back in its benighted, unconstitutional days? The particular order that was the subject of Intercollegiate's appeal has been vacated and shipped back to the CRB – that would be the New and Improved CRB, Now With Real Constitutional Authority! – for further consideration. While Intercollegiate did, of course, raise some substantive gripes about the old CRB's royalty ruling, it'll be back to square one for those gripes. Intercollegiate will have to present them again to the CRB. If, as one might expect, the new CRB does exactly what the old CRB had done, royalty-wise, Intercollegiate will have to bring its gripes back up to the D.C. Circuit all over again. But next time, it won't have the Appointments Clause argument in its holster.

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Mum's still the word at the FCC

FCC Still Clenching Improperly Collected Application Fees

By Harry F. Cole
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Gee, has it already been more than a year?

In June, 2011, we posted an item about how the FCC had, for seven years or so, been pocketing certain application filing fees which weren't really owed by the applicants. The Commission did quietly issue a refund in response to one request in March, 2011 (notation on the refund check's memorandum line: "not required to pay fees"). But it didn't publicly announce that refund; instead, it quietly tried to change the rule that forbade collection of the fees.

During the summer of 2011, we filed a number of such requests on behalf of various clients, citing the refund that was issued. We understand that other law firms did as well. In the intervening year or so, however, no further refunds have been issued.

Last March, Jack Mullaney, the consulting engineer who (through our friends at *Radio World*) first called our attention to the FCC's, um, sticky fingers, emailed the folks in the Office of the Managing Director (OMD) – which normally handles fee-related matters – inquiring about where things stand. Opting not to respond in writing, OMD offered to speak with Jack by phone. Jack agreed, and asked us if we'd like to sit in. You betcha, we said.

We've included on our blog (CommLawBlog.com) a link to a letter providing the formal version of how the conversation went. That's an *ex parte* report that we filed with the Commission, at OMD's request, the day after the call. (Frankly, we didn't think that the conversation was subject to the *ex parte* rules for a number of reasons, but OMD thought otherwise and who were we to say them nay?)

As the folks at OMD seem to see things, there are three separate but related items sitting on their desks: (1) petitions for reconsideration (three in all) of the June, 2011 Second Report and Order in which the Commission changed the law to allow it to collect future application fees; (2) the various refund requests filed in 2011 relating to fees paid between 2004-2011; and (3) the refund that was issued in March, 2011.

As to the three petitions for reconsideration (one of which was filed by us at Fletcher Heald on behalf of one of our clients), all OMD would say is that those petitions are under consideration. Fair enough, although it's hard to see why it would take OMD a year (and still counting) to work its way through three unopposed petitions consisting of a whopping total of 15 pages of argument.

As to our refund requests, we were assured that they would be resolved "shortly", either by order or by letter. Why an order or letter, when the one refund that had been granted required neither? (In that case, the Commission simply sent the refund requester a check.) We were told, without elaboration, that OMD figured it would be "preferable" to send an order or letter.

And as to that earlier refund – the folks at OMD said that they're taking a second look at that, too. Not that anybody has asked them to do so by, like, filing a petition for reconsideration or anything. No, the staff has apparently decided on its own to review the earlier refund. Of course, that refund was issued more than 15 months ago – good luck trying to get any of the money back.

Question: Don't FCC actions get to a point where it's too late for even the FCC to reach back and jigger with history? Answer: Yes, but the shot-clock count-down to get to that point doesn't start ticking until "public notice" of the action in question. In this case – hold onto your seats – OMD has not yet issued a "public notice" of the March, 2011 fee refund. Why it's taken so long to issue a simple notice like that is anybody's guess. Maybe OMD lost the paperwork; maybe OMD forgot; maybe OMD has been so completely overwhelmed by other vastly more important things for the last 16 months that it couldn't find the time to include a two-three line notice in with the other, similar notices it still somehow managed to crank out; maybe OMD's dog ate it. Or maybe OMD, by purposely not issuing a public notice, figures that it can thereby retain *ad infinitum* the ability to rescind the refund, once it manages to come up with some non-risible justification for doing so. (Whether that interpretation would hold up is far from clear; the FCC's procedural rules can be read to say that, if OMD wanted to re-think its issuance of the initial refund, it had to do so within 30 days of the date shown on the check.)

Of course, OMD's – and the Commission's – biggest problem here is that they haven't come up with any non-risible justification for holding onto the relatively small universe of application fees that they collected in seemingly clear violation of the FCC's own rules. And that puts the Commission in a bind.

To recap what appears to have happened:

More than a decade ago, the Commission figured it might start collecting application fees from successful broadcast auction applicants; to do so it would have had to change its rule expressly exempting such applicants from such fees. Don't take our word for that: the rule in question provided that

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FHH - On the Job, On the Go

Howard Weiss has been appointed Co-Chair of the Transactional Practice Committee of the Federal Communications Bar Association, and **Frank Jazzo** has been reappointed Co-Chair of the FCBA's Mass Media Committee.

Last month we reported here that **Frank Montero** would be attending, and speaking at, the MMTC Access to Capital and Telecom Policy Conference in Washington. Turns out that **Frank** wasn't just "attending" and "speaking", he was *presiding* at the special presentation on "*Media Images Of Latinos And What Must Be Done to Improve Them*" that closed the conference. Let's be clear about that.

Back in June, globe-trotter **Kathy Kleiman** trotted her way to Prague (in the Czech Republic) for *ICANN 44***,** a general meeting in which the ICANN (short for Internet Corporation for Assigned Names and Numbers) community addressed a wide range of important Internet-related issues. Good thing she did – ICANN's Chairman gave her a big shout-out at the plenary session (attendance: 1,200 or so) for her work as Vice Chair of ICANN's Whois Review Team.

And upon her return to the USofA, **Kathy,** along with **Rob Schill**, attended the Internet Governance Form – USA in Washington on July 26. The Forum is billed as a "multistakeholder effort to illuminate issues and cultivate constructive discussions about the future of the Internet."

On August 4 **Frank M** and **Harry Martin** will be participating in an FCC legal panel at the West Virginia Broadcasters Association's annual meeting in White Sulphur Springs, West Virginia.

Frank J will be a panelist on the Legal, Regulatory & Politics session during the Annual Conference of the Tennessee Association of Broadcasters from 8:30-10:30 am, on August 8 in Murfreesboro, Tennessee.

On August 9, **Harry Cole** will join FCC Enforcement Bureau official **Stephen Lee** for a panel about FCC enforcement activities at the annual Convention & Trade Show of the Texas Association of Broadcasters in Austin.

Scott Johnson will be conducting a TV license renewal seminar *and* a separate political broadcasting seminar (the latter will also feature the FCC's **Bobby Baker**) at the Alabama Broadcasters Association Convention in Birmingham August 10-11.

And coming up in September – the NAB Radio Show in Dallas! So far **Howard Weiss** and **Matt McCormick** have reported that they plan to be there. We're sure plenty of other FHH folks will join them. Check back here next month for an update on our attendees.

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> [n]otwithstanding any other provision in title 47 of the Code of Federal Regulations to the contrary, ***high bidders [in the types of auctions at issue here] need not submit an additional application filing fee*** with their long form applications. [emphasis added]

But if the FCC did want to go ahead and collect fees, somebody must have messed up because the rule never got changed, and it remained as a bar to such fees. Nevertheless, the Commission insisted that those fees be paid. The first request for a refund of any those fees arrived in 2009, citing the rule that hadn't been changed. OMD granted that request in 2011, but then the Commission tried to address the problem going forward by secreting a rulemaking proceeding in an otherwise routine order revising the application fee schedule. In that rulemaking the Commission repeatedly characterized the change – from "no fee is required" to "of course a fee is required" – as a "clarification". The Commission also baldly asserted that the changed rule would not "substantially affect the rights of non-agency parties", even though the change plainly opened the door for fees that previously been foreclosed.

And, since FCC rules generally do not have retroactive effect, even if the rule change is valid going forward, it does not legitimize the FCC's collection of these particular fees prior to the rule change.

Not a pretty picture, with plenty of potential for agency embarrassment on several levels.

Multiple parties focused on this unfortunate situation a year ago and called on the Commission to set things right – through refund requests and petitions for reconsideration. The fact that the Commission has not yet taken advantage of that opportunity suggests that the agency may still be casting about for some excuse that might allow it to hold onto the improperly collected fees. That will be difficult – as the Commission has presumably already figured out – since the FCC's own rules specified that the applicants in question were not obligated to pony up application fees, an undeniable fact confirmed by the 2011 fee refund.

In March, OMD staffers advised us that they'd be acting on our refund requests "shortly". Four months later, we're still waiting. We recently wrote to OMD (with copies to all the Commissioners, as well as folks in the General Counsel's office) expressing concern about the continuing delay. We'll report back on their response . . . if we get one.

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In the view of the Second Circuit, when a system for delivering video programming involves a "single subscriber using a unique copy produced by that subscriber", that system is *not* providing transmissions "to the public", but rather to that single subscriber. Since transmissions "to the public" are an essential element of "retransmission" for copyright infringement purposes, a "single subscriber" system does not infringe.

It's pretty clear that the folks who devised the Aereo system used the blue print provided by the Second Circuit as a guide to the design of their system. As presented to Judge Nathan through a number of technical witnesses, the Aereo system looked just like its earlier infringement-free counterparts – technologically distinct, of course, but functionally the same as the RS-DVR and the Betamax, as far as copyright law is concerned. In fact, the judge seemed to conclude that Aereo's system is even *more* legal than its precursors. That's because, as she saw it, Aereo invariably provides only a single data stream to a single user throughout its process, while the RS-DVR system started with multiple data streams from which it then created individual user streams. If the latter didn't constitute an infringing use, the former certainly didn't.

Judge Nathan clearly did not intend to open the door to any number of other technical innovations in the future.

Judge Nathan was not unsympathetic to the broadcasters. She agreed that the operation of Aereo could cause the broadcasters irreparable harm, and she seemed to view the relative harms that would be suffered by the broadcasters, on the one hand, and Aereo, on the other, as reasonably equivalent. And, surprisingly, she even said that an injunction "would not disserve the public interest" – which, when you unwind the double negative, seems to say that the public interest *would* be served by an injunction.

It's worth noting too that Judge Nathan clearly did not intend to open the door to any number of other technical innovations in the future. Broadcasters, who might fear her ruling as a massive expansion of the concept of "public performance", will presumably read her opinion with suspicion in this regard. But in assessing the public interest considerations, she specifically rejected the exceedingly broad claim advanced by Aereo and Electronic Frontier Foundation (an amicus on Aereo's side), *i.e.*, that free access to and reception of broadcast television by any medium is necessarily in the public interest.

That claim echoes a theme espoused by new media innovators everywhere. They assert that copyright owners have some obligation to share their works with the public because that's just the way the electronically interconnected world operates now. (The corollary: anyone who tries to stifle innovation is a dinosaur (or worse).) For the record, we're on board with Judge Nathan when she observes that, taken to its logical extension, that notion would lead to the conclusion that the public interest favors no copyright restrictions at all, since "unrestrained piracy" of content would also increase public access to that content.

But none of those points arguably favorable to broadcasters could override the fact that Judge Nathan did not believe that the broadcasters are likely to prevail on the merits.

That doesn't necessarily mean that the broadcasters ***can't*** prevail on the merits. The trial process is a long one, often with lots of unexpected twists and turns. One possible scenario: to support their injunction request, the broadcasters relied on a report from an expert witness who did not personally testify at the hearing (the broadcasters offered his written report instead). In his view, the Aereo system is *not* the functional equivalent of the RS-DVR approach. But Aereo offered live testimony from its experts to counter that view, and the Judge found Aereo's witnesses to be "highly credible and persuasive". It's at least possible that, if the broadcasters were to put their experts on the witness stand at trial, they might be able to undermine the persuasive showing advanced by Aereo during the injunction hearing. That's particularly so in view of the fact that the Judge has now explained why she believes that Aereo's system (at least as she understands it) doesn't infringe. If the broadcasters' experts could convince her that her understanding is incorrect in any respect, they might be able to turn things around.

Another possible line of attack to explore: the front end of the Aereo system, in which Aereo first acquires and records the over-the-air programming for later transmission to Aereo's subscribers. Judge Nathan's opinion focuses on the back end of the Aereo system, *i..e.*, the process by which the subscriber accesses and retrieves the programming. Since it doesn't appear to have been fully explored in the injunction hearing, the front end of the Aereo system -- and the transition from the front end to the back end -- may be susceptible to effective challenge at trial.

In her opinion Judge Nathan went to some lengths to emphasize that her conclusions as to the broadcaster's likelihood of success were intended to be narrow. Nevertheless, her decision doubtless reassures Aereo that its approach is solid: keep yourself well within the wake of the RS-DVR and Betamax precedent and you should be able to avoid copyright problems.

According to the opinion, the broadcasters have signaled that they're probably going to appeal this interlocutory decision. That appeal would go to the Second Circuit – so if Judge Nathan is reading the Circuit's *Cartoon Network* opinion incorrectly, the Circuit can set everybody straight sooner rather than later. But in the meantime, it looks like Aereo will remain up and running for the foreseeable future.

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tion unless the harm is severe. It is difficult to see any severe harm done in any of the recent cases involving forfeitures dealt out to student-run stations.

But the FCC knows no tolerance – and as a result, even a harmless mistake borne of regulatory naiveté can destroy a station because, as the FCC's historical fining practices demonstrate, the Commission cuts student-run stations no slack when it comes to compliance issues.

We spend a lot of time engaged in the challenging chore of introducing students to the importance of the FCC's regulatory requirements. It's easy to explain why a station shouldn't operate at excessive power or off its proper frequency. We may even be able to keep a straight face when we spell out indecency restrictions (although some students snicker at regulations that suppress their music and forbid the use of words that are part of their daily vernacular).

Do we really want to penalize kids in the same way we might penalize their more mature counterparts?

EEO recruitment requirements are rather more difficult to sell because those requirements are out of date and don't reflect the real world of 18-21 year olds. Yes, students themselves may not routinely be involved in recruiting employees, but EEO rules are a part of the Commission's regimen, so students are schooled in even those esoterica. What's a student in 2012 to make of a rule that doesn't allow a station to rely exclusively on web-based recruitment? That notion is mind-blowing to students who search for everything on the web and nowhere else.

Even more difficult to grasp, on several levels, is the public file requirement. Students produce some very innovative programming, often spontaneously. Documenting that programming tends not to be a high priority for students, if they think of it at all. That's especially true when any documentation that might be produced just goes into a file that no one has ever come to see during the memory of any current student. You can explain the theory behind the requirement until you're blue in the face, but it won't make a dent.

So let's all agree that, in the ecosystem of student-run stations, the likelihood of violations is high. Kids, like puppies, tend not to behave the way we might like, or the way that we can expect them to once they've matured a bit. But do we really want to penalize them in the same way we might penalize their more mature counterparts – especially when the brunt of any forfeiture will be borne *not* by the students, but by their educational institution?

Case in point: Bethany College has only 830 students. Where does the FCC think that the student radio station is going to come up with $6,500?

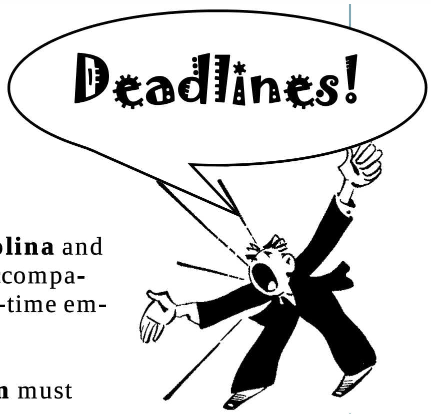
Oh sure, targeted schools can request that the fine be reduced. But in assessing such requests, the FCC relies on the income of the entire college, not just the radio station. Result: forfeitures for student stations are seldom reduced. The reaction among the Responsible Adults in a college's administration is likely to be OMG, the kids got us in hot water with the feds. We have federal research grants and relationships with lots of federal agencies. We can't afford to have a black mark on our record. Priority Action Items: (1) Pay fine; (2) Get rid of radio station.

And once that happens, diversity and learning suffer as young voices are silenced.

There's already plenty of pressure on cash-strapped universities and colleges to get themselves out of the radio business. The University of San Francisco, for example, has dumped KUSF(FM) (new call sign – KOSC). And Vanderbilt University has turned programming responsibilities for WFCL over to Nashville Public Radio through an LMA (that according to a petition to deny directed against the recent WFCL renewal). Nationwide concern about the fate of college radio generally has led to a number of activities to save that institution.

The FCC's hefty fines don't help make radio relevant to the younger generation or encourage learning and innovation. Every time the Commission whacks a college station with a budget-crushing forfeiture for violating rules that make no sense to students, the FCC ensures that another batch of students will enter the career world with some combination of fear and disdain for the agency rather than the respect they might have had – or, very possibly, the fine may lead those students to choose a career beyond the reach of the FCC. We find that disappointing and sad.

Wouldn't it be more meaningful if, instead of a budget-crushing fine, the punishment for a student violation were more narrowly tailored to the circumstances? Perhaps the wrong-doer could be required to write a paper explaining the basis for the rule that was violated and outlining steps that might be taken to achieve compliance. Writing papers is something that students understand. It's an exercise that they're likely to remember. Of course, if the conclusions in the papers sometimes turn out to be critical of the rule, that's something that the FCC should welcome in its ongoing quest for transparency and relevance.



August 1, 2012

Radio License Renewal Applications **-** *Radio* stations located in **Illinois** and **Wisconsin** 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.

Television License Renewal Applications **-** *Television* stations located in **North Carolina** and **South Carolina** 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.

Radio Post-Filing Announcements **-** *Radio* stations located in **Illinois** and **Wisconsin** must begin their post-filing announcements with regard to their license renewal applications. These announcements must continue on August 1, August 16, September 1, September 16, October 1, and October 16.

Television Post-Filing Announcements **-** *Television* stations located in **North Carolina** and **South Carolina** must begin their post-filing announcements with regard to their license renewal applications. These announcements must continue on August 1, August 16, September 1, September 16, October 1, and October 16.

Radio License Renewal Pre-Filing Announcements **-** *Radio* stations located in **Iowa** and **Missouri** must begin their pre-filing announcements with regard to their applications for renewal of license. These announcements must be continued on August 16, September 1, and September 16.

Television License Renewal Pre-filing Announcements **-** *Television* stations located in **Florida**, **Puerto Rico**, and the **Virgin Islands** must begin their pre-filing announcements with regard to their applications for renewal of license. These announcements must be continued on August 16, September 1, and September 16.

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.

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

August 2, 2012

Online TV Public File Requirement Takes Effect – The revised local public inspection file rule requiring *television* and *Class A television* stations to upload public file documents to an online system maintained by the FCC takes effect. All ***newly-created*** documents required to be placed in the public file must be uploaded ***except for*** letters/emails from the public and, in *some-but-not-all* cases, political file materials. (For the time being, newly-created political file materials need be uploaded *only* by Top Four Network affiliates in the Top 50 markets.) Stations will have six months during which to upload all pre-existing public file documents to the online system (again, with the exception of communications from the public and, in *all* cases, political materials).

October 1, 2012

Radio License Renewal Applications **-** *Radio* stations located in **Iowa** and **Missouri** 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.

Television License Renewal Applications - *Television* stations located in **Florida**, **Puerto Rico**, and the **Virgin Islands** 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.

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Radio Post-Filing Announcements - *Radio* stations located in **Iowa** and **Missouri** must begin their post-filing announcements with regard to their license renewal applications. These announcements must continue on October 16, November 1, November 16, December 1, and December 16.

Television Post-Filing Announcements - *Television* stations located in **Florida**, **Puerto Rico**, and the **Virgin Islands** must begin their post-filing announcements with regard to their license renewal applications. These announcements must continue on October 16, November 1, November 16, December 1, and December 16.

Radio License Renewal Pre-Filing Announcements - *Radio* stations located in **Colorado**, **Minnesota**, **Montana**, **North Dakota**, and **South Dakota** must begin their pre-filing announcements with regard to their applications for renewal of license. These announcements must be continued on October 16, November 1, and November 16.

Television License Renewal Pre-filing Announcements - *Television* stations located in **Alabama** and **Georgia** must begin their pre-filing announcements with regard to their applications for renewal of license. These announcements must be continued on October 16, November 1, and November 16.

EEO Public File Reports - All *radio* and *television* stations *with five (5) or more full-time employees* located in **Alaska**, **American Samoa**, **Florida**, **Guam**, **Hawaii**, **Iowa**, **Mariana Islands**, **Missouri**, **Oregon**, **Puerto Rico**, the **Virgin Islands**, and **Washington** must place EEO Public File Reports in their public inspection files. For all stations with websites, the report must be posted there as well. Per announced FCC policy, the reporting period may end ten days before the report is due, and the reporting period for the next year will begin on the following day.

Noncommercial Television Ownership Reports - All *noncommercial television* stations located in **Alaska**, **American Samoa**, **Florida**, **Guam**, **Hawaii**, **Mariana Islands**, **Oregon**, **Puerto Rico**, the **Virgin Islands**, and **Washington** must file a biennial Ownership Report (FCC Form 323-E). All reports must be filed electronically.

Noncommercial Radio Ownership Reports - All *noncommercial radio* stations located in **Iowa** and **Missouri** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323-E.

October 10, 2012

Children's Television Programming Reports - For all *commercial television* and *Class A television* stations, the third 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 requires the use of 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. ***Important reminder***: Issues/Programs lists for *television* and *Class A television* stations must be uploaded to the FCC-maintained online public inspection system.

(Continued from page 9)

It's possible that others subject to previous CRB rulings could now claim that those rulings have no force and effect, thanks to the D.C. Circuit's decision. Whether or not anybody will view that as a worthwhile exercise remains to be seen.

This is the point where we would ordinarily observe that the losing party before the D.C. Circuit can still seek rehearing, or maybe even Supreme Court review. Chances of further appeals in this case, however, are effectively zero. Intercollegiate won its appeal, so it's not likely to ask for further consideration by the Circuit or the Supremes. And the CRB isn't likely to, either. After all, the Circuit's decision saved the CRB from unconstitutional oblivion – why would the CRB want to appeal that? So we're guessing that, with the judicially-imposed revisions to the Congressionally-enacted CRB statute in place, life at the CRB will go on largely as it has in the past.

Extra!!! Last minute update . . .

Online TV Public File News

Court denies NAB stay request;
Revised public file rule set to take effect August 2

Things have been happening on the TV public inspection file front this month.

As we have been regularly reporting in recent issues (see, for example, the April, 2012 *Memo to Clients*), the Commission has decided to move the public inspection files of all TV and Class A TV stations to an online system which will be maintained by the Commission. The effective date of the change has been set for August 2. That means that as of ***August 2, 2012*** all full-power and Class A TV licensees will have to start uploading to the FCC's online file system all ***newly-created*** documents required to be placed in the public file ***except for*** letters/emails from the public and, in *some-but-not-all* cases, political file materials. Those licensees will have six months in which to upload all pre-existing public file documents to the online system (again, with the exception of communications from the public and, in *all* cases, political materials).

Who has to upload *political* materials and when? Nobody has to upload *existing* political file materials – they've been exempted from the online file requirement. The first folks to feel the brunt of the online rule as far as political materials go are the stations (a) affiliated with one of the top four commercial networks and (b) located in a Top 50 market. If you're one of them, you have to start uploading your newly-created political documents as of the effective date of the rules, just in time for the crush of a national election. (Previously-created political documents need ***not*** be uploaded to the online file.) Everybody else – *i.e.*, Top 50 stations not affiliated with ABC, CBS, Fox or NBC and all non-Top 50 stations – can relax until July 1, 2014 on the political file front.

Once the effective date had been established, the NAB (which has appealed the decision to create the online system) asked the FCC, and then the Court of Appeals, to stay the date. To no avail. Both the Commission and the court gave short shrift to the NAB's arguments, and the August 2 date is set . . . as long as the FCC's system gets up and running.

About that system. The good news is that not only has the FCC in fact developed a system, but early reviews of the system have been favorable. The Commission conducted a demonstration of the system in mid-July (no time like the present!) and it appeared to work smoothly. Some areas for potential improvement were identified in the demo – including the design of the log-on procedure – but on the whole there is reason to believe that the system might be fully functional, and user-friendly, to boot, by the August 2 effective date.

On July 27 (that would be less than a week before the effective date), the FCC announced that it would conduct two more demonstrations of the system for online viewers. However, in making that announcement the Commission still stopped short of providing complete chapter and verse for the implementation of the new system. So while we know that August 2 is the official effective date, we have no direct pronouncement of what we're all supposed to do once that date rolls around. Presumably, sometime before then we'll see a public notice with instructions for setting up an online public file in the new system and uploading documents to it.

Early reviews of the FCC's online public file system have been favorable.

Of course, the mere fact that the NAB's stay request was denied does *not* necessarily mean that the revised public file rule will survive judicial review. The burden imposed on a party seeking a stay is extraordinarily heavy as these things go, and the issuance of a stay tends to be a rarity.

A stay request is expected to include, among other things, a demonstration that the party seeking the stay (in this case, the NAB) is likely to prevail on the merits of its appeal. Sometimes, in assessing that element of the request, the court may tip its hand as to the likely eventual outcome of the appeal. For example, in the Aereo proceeding (see page 1), the judge's denial of the broadcasters' stay request shed considerable light on the judge's view of the parties' respective arguments on the merits of the case.

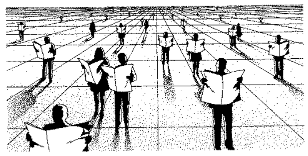
In this TV public file appeal, however, the court's order was terse in the extreme — a total of two very brief sentences. As a result, it's impossible to say what may be in store for the online public file rule once the D.C. Circuit digs into the nitty-gritty details of the arguments. That, however, is not likely to happen until sometime next year.

Developments relative to the public file matter have been hot and heavy during July, and they may continue into early August, at least. To stay up to day, check back regularly with our blog at www.CommLawBlog.com, where you can find more details – including helpful links – about all this and more.

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

Updates On The News

E-file a pleading, save a tree — Dr. Seuss fans know that the Lorax speaks for the trees. And in that capacity, the Lorax is likely saying "thanks" to the Media Bureau. That's because the Bureau has announced that it is now accepting application-related pleadings ***electronically***, through the Commission's Consolidated DataBase System (CDBS). So instead of filing mountains of paper (in multiple copies), petitioners can now save some trees by preparing a PDF of their pleading and, with a few relatively simple keystrokes, filing it with paperless online convenience.



The new filing option is available for pleadings directed to particular applications. Think informal objections, petitions to deny, petitions for reconsideration, applications for review . . . that sort of thing. Also, of course, pleadings that respond to any of those. (The new option does ***not*** apply to pleadings in docketed proceedings – those can be filed electronically, but through the Electronic Comment Filing System (ECFS).)

The Bureau's public notice lays out the basic process:

- ✔ Log into your CDBS account;
- ✔ Get to the "additional non-form filings" screen;
- ✔ Select the option for "Informal Objection/Petition to Deny/Petition for Reconsideration/Application for Review/Opposition/Reply/Supplement";
- ✔ Fill in the "pre-form" information (heads up – for this you'll need the file number of the application to which your pleading is directed) and hit "enter";
- ✔ Upload your pleading (PDF's only); and
- ✔ Submit it.

CDBS should flash you its customary confirmation screen so that you'll know that the pleading has been officially filed. (Helpful tip: it's always a good idea, even if it's not technically required, to retain a copy of that confirmation screen – by screen grab or screen print or whatever other means you may have – so that you'll have some evidence of the filing, should any questions ever arise.)

If your pleading is directed to somebody else's application, you'll still have to serve that somebody else (or his/her counsel) with a hard copy of the pleading. But, importantly, the electronic filing will take care of your filing obligations as far as the Commission is concerned. No more original and X number of additional copies delivered to the Portals.

According to the Bureau's notice, "[p]leadings filed electronically shall be treated as properly transmitted to the Commission as of the date of receipt." That appears to say that you can file a pleading between the FCC's normal quittin' time and midnight, which should provide procrastinators an extra several hours in which to procrastinate.

Video Description Now In Effect, Again

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[*Editor's Note: As reported in the September, 2011 Memo to Clients, the FCC has re-imposed the "video description" requirement at Congress's direction. The video description rules took effect as of* ***July 1, 2012****. If you're a bit hazy on the details of the new rules and want an in-depth review of who's got to do what when, check out the September, 2011 Memo to Clients, which is also posted on our blog. It lays things out in detail. For those of you who need only a quick refresher course, what better (or, at least, quicker or more refreshing) way of getting that to you than with . . . (wait for it) . . . haikus! A Memo to Clients exclusive: Video Description in 51 syllables!*]

Top four stations in
Twenty-five largest markets
Must have 50 hours

Big MVPDs
Also provide 50 hours
On top five channels

All others pass through
Video-described programs
To their blind viewers