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Memorandum to Clients

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If you've got a website, you could have a problem.

Website Operators: Be Aware, and Beware, of COPPA

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If you operate a commercial website that collects personal information from visitors, you'd better be familiar with COPPA – the Children's Online Privacy Protection Act – and the COPPA Rule adopted by the Federal Trade Commission pursuant to the Act. Even a single COPPA Rule violation can lead to a $16,000 penalty, and the FTC hasn't been shy about doling out seven-figure fines for cumulative violations. (For the faint of heart unwilling to wade into the actual law or FTC rule, you can check out the FTC's COPPA FAQs. But even that resource weighs in at the equivalent of 58 printed pages.)

The principal goal of COPPA is to ensure that personal information relating to children under the age of 13 is not collected or distributed by website operators without parental consent. Since many broadcast stations may be collecting information on their websites (even without realizing it), we figure it's a good idea to remind all our readers about COPPA.

And now is an excellent time to do so because a number of important changes to the law are set to take effect on ***July 1, 2013***.

I'll address the five changes that I think are among the most important below, but be advised that I'm only scratching the surface. At minimum, anyone with a website that collects personal information from visitors, and that features links to advertisers who collect such information, would be well-advised *at least* to read the COPPA FAQs, if not everything on the FTC's COPPA webpage.

Before we get into the changes that are about to kick in, though, let's take a quick look at the basics of the law to get a fix on: (1) what types of websites are covered by the law; (2) what types of "personal information" trigger the consent requirements; and (3) what covered websites are expected to do.

Covered Operations

You're subject to COPPA if you operate either:

> a commercial website or online service (including Mobile Apps) directed to children under 13 that collects, uses, or discloses personal information from children;
>
> or
>
> a general audience commercial website or online service and you have actual knowledge either that you are collecting, using, or disclosing personal information from children under 13.

Under COPPA you could also be liable for the collection of information that occurs on or through your site(s) and service(s), even if you yourself do not engage in such collection. That means it's important that you (in the FTC's words) "make informed decisions before you permit advertising to run on your sites and services."

Personal Information

"Personal information" for COPPA purposes means "individually identifiable information about an individual collected online". It includes the obvious stuff (*e.g.*, first/last name, physical address, telephone number, social security number) and the (perhaps) less obvious, such as:

> online contact information (including a screen or user name that functions as online contact information);
>
> a "persistent identifier" (*e.g.*, a customer number held in a cookie or a processor serial number) that can be used to recognize a user over time and across different

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Inside this issue . . .

LS telcom joins the club

Fifth "White Space" Coordinator Begins Tests

By Mitchell Lazarus
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TV "white space" devices operate on TV channels that are vacant in a given area. (On a map of frequency usage, these areas show up in white; hence the name.)

These devices must avoid causing interference to active TV stations, certain wireless microphones, and certain TV reception sites. To accomplish this, most are required to consult a complex and changing database that shows where they can safely operate.

The FCC has identified ten administrators for the database, expected to operate competitively. Before receiving FCC approval, each candidate must run a live test of its operations, submit test reports to the FCC, and survive public comment.

We here in the *Memo to Clients* penthouse editorial suite have covered developments on the white space database coordination front for several years. Most recently, those developments have been somewhat repetitive and our articles were all starting to look the same. We tried to mix things up a bit with poetry (limericks! a haiku!) . . . but soon found the limit to our poetic abilities. So here's what we plan to do going forward.

The table below reflects all the would-be database coordinators and all the steps on the way to FCC approval. Each time there is a new development, we will post an updated version of the table. Dates in the table reflect the dates of the FCC public notices relevant to the particular event. Clicking on a date brings up the respective public notice. The date shown in bold face red will always be the most recent event.

Coordinator	Test Started	Test Finished; Comments Sought	Coordinator Approved
Comsearch			
Frequency Finder Inc.			
Google Inc.	~~Feb. 27, 2013~~	May 29, 2013	
LS telcom AG	**June 18, 2013**		
Key Bridge Global LLC	March 4, 2013	May 29, 2013	
Microsoft Corp.			
Neustar Inc.			
Spectrum Bridge Inc.	Sept. 14, 2011	Nov. 10, 2011	Dec. 22, 2011
Telcordia Technologies	Dec. 2, 2011	Feb. 1, 2012	March 26, 2012
WSdb LLC			

Prosaic, perhaps, but far less taxing on our limited creative resources and, in the end, probably a more useful way of keeping our readers abreast of the overall database coordinator scene.

[*Editor's Note: We are hoping to work a deal with somebody (are you listening, Starbucks and Chipotle?) so that, when the table has been completely filled up, our readers will be able to print it out and present it for a free cup of coffee or maybe a burrito. Check back with CommLawBlog.com for updates.*]

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No retrans consent? That'll be $2.25 million, please.

FCC Whacks TV Max

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If you've ever wondered what would happen if you retransmitted the programming of TV stations without their consent, and then dissembled about it to the FCC, listen up. If you go that route, you could be looking at a fine north of $2,000,000. That's right – two MILLION dollars plus.

Do we have your attention?

We know about the likely penalty thanks to a Notice of Apparent Liability For Forfeiture and Order (*Order*) – directed to TV Max, Inc. ***and*** its affiliates ***and*** its individual controlling principals – for violating Section 325 (b) of the Communications Act and Section 76.64 of the Commission's rules. Those sections lay out the general retransmission consent rules governing multichannel video programming distributor (MVPD) carriage of over-the-air TV signals other than through the "must-carry" process. According to the *Order*, TV Max retransmitted the signals of six broadcast stations without obtaining their consent. For doing so, TV Max is looking at a proposed fine of $2,250,000. Since the Commission has penalized MVPD's for retransmission consent violations only a couple of times in the past – and then only in the low five-figure range of $15,000 (reduced from a maximum potential of $250,000 or so) – we can probably assume that TV Max ***really*** ticked off the FCC.

In fact, the ***Order*** provides a model for how to infuriate the Commission. [Practice tip: We strongly recommend that MVPDs avoid this model.]

First, some background.

Under the must-carry/retrans consent system established by Congress a couple of decades ago, every three years TV stations elect how they will make their signals available to MVPD's for retransmission. The two choices: either (a) require the MVPD to negotiate to obtain the station's consent or (b) elect must-carry, which allows the MVPD to carry the TV signal. If a station elects retransmission consent, the MVPD may ***not*** (with at least one very narrow exception discussed below) carry the station's signal without the express consent of the station.

TV Max is an MVPD in the Houston area, providing service to approximately 10,000 subscribers in 245 apartment/condo buildings. It carried the signals of six Houston stations which had all elected retransmission consent. It had retrans consent agreements with the six stations, but those agreements had all expired by March, 2012; the carriage continued well beyond that date.

The TV stations complained to TV Max, and then to the Commission starting in April, 2012. In response, TV Max had a story. It claimed that it was subject to the Master Antenna TV (MATV) exception to the rules. Under that exception, the owners of a multi-unit apartment or condo building can put up a master antenna for their building and provide carriage of over-the-air (OTA) TV signals to the building's units without the stations' consent, as long as: (a) the OTA signals are in fact received by the MATV facilities; (b) those signals are made available at the viewers' option and without charge to the viewers; and (c) the MATV antenna and facilities are under the ownership and control of a building owner or the viewers in that building.

There was one **big** *problem with TV Max's claim. It apparently wasn't true.*

So TV Max wrapped itself in the MATV exception, claiming that the signals were being delivered to its viewers through MATV facilities on each building.

There was one ***big*** problem with that claim. It apparently wasn't true.

According to the Commission, by the time TV Max's previous retrans consent agreements had expired, only ***some*** of its buildings actually had MATV equipment installed. And even after it had supposedly completed installation of such gear on all its buildings (by late July, 2012), TV Max was *still* not providing the OTA stations' programming to all buildings through those MATV systems. (It was apparently using a metropolitan-wide optical fiber system, or "fiber ring", rather than in-building, coaxial-based MATV systems.) By December, 2012, the Media Bureau had investigated the matter – even convening a "lengthy conference call" with all the parties – and had concluded that TV Max was violating the retrans consent rules. It so notified TV Max.

Nevertheless, TV Max apparently continued its carriage of the stations' programming. But, in answer to follow-up inquiries from the Bureau in April, 2013, it told the Bureau that since June, 2012, the stations' signals "ha[d] not been carried on any fiber ring owned or controlled by TV Max". This claim was apparently based on the fact that sometime in mid-2012, TV Max had sold "certain" of its assets – including head-end and "cable TV subscriber assets" – to a couple of other companies. TV Max seemed to be saying that any carriage after mid-2012 had not been its fault.

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Window to open October 15

FCC to LPFM Applicants: Let the Uploading Begin!

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Attention all you LPFM wannabes. Mark your calendars, get your CDBS and FRN account information in order, stock up on NoDoz® and let the games begin – because the count-down has started. The Media Bureau has announced that, on ***October 15, 2013***, the first LPFM filing window in more than a decade will be flung open, and will stay open until ***6:00 p.m. (EDT) on October 29, 2013***. The window will permit the filing of applications for new LPFM stations and major changes to existing stations.

While applications can't be filed until October 15, they may be uploaded to CDBS anytime between now and then – which gives would-be LPFM applicants plenty of time to undertake searches for channels and transmitter sites and prep their apps in anticipation of the opening of the window.

A few important threshold factors to keep in mind:

Eligibility. Eligibility to file an LPFM application is limited to three specific categories of applicant: (1) nonprofit educational organizations (NEOs); (2) Tribe or Tribally-controlled organizations (Tribes); and (3) state or local governments or non-government entities proposing to provide a "noncommercial public safety radio service to protect the safety of life, health, or property" (Public Safety Applicants). Nobody else gets a crack.

Any NEO may file only one application in this window, and Tribes may file no more than two. Public Safety Applicants may file more than one, but if they do so, they must designate one as the "priority" application; non-"priority" applications will be dismissed if timely mutually exclusive applications from other applicants are submitted.

If an NEO applicant files more than one application, all but the first one in the door will be tossed as "conflicting" pursuant to Section 73.3518 of the rules. While the Bureau's public notice does not expressly address the point, Section 73.855 of the rules prohibits any person or entity from holding attributable interests in more than one LPFM station. And Section 73.860 prohibits all cross-ownership of full-service and LPFM stations, although it does permit some very limited cross-ownership of LPFM and FM translators. The application form (Form 318) is set up to ferret out information about such things.

One more eligibility consideration: applicants must be "local" as that concept is defined in Section 73.853 of the rules. Since that definition is particularly detailed in its requirements, we strongly suggest that prospective applicants thoroughly familiarize themselves with it before getting too deep into the project.

Protection Requirements. LPFM applications will have to protect: all existing vacant FM allotments; ***and*** all outstanding FM, FM Translator, FM Booster and TV Channel 6 authorizations; ***and*** all applications for any of those services that were on file prior to June 17, 2013 (the date of the public notice announcing the filing window). Note that the public notice does ***not*** expressly address protection of any amendments that might be filed on or after June 17 with respect to applications pending before that date. That raises potential problems. We know for sure that an application filed prior to June 17 is entitled to protection. But what if that application is then amended after June 17 – not an unlikely prospect in the FM translator universe, since the Commission back in May specifically opened a window allowing translator applicants in mutually exclusive groups to amend their applications through July 22. We have been informally advised by some members of the FCC's staff that the LPFM window notice may trump the FM translator amendment notice, meaning that translator amendments filed between June 17 and July 22 would *not* be entitled to protection from LPFM applicants come October. The advice we have been given, however, is strictly informal and unofficial at this point; until the Commission issues a public notice addressing in considerably greater detail the problem of FM translator amendments, we won't know for sure how the Commission plans to proceed.

Applicants should not share their CDBS account passwords with anyone not authorized to modify their proposals.

Form 318. If you want to file in this window, you've got to use the April, 2013 version of Form 318. Since you have to file through CDBS, and since that version of the form is presumably the only one currently available, that shouldn't be a problem. No filing fee is required. The public notice instructs applicants that CDBS will give them a confirmation that their applications have been "successfully filed" and that, unless they get such a notice screen, they should take steps to determine whether their applications really have been filed.

The Bureau also cautions that applicants should not share the CDBS account passwords with anyone not authorized to modify their proposals. Bear in mind that applications filed during the window period will ***not*** be publicly available until ***after*** the window closes.

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From the Memo to Clients editors

A Note to Our Readers

Format changes are on the way.

The *Memo to Clients* in its current form took shape more than a decade ago, printed in hard-copy and snail-mailed out to our subscribers. Several years ago we moved our mode of distribution online, but old habits die hard. Despite our electronic distribution, the essential format has remained rooted in 20th Century technology: we have continued to prepare the *Memo* as a print document which we then save and distribute as a .PDF file.

We have heard from a number of readers in recent months (and years), asking us to adopt a format more appropriate for online consumption. When articles skip to different pages, it's not always maximally easy to follow them, particularly when you're reading them on a mobile device. Why, readers have asked, can't you just publish in a format that permits continuous reading of each article?

We agree – and are currently trying to identify the best program or process or format for the next generation of the *Memo*. We have just started the search, but hope to be able to move things along fairly quickly.

Still, we recognize that there's at least a chance that some of our readers may prefer the existing PDF-based format. With that in mind, we are hereby soliciting your views on the matter. If you have particularly strong feelings about the format in which the *Memo* arrives to you, we'd like to know.

As noted, we have already heard from several readers who have made their preference clear: they would like a purely electronic version that allows uninterrupted scrolling of each article from beginning to end. Can any of those readers suggest specific software we might examine or other newsletters whose electronic formats we might try to replicate?

In attempting to address the expressed preferences of some readers, though, we want to be sure not to disserve readers with different preferences. Are there any readers who find the PDF approach preferable – perhaps because they print it out for their own internal distribution or archiving?

Any changes we make are still probably at least a couple of months away (thanks to the limited size of the *Memo*'s production staff and the fact that, occasionally, he still has to practice some law), so ideally we'll have time to factor as many reader responses as possible into the final resolution. Please let us know what you think. Send your comments and suggestions to cole@fhhlaw.com; it would be helpful if you refer to "Memo to Clients format change" in the subject line, to make it easier to keep track of them.

Thanks for your help.

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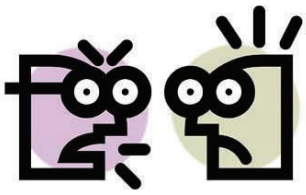
Return of "Letter Perfect". In what appears to be a variation on the "letter perfect" standard of days gone by, any application that is "incomplete" or "patently defective" or that does not afford the requisite protection will be dismissed with no opportunity to correct the deficiency. Such dismissals will occur *after* the window closes; until then (*i.e.*, until 6:00 p.m. (EDT) on October 29), applicants ***will*** be able to amend their previously uploaded-and-filed applications. (You do that by opening a new Form 318 and checking "Amendment to pending application" in response to the "Application Purpose" question, *i.e.*, Section I, Question 3.)

Looking for an LPFM Channel? The Bureau's notice directs prospective applicants to the Bureau's on-line LPFM Channel Finder, which has been updated to include technical changes adopted last November. Be mindful, though, that the Channel Finder is "intended solely to assist LPFM applicants in tentatively identifying available FM channels." In other words, anybody using that facility should (in classic Reaganesque terms) be sure to "trust, but verify". Hiring a competent consulting engineer would be a good start.

Once the window has closed, the Bureau's staff will weed through the filed applications, toss the defective ones, and group the rest according to mutual exclusivity. MX applicants will apparently be given the opportunity to resolve their conflict through settlement, although the precise metes and bounds of such settlements aren't described in the notice. MX groups that don't get resolved that way will be subject to the Commission's point system.

The formal announcement of an October 15 LPFM window is a testament to the way the Audio Division has played the very difficult FM translator/LPFM hand that it was dealt by the Commission, the courts and the Congress. Last November the Commission set October 15 as its target date, but to get there, the Division had to dispose of several thousand FM translator applications that had been hanging around since 2003. To be perfectly honest, we here in the editorial suites of *Memo to Clients* penthouse were, um, skeptical about the October 15 goal. But, while it's still possible that, as we get closer to October 15, there might be some slippage, the Bureau is obviously confident enough at this point to issue the notice and get the ball rolling. Props to them for getting that far.



Harmonic convergence?

700 MHz LTE Providers Complain of Interference from FM Stations

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The introduction of different species into an established ecosystem tends to be a dicey proposition. Almost invariably, co-habitation requires the sharing of scarce resources. And more often than not, the different species approach the whole sharing thing in different, not entirely compatible, ways. The result: occasional dissatisfactions and frustrations – leading to occasional inter-species frictions and fisticuffs.

Take the RF spectrum ecosystem, for example.

Most inhabitants of the spectrum have historically figured out ways to coexist in relative peace (at least for the most part) – thanks largely to the fact that the potential impact of one service on another has been taken into account in the frequency allocation process. But as the demand for spectrum increases, and every little niche is filled up, it is becoming more difficult to avoid inter-service conflicts. And sure enough, the introduction of a recent new species – 700 MHz wireless systems using LTE equipment – seems to be causing some unexpected problems.

How can FM stations that operate in the 88-108 MHz band interfere with 700 MHz operations?

Since January, 2012, spectrum that used to constitute TV channels 52 and up has been reallocated to 700 MHz wireless services. Television still occupies channels 51 and down (at least for the time being), and there has been much hand-wringing over how the relatively low power wireless services will be able to coexist in such close proximity to high-powered TV stations.

Now it turns out that another problem – less anticipated – has reared its ugly head. Wireless operators using high gain LTE antenna systems and high gain LTE receivers have experienced interference which, they claim, is caused not by TV but by nearby FM stations.

FM stations? How can that be, since FM stations operate in the 88-108 MHz band, far away from 700 MHz?

Every radio transmitter emits not only its primary signal but also multiples – two times, three times, four times the frequency and on up. Do the math: stations operating anywhere from 88.1 MHz to 100.5 MHz will generate 8th harmonics somewhere in the 700 MHz wireless band.

Wireless carriers have recently complained to a number of FM stations, demanding that the FM stations suppress their harmonic in the 700 MHz band. In at least one instance, that has led to the FCC's issuance of an official Notice of Violation (NOV) directed to the FM station. According to the NOV, the FM licensee is somehow violating the rules and is supposed to be taking corrective actions.

The problem is that it's not at all clear that the FM licensee has done anything wrong.

According to the NOV, the FM station has been violating Section 73.317(a). Allow us to quote that section in its entirety, so we're all on the same page here:

> (a) FM broadcast stations employing transmitters authorized after January 1, 1960, must maintain the bandwidth occupied by their emissions in accordance with the specification detailed below. FM broadcast stations employing transmitters installed or type accepted before January 1, 1960, must achieve the highest degree of compliance with these specifications practicable with their existing equipment. In either case, should harmful interference to other authorized stations occur, the licensee shall correct the problem promptly or cease operation.

You'll note right off the bat that this section does not itself impose any particular operating limitation on FM stations; rather, it requires that they maintain their occupied bandwidth "in accordance with the specification detailed below". From what we hear from our friends in the consulting engineering universe, FM transmitters these days easily meet the various "specification[s] detailed below" in the rest of Section 73.317.

Section 73.317***(d)*** tells FM licensees how strong harmonic emissions can be, and there's no indication in the NOV that the targeted station was violating that particular standard. Stations powered at 5 kW or more are required to suppress harmonics by 80 dB. In other words, if the 8th harmonic of a 50 kW station is 80 dB below the carrier on the main frequency – around five ten-thousandths of a one watt, or 0.0005 watt – the rule is satisfied.

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One of our long-time friends, Gary Cavell (of the eponymous Cavell Mertz & Associates – a swell bunch of folks and excellent engineers, to boot) suggests that the interference observed by the wireless operators may arise from the extreme sensitivity of the LTE high gain antennas (juiced up by high gain amplifiers) they're using. Such gear provides reliable service from handsets operating at a distance from the LTE towers, so it's attractive to wireless providers because it reduces the number of cells required to cover an area (yup, it reduces costs). But that sensitivity can result in the LTE systems being disturbed by FM emissions well below the floor that FM stations are required by the rules to maintain. We have heard of at least one wireless carrier demanding that the FM station suppress harmonic radiation to -105 dB, or less than 2 one-millionths of a watt (0.000002 watt) for a 50 kW station.

If there is an interference problem here – and there may well be – is it the fault of FM broadcasters who may not be in any violation of the FCC's Rules; or is it from the hyper-sensitivity of the wireless equipment in an existing RF environment that the FCC has blessed for decades?

As it turns out, the FM emissions that appear to be causing the problem here may not be coming out of the FM antenna at all. Rather, according to Professor Cavell (whose team has been looking into the issue), the emissions may be leaking from the FM transmitter cabinets, even when those transmitters are fully compliant with all technical specs. Keep in mind that FM transmitter manufacturers have designed their equipment to comply with the FCC's rule, not the demands of wireless carriers.

Installation of a full-fledged Faraday Cage is not a cheap date.

Why not just put up a shield to block the undesired emissions? Gary reports that shielding a (supposedly) interfering transmitter's air intake and exhaust areas with screening seems to help some, but installation of a full-fledged Faraday Cage seems to do better. Bad news: as Professor Cavell put it so that we could wrap our non-engineering minds around it, going that route "is not a cheap date". And whatever fix may eventually be used, it'll cost time and effort on the part of the station's engineer to figure out how best to mitigate the problem.

So the real question is who should be responsible for fixing whatever problem exists? For the last several decades, at least, the Commission has imposed a "last-in" policy to handle interference problems that arise when one spectrum user's newly-commenced operation causes or receives interference from other nearby spectrum users. If all the various players are using gear that complies with all applicable rules, the "last-in" policy calls for the new kid on the block to fix things. In the FM/700 MHz LTE situation, that would be the 700 MHz folks. (Of course, to avoid the problem in the first place, 700 MHz operators might want to opt for antenna sites that don't happen to be close to any FM station whose 8th harmonic falls in the 700 MHz's mobile-to-base band – if, that is, such sites happen to be available.)

But if the "last-in" policy applies here, the NOV doesn't make much sense. It seems, in knee-jerk fashion, to pin the blame on the FM broadcaster. Exactly how the Enforcement Bureau's Northeast Office reached that decision is not clear. If the Bureau really thinks that the FM station's equipment doesn't satisfy the rules, it should say why it thinks that.

But simply citing Section 73.317(a) without reference to any of the other, substantive, portions of that rule doesn't seem to do the trick unless the Bureau has, without telling anybody, decided that the "last-in" policy is no longer in effect – or that the policy doesn't apply when the "last-in" party happens to be a wireless operator and the other party is a mere FM broadcaster. That would be unfortunate – and possibly unjustifiable, if it ever got to court without further due process, say, an intervening rule-making to afford everyone adequate time to implement any new standards. Keep in mind, though, that the NOV came from an FCC Field Office; we don't know whether they consulted with the FCC folks at home base in Washington. We also have not yet heard from the Media Bureau, which ideally isn't likely to be in a hurry to put the squeeze on stations whose equipment is operating as designed and in compliance with the rules.

We hear that, in other situations, the FCC has not yet been called in. Instead, some 700 MHz operators have sent their own nasty-grams to the FM stations calling on the FMers to correct the interference as if it's a given that the FM licensee is responsible. The good news there is that, in at least one such case that we're aware of, the 700 MHz folks have seemed to be open to reason when the rules (and the longstanding "last-in" policy) are explained to them. Of course, in such instances it's useful – and probably the Right Thing to Do – for the FM operator to be cooperative in efforts to identify the precise source(s) of the interference and devise ways of fixing things. But that cooperation does not necessarily require the FM licensee to bear any financial expense in that process, particularly if the FM licensee's equipment complies with all applicable rules.

With the increasing deployment of 700 MHz operations nation-wide, it's likely, if not certain, that this type of set-to will recur repeatedly. FM licensees would be well-advised to consult knowledgeable engineering and legal counsel if a complainant (or the FCC) comes knocking on their door.

FEMA WEA PSA's 'R' OK!

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Broadcasters may be asked (many apparently already have been asked) by the Federal Emergency Management Agency (FEMA) to broadcast some PSA's relating to the (relatively) new Wireless Emergency Alert (WEA) system. While some broadcasters have reacted to that request with understandable – and legitimate – reluctance, the FCC's Public Safety and Homeland Security Bureau has now assured us that the PSA's are OK for broadcast. . . as long as certain conditions are met.

The bottom line here is relatively simple; getting there, though, requires a surprising amount of explanation.

For years, FEMA and the FCC and others have been working to improve the overall ability of government officials to alert the citizenry to emergency situations. Broadcasters have observed one aspect of that effort in the overhaul of the Emergency Alert System. On the non-broadcast side, the FCC established the WEA system, through which the guv'mint can send geographically-targeted emergency messages direct to individuals' mobile devices. The WEA has already been triggered in a wide range of situations – hurricanes, tornadoes, terrorist threats, missing persons, etc. – and has, according to the FCC, "proven to be a valuable tool".

Broadcasters were concerned that the WEA signal might be mistaken for EAS tones, leading to forfeiture notices.

So what's the problem?

When the WEA system is triggered, it sends out an "Attention Signal" to all mobile devices serviced by carriers participating in the system. That signal apparently sounds an awful lot like the standard two-tone EAS signal familiar to the broadcast audience. In addition, the signal is accompanied by a unique "vibration cadence" (we don't know exactly what that feels like, but it's probably worth checking out on a number of levels). The goal, obviously, is to get the attention of the person with the mobile device.

The good news is that the attention signal apparently works because it gets the user's attention. The bad news is that a lot of users apparently don't want their attention to be gotten. FEMA reports that "many people are startled or annoyed when hearing the WEA attention signal for the first time" and, worse yet, many have inquired about "opting-out" of the WEA system.

What's an agency to do?

The answer is obvious: Prepare a bunch of PSA's to convince the (supposedly) "confused" and (certainly) "annoyed" Great Unwashed that, rather than opting out, they should embrace the WEA Attention Signal. And how better to do that than to include the Attention Signal itself within the PSA?
Experienced broadcasters will see where this is going.

It is well-established – in Section 11.45 of the rules – that broadcasters are ***not*** supposed to broadcast EAS tones except in times of true emergency (or in connection with routine EAS tests). (Rationale: The FCC does not want to "dissipate[ ]" the "attention grabbing value" of the alert.) But there is no corresponding prohibition against broadcasting WEA Attention Signals. The closest rule on that score is Section 10.520, which says nothing at all about broadcasting. Still, because WEA signals so closely resemble EAS tones, a number of broadcasters presumably didn't want to take the chance that the WEA signal might be mistaken for the EAS tones, leading to forfeiture notices and other unpleasantness. So they told FEMA "thanks but no thanks" when asked to air the FEMA PSA's that included the WEA signals. The utility of the PSA component of FEMA's effort to win public buy-in for the WEA system was thus threatened.

Since the problem appeared to arise from the FCC's rules, FEMA wrote to the Bureau, asking for its "support in allaying the concerns . . . about playing a PSA that includes" the Attention Signal.

The Bureau, happy to play ball with FEMA, has agreed essentially to waive whatever rules might need to be waived to encourage the broadcast of the PSA's.

The result is an interesting exercise in bureaucratic contortionism. Consider these elements. First, FEMA's letter did not include any explicit request for any waivers; rather it just asked for the Bureau's support. Second, the lack of a waiver request makes sense because there is no regulatory prohibition against the broadcast of WEA Attention Signals, so no waiver was technically necessary. Third, the Bureau's goal here appears to be to convince broadcasters that they can and should ignore the instinct that screams "Danger – Likely Rule Violation Dead Ahead", an instinct you'd think the FCC would want to encourage. And fourth, FEMA (with the Bureau's help) is trying to convince people that they really shouldn't be annoyed or confused when their mobile devices suddenly start to emit annoying and confusing signals.

The bottom line? An artful paragraph in which, on its own motion, the Bureau has granted

> a limited waiver of Sections 11.45 and 10.520 of the Commission's rules, for a period of one year from the release date of this Order, to allow the broadcast or transmission of the WEA Attention Signal in PSAs pro-

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Appeal me a grape?

Raisin' Defenses at the FCC

By Jon Markman
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A pair of California raisin farmers might have made it easier to challenge an FCC forfeiture.

A party dinged with a forfeiture that it thinks is unfair now has two options under the Communications Act. One is to challenge the forfeiture order directly in the Court of Appeals. The problem with that approach is that, as a condition to getting into the Court of Appeals, the challenger must first pay the forfeiture. Since forfeitures can reach up into six and seven figures and, let's face it, not everyone has that much spare cash lying around, that condition poses a serious disincentive to direct appeals.

The other option is to not pay the forfeiture and wait for the FCC (assisted by their friends from the Department of Justice) to bring suit in your nearest federal District Court. In that case, the burden is on the government to prove that you are in fact really liable for the forfeiture, which gives you an arguable advantage going in. But at least one appellate court has held that a party choosing this option is not allowed to raise the full panoply of defenses that might normally be available in challenging the forfeiture.

What does this have to do with raisins?

Enter Marvin and Laura Horne, mom-and-pop raisin growers, who failed to turn over a stated portion of their crop, as required, to the Department of Agriculture's Raisin Administrative Committee. (Who knew that raisin growers are required, by a Great Depression-era law, to turn over a percentage of their crop to the government? Details here – it's worth the read, because you can't make this stuff up.) The powers-that-be in the Agriculture Department were not pleased, and they brought the enforcement hammer down. The fines and penalties for the Hornes' alleged offense totaled more than $650,000.

The Hornes sought to challenge these sanctions, arguing in part that the requirement to surrender their raisins was an unconstitutional "taking" under the Fifth Amendment.

Their dispute reached the U.S. Supreme Court on the question of how the Hornes could bring their case: (1) by a direct challenge through the routine federal courts (the Hornes' preference); or (2) by paying the fines and penalties and suing to get the money back in a different court under the Tucker Act, which governs many kinds of claims against the federal government.

The Ninth Circuit had concluded that, if the Hornes wanted to press their "taking" argument, they would have to do it under the Tucker Act *after* paying the penalties because otherwise their claim, in an ironic turn of judicial phrase for a raisin-related case, would be "unripe".

A unanimous Supreme Court reversed that holding. It found that the Hornes could and should have been permitted to make their "taking" argument in their direct challenge to the Agriculture Department's enforcement efforts, rather than having to wait to raise that argument in a separate Tucker Act lawsuit after the fine was paid. The Supremes said in passing, and of interest to us:

> In the case of an administrative enforcement proceeding, when a party raises a constitutional defense to an assessed fine, it would make little sense to require the party to pay the fine in one proceeding and then turn around and sue for recovery of that same money in another proceeding.

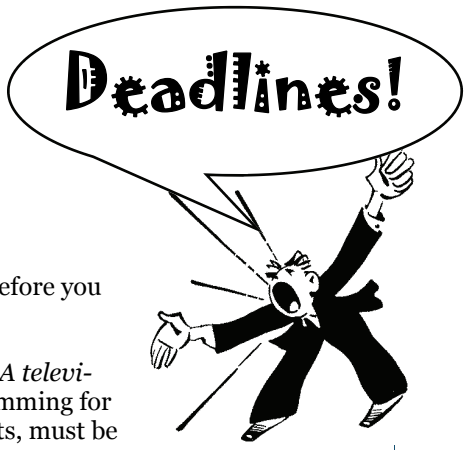
The regulatory scheme, and related judicial review provisions, governing the raisin business are very different from those of the Communications Act, so it's by no means a given that the Court's decision will necessarily be applicable to FCC enforcement actions. But the quoted passage could arguably be read to apply in that context, at least where the target of an FCC fine mounts a constitutional defense. The *Horne* case thus opens the possibility that an FCC forfeiture defendant – especially one with a constitutional defense – might get directly into the Court of Appeals without first paying the forfeiture. That could afford a small but important tilt in the balance between the FCC and the people it regulates.

(Continued from page 8)

duced as part of FEMA's WEA public education campaign. In doing so, we recommend that FEMA take steps to ensure that such PSAs clearly state that they are part of FEMA's public education campaign.

The Bureau also cautioned that, in order to be permissible, FEMA's PSA's should not "predictably lead the public into concluding that an actual alert is being transmitted". Example? "[L]eading off a PSA with a WEA Attention Signal, without warning." The Bureau concedes that that could be "an effective attention-getting device", but it's nevertheless *verboten* because of the "predictable effect it could have" on the audience.

As silly as this bureaucratic dance might seem, the government's heart is in the right place here. With mounting meteorological devastation across the country, not to mention potentially catastrophic accidents (*e.g.*, three major railroad incidents in less than two weeks) and the constant threat of terrorism, the government's ability to notify citizens of imminent danger is a matter of some legitimate urgency. That being the case, though, you might have thought that FEMA and the FCC would have worked out such details as public promotion of its WEA program *before* launching the program.



July 10, 2013

Children's Television Programming Reports – For all *commercial television* and *Class A television* stations, the second quarter 2013 reports on FCC Form 398 must be filed electronically with the Commission. These reports then should be automatically included in the online public inspection file, but we would recommend checking. Please note that the FCC requires the use of FRN's and passwords in either the preparation or filing of the reports. We suggest that you have that information at hand 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 uploaded to the public inspection file.

Website Compliance Information – *Television* and *Class A television* station licensees must upload and retain in their online 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 public inspection file. Radio stations will continue to place hard copies in the file, while television and Class A television stations must upload them to the online 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.

July 22, 2013

Media Ownership – Comments are due with regard to the MMTC study entitled *The Impact of Cross Media Ownership on Minority/Women Owned Broadcast Stations*.

August 1, 2013

Radio License Renewal Applications - *Radio* stations located in **California** 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 **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.

Radio Post-Filing Announcements – *Radio* stations located in **California** must begin their post-filing announcements with regard to their license renewal applications on August 1. These announcements then must continue on August 16, September 1, September 16, October 1, and October 16. Once complete, a certification of broadcast, with a copy of the announcement's text, must be placed in the public file within seven days.

Television Post-Filing Announcements – *Television* and *Class A television* stations located in **Illinois** and **Wisconsin** must begin their post-filing announcements with regard to their license renewal applications on August 1. These announcements then must continue on August 16, September 1, September 16, October 1, and October 16. Please note that with the advent of the online public file, the prescribed text of the announcement has changed slightly. Also, once complete, a certification of broadcast, with a copy of the announcement's text, must be uploaded to the online public file within seven days.

Radio License Renewal Pre-Filing Announcements – *Radio* stations located in **Alaska**, **American Samoa**, **Guam**, **Hawaii**, the **Mariana Islands**, **Oregon**, and **Washington** must begin their pre-filing announcements with regard to their applications for renewal of licenses on August 1. These announcements then must be continued on August 16, September 1, and September 16.

Television License Renewal Pre-filing Announcements – *Television* and *Class A television* stations located in

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Iowa and **Missouri** must begin their pre-filing announcements with regard to their applications for renewal of license on August 1. These announcements then must be continued on August 16, September 1, and September 16. Please note that, with the advent of the online public file, the prescribed text of the announcement has been changed slightly from that of previous renewal cycles.

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. TV stations must upload the reports to the online public file. 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 **Illinois** and **Wisconsin** 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 **California**, **North Carolina**, and **South Carolina** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323-E.

August 6, 2013

Media Ownership – Reply Comments are due with regard to the MMTC study entitled *The Impact of Cross Media Ownership on Minority/Women Owned Broadcast Stations*.

August - September

Annual Regulatory Fees – While we do not have an exact due date as yet, this is a reminder that annual regulatory fees will be due from all non-exempt broadcasters, satellite earth station licensees, cable systems, and other FCC licensees at some point in the August to September time frame, and the due date most likely will be at least a couple of weeks before the end of the fiscal year on September 30. The fees will cover Fiscal Year 2013, which began on October 1, 2012, and will end on September 30, 2013.

FHH - On the Job, On the Go

On June 13 **Frank Montero** was interviewed by Radio Ink about Pandora's acquisition of an FM station. And coming soon, Radio Ink's 40 Most Powerful People in Radio issue will include an article by **Frank** titled, *Top Issues Facing the 40 Most Powerful People in Radio*. Meanwhile, July will be a busy month for **Frank**. He'll be moderating a panel titled "*Media Experts Share their Secrets to Success in a Multi-platform World*" during the MMTC Access to Capital and Telecom Policy Conference being held July 9-10 in Washington, D.C. Immediately after that, he's scheduled to speak on *Angel Investing* at the July 11 Access to Capital conference sponsored by the FCC at its D.C. headquarters. And after *that* he's scheduled to appear on a panel (titled "*View from the Top: Lessons and Advice from Managing Partners to Young Lawyers*") at a July 15 lunch hosted by the FCBA's Young Lawyers Committee.

On June 25, **Peter Tannenwald** was a featured speaker at a presentation titled "Disappearing off the Dial: The Future of Low Power TV" sponsored by the New America Foundation in Washington, D.C.

Frank Jazzo, along with the NAB's **Ann Bobeck**, will be conducting the FCC/Legal Update session at the Annual Convention of the Arkansas Broadcasters Association on July 19 in Little Rock.

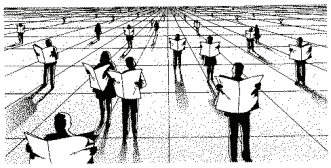
Hard on the heels of his keynote presentation at the SNL Kagan Summit in NYC on June 6, **Harry Cole** is set to appear on the DC Regulatory Update panel at the Texas Association of Broadcasters Convention and Trade Show in Austin on August 8.

And a bit further on down the road, **Matt McCormick** will be attending the Nebraska Broadcasters Association in Omaha on August 14-15, where he'll be a featured speaker.

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

Updates On The News

Online TV public inspection file requirement – Has it really been almost a year since the online public inspection file took effect for TV licensees? Sure enough, August 2, 2012 was the Big Date last year; since the initial flurry of public file-related activities, things seemed to have settled into a routine. But now the Commission – keeping a commitment it made back in April, 2012 – has asked for comments on how the political file component of the online public file system has affected the 240 or so stations that have been subject to that particular requirement. The responses the Commission gets could determine whether any changes should be made to the requirement before it takes effect for other stations.



The history of the TV online public file is extensive. If you're a bit fuzzy on it all, check out the archive of our blog reports on the topic here.

For our immediate purposes, it suffices to remind readers that, while ***all*** full-power and Class A TV stations are required to maintain the majority of their public files online (using the FCC-maintained system), only affiliates of the top-four commercial networks in the top 50 DMAs have been required to keep their ***political*** public files online. (All other stations are still required to maintain their political files the old-fashioned in-house way at least until July 1, 2014, at which point the current plan is to have everybody go online.)

The idea behind easing the online political file obligation in that way was: (a) to make sure that the FCC's system (which was largely untested as the August 2, 2012 start-up date) could handle the load; and (b) to "limit any unforeseen start-up difficulties to those stations that are best able to address them", whatever that might have meant. And to take advantage of that testing phase, the Commission committed to invite comments, by July 1, 2013, on how things are going on the online political file front.

That invitation has now been issued, in the form of a public notice soliciting comments on the functioning of the political file component of the online public file system.

The Commission is looking for input from the 240 or so stations currently subject to the online approach. Any special problems? Does the upload process get easier as staff becomes more familiar with the system? Any suggestions for making the system more user-friendly?

The Commission also invites comments from the public (a concept that includes not only the Great Unwashed, but also political candidates and their reps) to get their side of the story. And it would like to hear from any of the stations *not* currently subject to the online political public file requirement to see if they have any suggestions for improving the system in advance of July 1, 2014.

Trying to kill two birds with one stone, the Commission has also taken the opportunity afforded by the public notice to invite responses to a petition for reconsideration, filed in June, 2012, by a "group of large television station owners". The petition took aim at the online political public file requirement, claiming that the requirement isn't in the public interest. (The petition also offered a suggested alternative that featured an "opt-in" alternative calling for the online posting of the "aggregate amount of money spent by a sponsor of political advertisements on the station in lieu of posting specific rate information online".) For what it's worth, the petition has already been opposed by the Public Interest Public Airways Coalition.

Comments in response to the Commission's notice are due by ***August 26, 2013***; reply comments are due by ***September 23***.

Quad erat demonstrandum? – Despite the FCC's efforts in its 2002 and 2006 quadrennial review proceedings to relax (or maybe even eliminate) its newspaper-broadcast cross-ownership (NBCO) prohibition, that prohibition is still alive and kicking after nearly 40 years. In the 2010 quadrennial the NBCO is again in the Commission's sights. And now the Minority Media and Telecommunications Council (MMTC) has provided arguable impetus for the Commission to try to pull the trigger, again.

MMTC has submitted a specially-commissioned study entitled "The Impact of Cross Media Ownership on Minority/Women Owned Broadcast Stations" (Study). Prepared by well-respected BIA/Kelsey Chief Economist Mark Fratrik, the Study presents evidence that

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What TV Max didn't mention to the Commission was the fact that, according to readily available public records, the companies that acquired those assets are apparently controlled by some or all of the same folks who control TV Max, a fact which plainly undermined the credibility of TV Max's seeming profession of innocence.

The Commission unsurprisingly concluded that "it appears that TV Max simply assigned the cable operation and fiber optic network to two related companies in an effort to evade responsibility for its ongoing violations." In the Commission's view, TV Max's April, 2013 response was "lacking in candor". And, of course, TV Max's historic and on-going unauthorized carriage of the OTA signals violated the rules.

In calculating the forfeiture to be meted out, the Commission noted that TV Max was guilty of "egregious misconduct" featuring repeated, intentional violations the resulted in "substantial economic gain". So while the standard rate-card fine for retrans violations is $7,500 per violation (up to $37,500 per day), the FCC felt it needed to send a message to TV Max (and anybody else who might be inclined to follow TV Max's game plan). Using some unstated math, the Commission came up with a total fine of $2,250,000. According to the Commission, it could have come down even heavier on TV Max, but concluded that, because of TV Max's relatively small size, that wouldn't be necessary. Essentially, the final amount was designed to deter future similar violations and ensure that the forfeiture is not considered an affordable cost of doing business. (The Commission did, however, observe that even higher upward adjustments might be "quite appropriate in other cases".)

Over and above its sheer size, there is at least one additional interesting aspect of the proposed fine. While the Order doesn't dwell on this, it makes strikingly clear that the forfeiture is being imposed not only on TV Max, but also – jointly and severally – on TV Max's individual principals and related entities. As we have previously observed here, the imposition of monetary penalties on the individual principals of corporate wrong-doers seems inconsistent with the usual concept of "corporation". If nothing else, the TV Max order reflects the FCC's willingness to ignore the corporate veil.

TV Max still has the opportunity both to argue to the FCC that the forfeiture should be reduced and to fight the entire case anew in court. It's hard to imagine, though, that this matter is likely to end well for TV Max.

No MVPD likes to pay retransmission consent fees. But the TV Max case provides a cautionary tale of how an MVPD should ***not*** deal with that concern.

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"the impact of cross-media ownership on minority and women broadcast ownership is probably negligible". In other words, the Commission could probably dump the NBCO without having to worry about adversely affecting minority- or female-owned stations. Since the FCC's 2002 and 2006 quad efforts were criticized (by, among others, the U.S. Court of Appeals for the Third Circuit) because of the Commission's supposed lack of attention to minority/female considerations, the Study helps fill in that arguable gap.

Based on questionnaire responses provided by only a relatively limited sample of broadcast stations, the Study is, by its own terms, "not dispositive". Still, in light of its sponsor and its author, it may be viewed as a significant contribution to the record.

The FCC has invited public input on the Study. Comments are due by ***July 22, 2013***; reply comments by ***August 6***.

Radio wave health effects inquiry – Back in April we reported on the FCC's most recent foray into the thorny issue of health effects of radio waves. The FCC adopted minor tweaks to its existing rules, proposed further tweaks, and sought comments on broader issues, including the controversial question of whether the current radio-frequency exposure limits are safe, and if not, what they should be.

The document has since been published in the Federal Register, in two separate parts. The first part sets out the newly adopted rules; the second part poses the questions on which the Commission has requested comment.

Publication in the Federal Register establishes both (a) the effective date of the rule changes that were adopted and (b) the deadlines for comments on the out-for-comment questions. The adopted changes will become effective on ***August 5, 2013***. Comments will be due on ***September 3, 2013***, and reply comments on ***November 1***.

(Continued from page 1)

Web sites or online services;

geolocation information sufficient to identify a street name and name of a city or town; or

information concerning the child or the parents of that child that the operator collects online from the child and combines with an identifier described above.

Note that photos, videos, and audio recordings that contain a child's image or voice are all "personal information". And that term also encompasses "a combination of a last name or photograph of the individual with other information such that the combination permits physical or online contacting".

Obligations of Covered Operations

Operators subject to the COPPA Rule are subject to seven basic requirements. According to the COPPA FAQs, such operators must:

- post a clear and comprehensive online privacy policy describing their information practices for personal information collected online from children;
- provide direct notice to parents and obtain verifiable parental consent, with limited exceptions, before collecting personal information online from children;
- give parents the choice of consenting to the operator's collection and internal use of a child's information, but prohibiting the operator from disclosing that information to third parties (unless disclosure is integral to the site or service, in which case, this must be made clear to parents);
- provide parents access to their child's personal information to review and/or have the information deleted;
- give parents the opportunity to prevent further use or online collection of a child's personal information;
- maintain the confidentiality, security, and integrity of information they collect from children, including by taking reasonable steps to release such information only to parties capable of maintaining its confidentiality and security; and
- retain personal information collected online from a child for only as long as is necessary to fulfill the purpose for which it was collected and delete the information using reasonable measures to protect against its unauthorized access or use.

What's New?

What are the five major aspects of the COPPA Rule set to take effect on July 1 that you should be especially aware of?

The definition of a covered operator whose operation is "directed to children" has been refined to make it easier to trigger parental notice and consent requirements.

As noted, there are two ways in which a website operator might become subject to the requirements of the parental notice and consent process. The requirements apply, first, to an operator whose website is "directed to children" and collects personally identifying information from a child under the age of 13. Second, they apply to an operator of a general audience website who has actual knowledge that it is collecting personal information from a child under the age of 13. One big difference between these two alternatives: most sites that are "directed to children" can***not*** engage in "age screening" to prevent children under the age of 13 from even entering the site.

This may not seem like a big deal at first blush, since many sites have no intention of spending any extra time, money or effort to engage in age screening anyway, especially when they simply don't collect personal information from anybody, child or adult. But, given the expanded definition of "personal information" (see below) and the changes affecting Plug-ins and Ad Networks (also see below), the fact that the FTC appears to have expanded its view as to what constitutes a site "directed to children" means this change has potentially wide-ranging ramifications.

This change has potentially wide-ranging ramifications.

The FTC has always taken a pretty contextual approach in determining whether a site is "directed to children". The FTC considers "subject matter, visual or audio content, age of models, language or other characteristics of the website or online service, as well as whether advertising promoting or appearing on the website or online service is directed to children". But the site owner's own intent was also a factor, as evidenced by enforcement actions where the FTC had applied the "directed to children" label only to sites that (a) knowingly targeted children under 13 as a primary audience or (b) were likely, based on the site's overall content, to attract children under 13 as their primary audience. However, sites that did not appear likely to attract children under 13 were generally left alone, even in cases where some such sites may have happened in fact to attract an unexpectedly disproportionate number of under 13 visitors.

In its August, 2012 Second Notice of Proposed Rulemaking the FTC provided a distinction along these lines: on the one side were sites primarily targeting children or whose content is likely to attract children under 13 as the primary audience can***not*** engage in age-screening; on the other, those that simply have the unintended consequence of a disproportionate amount of child users ***can*** engage in age-screening. Its final rules reflect this distinction.

According to the FTC, Congress never intended to require

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the website operator's subjective intent to factor into the determination of whether a site is "directed to children". As it specifically stated, "Certainly, a website or online service that has the attributes, look and feel of a property targeted to children under 13 will be deemed to be a site or service directed to children, even if the operator were to claim that was not its intent". The FTC seemed to underscore this by expanding the non-dispositive list of likely "directed to children" factors to include: musical content, the presence of child celebrities, and celebrities who appeal to children. It specifically noted that, even when it is asked to determine that a site is allowed to engage in age-screening (because the site has a disproportionate amount of visits from children under the age of 13), the FTC will first look at this context-based "totality of the circumstances" test.

So, why might this affect you? Imagine that you create a new site, a mobile version of your current site, especially a Mobile App. Further imagine that you have no intent to direct your site or App to children. But now imagine that the FTC takes a look at your site and because you have, say, Justin Bieber (based on a look at my not-yet-13-year old niece's iPod, this appears to be a relevant example) featured because he's coming in concert soon. And, if the mobile version of your site or App doesn't happen to have a significant amount of other content, you ***might*** be viewed as a site that is "likely to attract children" – which in turn would mean that you can't age-screen before collecting personal information. But hold on there – you might be collecting such information in the form of geolocation information anyway, even if you don't intend to. That could put you in violation of COPPA.

If you're a general purpose site and you take ads directed at kids, you might have a COPPA problem.

Plug-ins and Advertising Networks can now trigger COPPA obligations.

COPPA's reach has been expanded beyond mere commercial "websites and online services" in a way that means you'll have to get real cozy with the suppliers of all the advertisements or plug-ins to your site. Two of the changes in particular are important.

First, the definition of "covered operator" has been fleshed out to make clear that the website operator is responsible for everything on the site, even if you didn't physically put it there or review it at all. So, if you're a general purpose site and you take ads directed at kids, you might have a COPPA problem. Advertisers collecting personally identifying information from children might trigger COPPA parental notice and consent obligations for ***you***.

Second, "the definition of a website or online service directed to children is expanded to include plug-ins or ad networks that have actual knowledge that they are collecting personal information through a child-directed website or online service". So if you're a site directed at children, your advertisers – who may think they don't have a COPPA problem, might now have one.

The definition of "personal information" has been expanded to include four new categories.

The term "personal information", while always somewhat broad, was also pretty understandable: things like name, phone number, address, email address, etc. The new rules add four key categories to that definition:

Geolocation Information: If you collect "geolocation information 'sufficient' to identify street name and name of city or town", you are collecting "personal information". (While this was not expressly stated in the original version of COPPA, the FTC has apparently been treating it as such all along. The new rule makes that treatment explicit.) Since virtually all mobile devices provide this information and many, if not most, sites (especially Apps) collect it, the potential to trigger the parental notice and consent requirements has significantly increased.

Photos or videos or audio files: Any photo, video or audio file that contains a child's image or voice is considered personal information and will trigger the parental notice and consent requirements if submitted by the child (although such a file submitted by the parent does *not* trigger the requirements). As the COPPA FAQs indicate, operators covered by COPPA must either: (a) prescreen and delete from children's submissions any photos, videos, or audio recordings of themselves or other children; or (b) first give parents notice and obtain their consent prior to permitting children to upload any photos, videos, or audio recordings of themselves or other children.

Screen or user name: A screen or user name is personal information if it functions as online contact information – so use of an email address as the online contact information will *not* relieve you of COPPA obligations.

Persistent identifiers: We're talking cookies here, people – "cookie" as in a computer file containing an IP address, a processor or device serial number, or a unique device identifier that can be used to recognize a user over time and across different Web sites or online services. A cookie in that sense is "personal information" even if it's not overtly paired with a name, email address, screen name, etc.

One possibly unexpected manner in which this is likely to arise is via the use of Mobile Apps, which aren't generally thought of as "websites" (but, under the rule changes, clearly are) and which often rely heavily on the use of geolocation information and allow for simplified sharing of photos and videos. So, while everybody is rushing to create that new App for their station or

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company, many don't realize that the streamlined, functionally superior contact with the world these Apps offer often comes with a hidden price tag.

The direct notice requirements have been streamlined and clarified.

Under the new version of Section 312.4 of the COPPA rule, the notice you must place on your website has gotten somewhat easier. You must simply provide:

- the name, address, telephone number, and email address of all operators collecting or maintaining personal information through the site or service (or, after listing all such operators, you can simply provide the contact information for one that will handle all inquiries from parents);
- a description of what information the operator collects from children, including whether the operator enables children to make their personal information publicly available, how the operator uses such information, and the operator's disclosure practices for such information; and
- notification that the parent can review or have deleted the child's personal information and refuse to permit its further collection or use, and state the procedures for doing so.

You should certainly consult with an attorney before providing direct notice to a parent.

This must be posted via a "clearly and prominently labeled link" on the home or landing page of the site or service and anywhere personally identifying information is collected from children. One wrinkle here is that a general audience site with a portion directed at children must post this separate COPPA-focused notice on that children-focused page.

However, the rule has gotten ***much*** more stringent with regard to the direct notice given to parents when personal information is being collected. These changes, in fact, are so extensive that it's not worth even listing them here. You should certainly consult with an attorney before providing direct notice to a parent.

The non-exhaustive list of acceptable methods for obtaining prior verifiable parental consent has been expanded.

You must get verifiable parental consent before collecting a child's personal information. The COPPA Rule does not dictate precisely how that is to done. The COPPA FAQs advise that you can use "any number of methods to obtain verifiable parental consent, as long as the method you choose is reasonably calculated to ensure that the person providing consent is the child's parent". However, the permissible methods are somewhat broader if you plan to use the personal information ***only*** for your own internal purposes.

If you are going to use such personal information externally or share it with third parties, you can:

- provide a consent form to be signed by the parent and returned via U.S. mail, fax, or electronic scan (the "print-and-send" method);
- require the parent, in connection with a monetary transaction, to use a credit card, debit card, or other online payment system that provides notification of each discrete transaction to the primary account holder;
- have the parent call a toll-free telephone number staffed by trained personnel, or have the parent connect to trained personnel via video-conference; or
- verify a parent's identity by checking a form of government-issued identification against databases of such information, provided that you promptly delete the parent's identification after completing the verification.

If you are only going to use the information internally, you can simply use any of the above methods, or you can use the "email plus" approach, which involves the following steps:

request in your initial message to the parent that the parent include a phone or fax number or mailing address in the reply message, so that you can follow up with a confirming phone call, fax or letter to the parent; or

after a reasonable time delay, send another message via the parent's online contact information to confirm consent. In this confirmatory message, you should include all the original information contained in the direct notice, inform the parent that he or she can revoke the consent, and inform the parent how to do so.

Finally, one more word about penalties for non-compliance. As mentioned above, COPPA provides for a penalty of up to ***$16,000 per violation***. Even a single violation would definitely hit just about any small- to medium-sized business hard. And it seems more than likely that, if you haven't been complying with the law, the FTC would be able to determine that you're really on the hook for multiple violations, which would only worsen the blow.

Again, it's important to recognize that COPPA is a very complicated law whose general applicability and requirements cannot be easily summarized. This article provides, at most, only a quick glimpse at some of the highlights. If you need guidance in determining whether your website is subject to COPPA obligations and, if so, how to ensure compliance, we strongly urge you to contact an FCC attorney or any other attorney familiar with COPPA.