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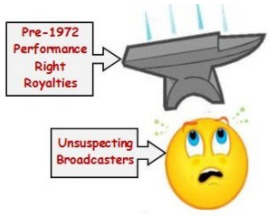
Memorandum to Clients

August 2015

NEWS AND ANALYSIS OF RECENT DEVELOPMENTS IN COMMUNICATIONS LAW

No. 15-08



Taking Flo and Eddie a big step further

Broadcasters Now in the Sights of Pre-1972 Performance Right Holders

By Kevin M. Goldberg
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For the last year or so I've reported on efforts being made by some recording artists and record labels to assert performance right interests in recordings made prior to February, 1972. (Why February, 1972? Take a minute and read this CommLawBlog post for some useful background. We'll wait for you.) You may recall these cases as the Flo and Eddie cases, since those former Turtles frontmen have been the most prominent litigants in these battles.

On the other side of the cases have been Sirius XM and Pandora, who have tended to be on the losing end of things. (Quick recap of the most prominent: Flo and Eddie beat Sirius XM in U.S. District Court in California, although an appeal is pending; various record labels were looking good against Sirius XM in California Superior Court, although the parties eventually settled, with Sirius XM ponying up $210 million; Flo and Eddie also looking good against Sirius XM in U.S. District Court in New York and against Pandora in federal court back in California. The only outlier as yet: a U.S. District Judge in Florida, who tossed a Flo and Eddie suit against Sirius XM there.)

So far, the targets of these suits have been ***non***-broadcasters. As a result, it's understandable if some of our broadcast readers may not have been following closely. Sure, there's that *schadenfreude* component that might interest some, but really, if broadcasters aren't being targeted, do we all really need to worry?

Short answer: Yes.

That's because ABS Entertainment (which claims to hold exclusive rights to recordings by, among others, Al Green, Otis Clay and Willie Mitchell) has filed separate class action lawsuits in the U.S. District Court for the Central District of California against three of the biggest radio broadcasters in the country – CBS, iHeartMedia and Cumulus Media – seeking damages in excess of $5 million from each. Most ominously for broadcasters, the complaints are based on the defendants' delivery of music content not only through the Internet and mobile devices, but also *over the radio*.

This is clearly a game changer.

For now, the three suits are limited to California, and involve only three particularly deep-pocketed broadcasters. California was presumably seen as the venue of choice because of the path that Flo and Eddie have already successfully blazed there. But if ABS's suits prove successful, we can expect similar suits – or threats of suits – to spread like wildfire against others broadcasting in California and elsewhere. In view of the headway Flo and Eddie have already made in New York, that would be a likely next-stop for the litigation train.

That's almost certainly why the NAB has sought leave to file an amicus brief in support of Sirius XM in the appeal of the New York case to the Second Circuit. And it's also almost certainly why the New York State Broadcasters Association retained Dr. Mark Fratrik, Senior Vice President and Chief Economist at BIA Kelsey, to research the effect that the imposition of performance fees for pre-1972 recordings would have on the radio industry.

In a report ("How Will the Radio Industry Be Affected by Pre-1972 Music Performers' Fees") published on July 27, 2015, Dr. Fratrik concludes that the impact could be "significant". The precise level of damages to which radio stations might conceivably be subject is impossible to calculate with certainty for a number of reasons: there is no definitive precedent; damage awards would vary from county

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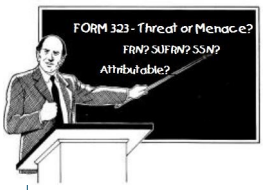

Already?

Biennial Ownership Reports Due This Fall

By Steve Lovelady
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As the FCC has already reminded us – twice, so far – Biennial Ownership Reports (FCC Form 323) for commercial radio and TV (including Class A and LPTV licensees) are due this fall.

The first official sign of this came when the Media Bureau, on its own motion, officially pushed back the due date from November 2 to ***December 2, 2015***.

The biennial extension of the deadline for filing biennial Ownership Reports is sort of a tradition by now. Since 2009 the rules have expressly provided that biennial Form 323s must be filed by November 1 of each year. As it turns out, though, since 2009 those forms have *never* been required to be filed by that date: each year something has come up that called for an extension. The reason given for this year's extension:

> [S]ome licensees and parent entities of multiple stations may be required to file numerous forms, and the extra time is intended to permit adequate time to prepare such filings. We believe it is in the public interest to provide additional time to ensure that all filers provide the Commission with accurate and reliable data.

Of course, that will be true each time biennial Ownership Reports are to be filed, which could cause you to ask why the Commission just doesn't move the deadline permanently to December 1. Until such a move happens, though, we should all accept the extra 30 days graciously and move on. (Note that, notwithstanding the extension, reports must still reflect each reporting entity's information *as of October 1, 2015*.)

And then, following up on that extension announcement, the folks at the Bureau advised that they'll be hosting an "information session" regarding Form 323. Mark your calendars: ***September 22, 2015, from 12:00 N to 1:30 p.m.*** During the show Bureau staff will "present an overview of Form 323", "conduct a filing demonstration", and answer questions from the audience, both those presented in -person or by email. Nothing if not ambitious in its scope, the session is designed to "assist both novice and experienced filers".

Truth be told, Form 323 is not the most user-friendly form. If you (a) have never filed one but (b) are nevertheless determined to try to do it yourself this time around, it would be a good idea to make time to attend the session. And who knows, even old-timers may get some useful pointers. The Bureau presentation will be made in the FCC Meeting Room at the Portals. Doors open at 11:00 a.m. on September 22. No food/drink will be served; you can bring your own brown bag if you'd like. If you're planning on attending in person, let the Commission know by emailing them at form323@fcc.gov by September 18. (You can also submit questions in advance to the same email address – but heads up, any emails relating to the session should refer to "Info Session" in the subject line.) If you can't make it to D.C., not to worry: the show will be streamed (with captions) at www.fcc.gov/live, and it'll be recorded for later viewing at https://www.fcc.gov/events/past.

Completion of Form 323 is not an intuitively obvious exercise. Recognizing that, the Bureau recommends that filers consult: (a) the instructions to the form; (b) the Frequently Asked Questions page on the Bureau's Form 323 website; and (c) the "Most Common Form 323 Filing Errors" page (also on the Form 323 website). The Bureau also encourages users "to check for updates to the filing advice", a suggestion that isn't entirely clear to us. And if all else fails, you can email the FCC's staff at Form323@fcc.gov.

Or you can just contact your communications counsel.

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Computer upgrade? What could possibly go wrong?

FCC to Rest of World: Take an Extra-Long Labor Day Weekend … and Keep Your Fingers Crossed

By Harry F. Cole
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If you've got something due to be filed at the FCC between September 2-8, 2015, the FCC has already given you an extension … to September 9. Happy Labor Day!

For this you can thank the Commission's IT gurus, who are going to perform "upgrades and improvements" to the various computer systems with which the Commission routinely operates. The upgrade process is scheduled to begin at 6:00 p.m. (ET) on Wednesday, September 2; the Commission is figuring everything will be hunky-dory, with all systems back up on-line, by 8:00 a.m. on Tuesday, September 8. (Sounds like an excellent opportunity for you to set up a pool in your office – when, exactly (to the hour) will filings really be accepted across the board?)

IT gurus will be performing "upgrades and improvements" to the various FCC computer systems.

During the down-time, "all electronic filing systems and electronic dockets" will be inaccessible (although Network Outage Reporting System, the Consumer Help Center and the Disaster Information Reporting System will remain up and running, as will the FCC's 24/7 Operations Center). What systems are we talking about? Take a deep breath and start reading: the Universal Licensing System (ULS), the Electronic Comment Filing System, the Electronic Document Management System, the Equipment Authorization System, the Electronic Tariff Filing System, the Experimental Licensing System, the Consolidated Database System, the Licensing and Management System, the International Bureau Filing System, the Section 43.62 Online Filing System, the Tower Construction Notification System (TCNS), the Antenna Structure Registration System (ASR), the Electronic Section-106 System (E-106), Fee Filer, the Commission Registration System and the 911 Reliability Certification System. (Note that ULS, ASR, E-106 and TCNS will technically shut down as of 12:01 a.m. on September 2.)

As a result, all "regulatory and enforcement" deadlines that would have fallen between September 2-8 (except for Network Outage Reports) have now been extended to ***September 9***. Deadlines for pleadings responsive to any pleading subject to this extension will be extended an equivalent amount of time. The Commission has also indicated a willingness to consider extension requests, where appropriate. (And a further benefit for regulators and regulatees alike: during the down-time, "most Commission staff will not have access to e-mail"!)

One limited set of exceptions: filings subject to statutory deadlines. Since the FCC technically doesn't have the authority to overrule Congressionally-established deadlines, it can't extend them. But no worries: in order to give folks with statutory deadlines the same break that everybody else is getting, the Commission has declared that it will deem itself not to be open for the purpose of filing documents with statutory deadlines of September 2-4; such filings will have to be filed by ***September 8***.

And another exception: payments that are not required to be submitted through Fee Filer. That limited universe of payments will still have to be made between September 2-4 the old-fashioned way, through the U.S. Bank.

Getting an extra couple of days tacked onto a long holiday weekend is generally welcome news to most working stiffs. Ditto for the news that old and creaky systems (um, CDBS, anybody?) may finally be getting dragged into the 21st Century. And anyway, what could possibly go wrong with a major league upgrade of complex computer systems? (Let's not focus on the fact that, in the last month alone system upgrades have been blamed for major problems in the air traffic control system, the New York Stock Exchange, and even the Bitcoin market.)

So change your travel plans, extend your Labor Day stay at the beach, and keep your fingers crossed that things will be up and running when you get back.

Spectrum hokey-pokey, coming up

Wireless Mics: The Lay of the Post-Incentive Auction Land Takes Shape

By Laura Stefani
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The Pope will visit the U.S. in late September, which is already prompting extensive preparations in many quarters. Among those readying themselves: news operations, professional wireless microphone operators and wireless mic frequency planners in several major cities where Francis is scheduled to drop by. They've got to figure out how many wireless mics will be needed to stage, cover and record the various events … and then they've got to figure out how to coordinate the spectrum necessary to make sure all those mics serve their various purposes.

Newscasters will want to be sure that they can deliver clear on-site audio feeds to audiences over whatever medium – broadcast, cable, satellite, the Internet – the audience may choose. Those who venture out to see the Pope in person will want to clearly hear his every word. And still others – historians, archivists, those who want a permanent record of some (or all) of his visit – will want to ensure the availability of high-quality recordings. For the most part we have come to assume that all of these needs will be met. What we often lose sight of is the fact that event coordinators must struggle to stretch the limited spectrum available for wireless mics to accommodate the various uses. And with two recent orders (you can find them here and here), the FCC has just make their jobs even harder in that regard.

As long-time readers know, traditionally wireless microphones operated in the TV spectrum until 2009. But since then, a series of Commission decisions (including some made at Congress's direction in connection with the upcoming Incentive Auction) have reduced the spectrum options for mics. And the reductions continue: With plans to auction off 100 MHz or more of the current TV spectrum to wireless carriers – while scrunching TV stations displaced by that into the ever-shrinking portion of the spectrum reserved for TV – the FCC has decided to reduce microphone access to UHF channels even more. On the upside, though, the Commission has concurrently opened some other bands for wireless mic use.

As a result, wireless microphone users now must prepare to dance a spectrum hokey-pokey, with some new rules to follow (and new spectrum to access as soon as those new rules are adopted); other rules that will apply during transition periods; and still more rules that will take effect with the transition of new 600 MHz spectrum licensees to UHF. And when it comes to spectrum options, they won't know exactly how much spectrum will be available to them, or where it will be located, until the Incentive Auction is over.

Let's start with the good news.

Licensed mics will be able to operate closer to co-channel TV stations by relying on a "sensing threshold" of -84 dBm (when indoors and under other conditions). Previous rules permitting co-channel operation when the TV station is at least 4 kilometers away (or after coordinating with TV licensees) will remain in effect as well.

Two UHF channels will be available for shared use by wireless mics and white space devices. The channels will consist of: (1) a "preserved white space" channel where mics will share with white space devices; and (2) the Duplex Gap between wireless uplink and downlink channels. The Gap will be divided into one 4 MHz block reserved exclusively for licensed mics and a 6 MHz block where unlicensed mics will share with white space devices. Recognizing that in some TV markets the Duplex Gap may have to be made available to a TV station, the Commission is proposing to provide a second "preserved white space" channel in those markets. This proposal will be addressed in a pending rulemaking.

Two UHF channels will be available for shared use by wireless mics and white space devices.

Depending on various auction outcome scenarios, unlicensed mics will share with white space devices most of the guard band between television and wireless downlink spectrum and will get to use 2 MHz of the 3 MHz of spectrum in the guard bands closest to TV Channel 37.

Licensed mic users may also "reserve" spectrum otherwise shared with white space devices. This can be done on short notice and/or for specific needs, *e.g.*, breaking news coverage or particular events (*e.g.*, concerts, gatherings, etc.) that involve extensive mic use. But there will be a slight lag time: the licensed mic user must notify a white space database administrator and request channels for immediate use; the administrator will then have 10 minutes to notify other administrators, and all administrators will then have 20 minutes to "push" notice out to any white space devices operating in the area, advising them to clear the channels.

New spectrum will be available for licensed wireless microphone operators in 941.5-944 MHz, 952.85-956.25 MHz, and 956.45-959.85 MHz. Use of any of those bands will be subject to coordination with the local SBE coordinator. And 944-952 MHZ, previously available only to certain licensed users, will now be open to ALL licensed mics, also subject to coordination.

Also, in certain limited circumstances, wireless mics will

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now be able to use 1435-1525 MHz – a band currently used for communications relating to flight tests – subject to coordination with the Aerospace and Flight Test Radio Coordinating Council (that's the test flight spectrum coordinator). Pre-operation authentication and verification confirmation will also be required to use 1435-1525 MHz, through specific procedures and requirements must be worked out. Use of this particular option will be limited to specific fixed locations, such as large venues (outdoor or indoor), where large numbers of mics (typically 100+) are needed for specified time periods, *i.e.* situations in which other available spectrum resources are insufficient.

And other, better bandwidth channels will be available on 169-172 MHz for Part 90 licensees, while two 25 MHz channels at the top and bottom of 6875-7125 MHz will be opened for Part 74 (and Part 78 CARS) licensees. Use of both bands will be subject to coordination.

Users must plan well-ahead to determine equipment to buy and spectrum to use.

Now the bad news.

The FCC rejected requests to "grandfather" existing equipment. As a result, a large amount of UHF microphone equipment currently owned must be tossed by 39 months after the Commission issues its "Channel Reassignment PN" placing TV stations in their new channels, an event we estimate is not likely to happen until June 2016 at the earliest. (Note two very marginal exceptions: some equipment may be modifiable, though this will be costly, and some mics may still fit within the new technical requirements.)

The FCC also rejected requests to assist a subset of professional wireless mic users protect their operations. Some such users are "unlicensed" because they use fewer than 50 microphones – think regional theaters like the Signature and Steppenwolf and orchestras even as large as the Houston and Baltimore Symphonies. Proponents had suggested a mechanism for such groups to register for protection from white space devices. The Commission declined to provide such a mechanism.

Unlicensed mics choosing to operate in the 600 MHz band may operate in the Duplex Gap and guard bands, but only with 20 mW EIRP, and they must register with (and pay any required fees to) white space database administrators. They also may no longer register for protection from white space devices.

Licensed mics may only operate in the 600 MHz band at 20 mW EIRP in the Duplex Gap. That's bad news because, generally, licensed mics are allowed more than 10 times that (*i.e.*, 250 mW power).

Where does this leave the industry?

Users must plan well-ahead to determine whether and when new equipment must be purchased, what spectrum may be available to them, and when specific operating rules go into effect. Once the Incentive Auction is done and the FCC makes new TV channel assignments, a 39-month transition period will begin where mics can operate in the 600 MHz Service Band, but after the transition they must vacate all of the 600 MHz Service Band except for the Duplex Gap & guard bands (licensed mics must vacate all of the 600 MHz Service Band except for 4 MHz in the Duplex Gap). Professional users that do not qualify for FCC licenses will not have access to any of the new spectrum and will need to determine how to continue to provide professional events while sharing spectrum with white space devices (from which they will no longer be able to register for protection).

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to county, jury to jury; statues of limitations may vary. However, he cites a number of governmental analyses and the recent $210 million settlement between a number of record labels and Sirius XM. From these he suggests that the burden of such royalties across the radio industry would be in the hundreds of millions, if not billions, of dollars, representing a significant percentage (2.35% – 37.8%) of station revenues, with the greatest burden possibly falling on smaller stations.

One illustration: according to Fratrik, pro-rating the $210 million Sirius XM settlement would translate to a royalty fee of $57,000 per station per year – *i.e.*, 15% of the median income of a New York station, perhaps a better indicator of what any individual station might be forced to pay. That's just one possible royalty calculation; there are others, and there are still more factors that could result in even higher numbers. And unlike subscription services (like Sirius XM) that can pass such costs along to their subscribers, broadcasters aren't in a position to do that.

The bottom line: If owners of copyrights in pre-1972 recordings are deemed to be entitled to performance rights royalties from broadcasters, many stations can expect financial upheaval. While the songs and artists that ABS represents may not be on everybody's playlist, and while for now ABS has targeted only three mega-broadcast groups, the principle at issue would apply to all pre-1972 recordings and all stations.

The NAB and the New York State Broadcasters Association understand the problem that would loom if the Flo and Eddie argument were to be extended to over-the-air broadcasters. They have wisely started to take steps to respond to the threat. All radio broadcasters would be well-advised to take the time, now, to get up to speed on this issue and to keep a close eye on further developments. We here at the *Memo to Clients* will do what we can to help out.

Do as we say, not as we do ...

FCC Clarifies (?) TCPA Autodialing Requirements

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[*Editor's Note: We try to limit articles in the Memo to Clients to matters of particular interest to broadcasters. Usually, the nitty-gritty aspects of the Telephone Consumer Protection Act would not seem obviously to qualify. But wait! It's at least possible that some broadcasters reach out to audience members (or prospective audience members) through robo-dialed services. If that's you, you should be aware of the do's and don'ts of such outreach, because failure to abide by the rules can be costly. And, as the following article demonstrates, compliance is not necessarily easy to achieve.*]

Pursuant to "clarifications" provided in a recent FCC Declaratory Ruling on the Telephone Consumer Protection Act (TCPA), the FCC and FTC are both in violation of the TCPA's prohibition against making autodialed calls to a consumer's wireless phone without prior express consent. Whose phone? You probably guessed it – I am an unfortunate victim of the government's illegal robocalling disruptions.

By my count, the FCC and FTC now owe me at least $7,500 in statutory damages.

But no need to feel bad for me, this is actually quite a windfall. By my count, the FCC and FTC now owe me at least $7,500 in statutory damages for their combined TCPA violations (and triple that amount, or $22,500, if the violations were committed "willfully or knowingly").

How can this be, you ask? I'll explain later...

First, let's go over some background info about the TCPA and cover some of the "clarifications" provided in the FCC's Declaratory Ruling.

(NOTE: We will cover only some of the major aspects of the Declaratory Ruling and not the myriad of issues and situation-specific details which it tries to address, details culled from 21 separately filed requests for clarification or other action. Our discussion of the TCPA will also be limited specifically to issues surrounding "autodialers" and wireless phones. But keep in mind that there are other requirements that apply to telemarketing in general, and to traditional phone lines and fax machines.)

We'll start with some TCPA basics.

The TCPA, as written by Congress back in 1991, defines "automatic telephone dialing system" (what we refer to as "autodialers" for short) as "equipment which has the capacity (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers". Take note of the word "capacity", as that will be important later.

Under the TCPA, and as explained in the Declaratory Ruling:

> if a caller uses an autodialer or prerecorded message to make a non-emergency call to a wireless phone, the caller must have obtained the consumer's prior express consent or face liability for violating the TCPA. Prior express consent for these calls must be in writing if the message is telemarketing, but can be either oral or written if the call is informational.

Also, don't forget that the FCC considers text messages to be "calls" for purposes of the TCPA. In other words, all calls or texts to a wireless phone that are made using what qualifies as an autodialer require the called party's prior express consent. If the call or text is marketing-related, then the prior express consent has to be in writing.

If you violate the TCPA's prohibitions on making calls using an autodialer without the called party's prior express consent, you can be liable for $500 in statutory damages (per violation!). The damages can also triple if your violations are found to be committed willfully or knowingly.

So far, all this should be old news.

Now, there's been a lot of debate over what constitutes an autodialer. If you read just the TCPA's definition of autodialer, you might surmise that Congress simply intended to restrict the use of devices that are being used to indiscriminately blast out calls to arbitrary numbers conjured from thin air. The FCC has previously found that "the basic functions of an autodialer are to 'dial numbers without human intervention' and to 'dial thousands of numbers in a short period of time.'" The FCC has also said that, although some equipment might have the "capacity" to function as an autodialer, "there must be more than a theoretical potential that the equipment could be modified to satisfy the 'autodialer' definition".

A reasonable person might take this to mean that, if you have a piece of equipment that might be modified to be

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an autodialer, but you haven't modified it, then it isn't one. It would also make sense that if you have an autodialer, but rather than using it as such, you're using it in the old fashioned way (punching in the numbers like a regular Joe Shmoe), then you're not actually doing anything that runs afoul of the TCPA. In other words, if you're not presently taking advantage of your gear's autodialer capabilities, or if your gear doesn't have those capabilities to start off with, you're not going to run afoul of the TCPA.

Not so, according to the FCC's Declaratory Ruling:

> the TCPA's use of "capacity" does not exempt equipment that lacks the "present ability" to dial randomly or sequentially. .... Hence, any equipment that has the requisite "capacity" is an autodialer and is therefore subject to the TCPA.

Moreover, even if it takes combining your equipment with equipment, software or service provided by someone else to have autodialer "capacity," you could still be operating an autodialer. So anything can be an autodialer if it has the "future ability" to dial randomly or sequentially? Wait, hasn't the FCC heard that "the future is LIMITLESS"?

The Declaratory Ruling even goes so far as to imply that smart phones can be considered autodialers. To make us feel better, the FCC concedes that nobody has yet complained about being autodialed by smart phones. (Butt dialing, on the other hand, has resulted in some serious complaints.)

But notwithstanding that less-than-convincing assurance, the Declaratory Ruling says what it says, so for all practical purposes, it may be safer (for now) to consider any piece of modern equipment to qualify as an autodialer under the TCPA. At least we can be safe in knowing that as long as we have prior express consent we can use our autodialers without fear of TCPA liability, right?

Maybe not.

Consent can be revoked. And according to the Declaratory Ruling, revocation of consent can be accomplished in just about any way a consumer deems fit.

The FCC "clarifies" that one way a consumer can revoke consent is simply by changing his or her number. The consumer might not bother to tell you about the change (or what the change is supposed to mean), but you're expected to know to stop making autodialed calls to that number regardless. In such cases the Declaratory Ruling gives you an out ... sort of. You have one call to a wireless number to ascertain that the number no longer belongs to the party who had given you prior express consent to call to that number. Even if the person you reach on the other line says nothing and hangs up, or the call goes to voicemail, or the call gets disconnected, or they PRETEND they are the right person ... you're just supposed to know it's the wrong person.

Better start consulting Miss Cleo before you make any calls (but don't autodial her)!

But consumers switching phone numbers like undergarments present only one consent-revocation problem. You still have to deal with how to track whether consent has been revoked in other ways. The Declaratory Ruling clarifies that "consumers may revoke consent through any reasonable means". This means that consumers can revoke their consent orally or in writing. They can call, email, text, fax, whisper, scream, shout, twist and shout, carrier pigeon, or mime their revocation to you and, presumably, you have to accept it.

OK, so the Declaratory Ruling does say that the FCC will consider the "totality of the facts and circumstances" in determining whether revocation was effectively communicated. But this includes whether "the consumer had a reasonable expectation" that the revocation was communicated. So, what if a consumer, in response to your autodialed text message, thinks he has texted back "UNSUBSCRIBE" but, due to fat finger syndrome or the autocorrect feature on his smart phone, actually sends "UNSUBSIDIZED"? Is the revocation effective? (This is a real world example, as we shall see below.)

Importantly, according to the FCC, folks using autodialers to call consumers are not permitted to designate an exclusive way for consumers to revoke consent. And the FCC warns that "callers may not deliberately design systems or operations in ways that make it difficult or impossible to effectuate revocations."

There are many other issues discussed in the Declaratory Ruling, but the last we're going to cover here is what the FCC refers to as "Internet-to-phone text messages". In a nutshell, this involves reaching a consumer via text message by either (a) emailing the consumer's phone number coupled with a domain name designated by the carrier (*e.g.*, 5555555@users.carrier.com) or (b) allowing messages to be delivered via text by entering it through an Internet web portal.

Of course, under the Declaratory Ruling, Internet-to

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-phone text messaging is considered a "call" for TCPA purposes. Moreover, the technology used to send such messaging is an auto-dialer for TCPA purposes because, presumably, any email system can be configured to automatically send these types of messages to thousands of randomly or sequentially generated addresses/numbers. So the requirements that apply to regular autodialed calls and texts also apply to Internet-to-phone text messages: you have to get prior express consent for these types of messages, and consumers can revoke consent in any reasonable manner. Maybe it's time to stop emailing those cat videos to your entire contact list?

Figure 1

Now that you're up to speed on some of the TCPA "clarifications" provided in the Declaratory Ruling, you've probably already guessed how the FCC and FTC might be violating the TCPA. In case you haven't, here's the scoop.

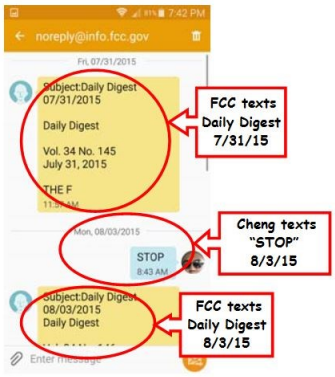

Figure 2

The FCC and FTC maintain automated distribution lists for folks to receive regular email updates about what's going on. Are these subject to the TCPA's autodialer requirements? Let's find out.

Could the systems used by the FCC and FTC be considered autodialers?

I imagine so. They can surely send messages to a large number of people. Even if they don't presently have the capacity to send messages to random or sequential lists of numbers, I'm sure there is a simple app that can be installed to make that possible.

Figure 3

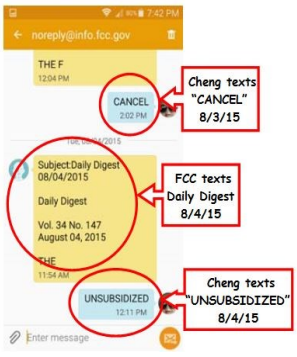

Figure 4

Do these systems even have the ability to make calls or, in other words, send Internet-to-phone text messages?

Yup, sure do! I subscribed using my Internet-to-phone email address and promptly received some confirmation messages via text. (*See* Figure 1.) By subscribing, I gave my prior express consent to receive these messages. So I was all set up to receive autodialed Internet-to-phone text messages from the FCC and FTC and, sure enough, the messages start rolling in.

But after receiving a couple of these messages, I realize getting these message isn't as useful as I thought it would be. In fact, it's rather annoying. I guess I better revoke my consent. Surely the FCC, proponent of the revocation-can-be-accomplished-by-any-reasonable-means principle, will make this easy for me.

I figured I'd just text back the simple message "STOP" to both the FCC and FTC. (*See* Figure 2.) After all, this is the industry standard for revoking consent to text message campaigns, is it not? Seems pretty reasonable. (Figure 3 is a grab showing the same on the FTC side.)

Guess what? It didn't work. The messages kept coming.

Figure 5

OK, fine. Even though the Declaratory Ruling technically extended the "one additional call" exception only to situations involving consumers who have changed numbers, I decide I should give them a one-time pass.

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So I try again, this time sending the message "CANCEL". Surely that will get my revocation across. No such luck. The messages keep coming, both from the FCC (*see* Figure 4) and from the FTC (*see* Figure 5).

Maybe I need to use "UNSUBSCRIBE" for the FCC? That's what I meant to do in my next attempt but,

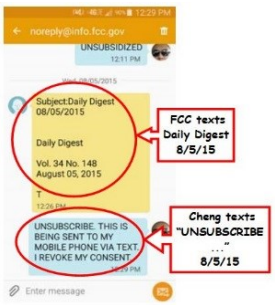

Figure 6

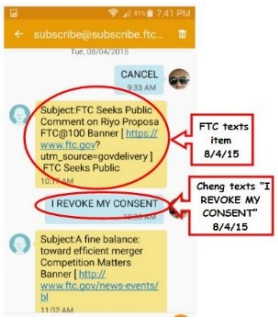

Figure 7

Figure 8

when I checked back after receiving another message, I realized I had texted "UNSUBSIDIZED" instead. (*See* Figure 4.)

Darn! Maybe I need to use something more forceful, with complete sentences and some context. Let's try "UNSUBSCRIBE. THIS IS BEING SENT TO MY MOBILE PHONE VIA TEXT. I REVOKE MY CONSENT" to the FCC. (*See* Figure 6.)

And for the FTC, let's try something a bit more terse, but still straightforward, like "I REVOKE MY CONSENT". (*See* Figure 7.)

That doesn't work, either. Neither does "UNSUBSCRIBE PLEASE" or "I DON'T WANT ANY MORE MESSAGES". (*See* Figure 8.)

I think it's clear now: Both the FCC and FTC are going to force me to revoke my consent using only the specific revocation methods that they have designated.

How inconvenient, not to mention inconsistent with the FCC's Declaratory Ruling.

On the bright side, the FCC and FTC owe me at least $7,500 in statutory TCPA damages because I've now received at least 15 autodialed Internet-to-phone text messages after I revoked my consent to receive these messages through what I thought to be reasonable means.

And there's more good news. As those familiar with the FCC's enforcement policies can tell you, in the FCC's view, you commit a violation "willfully or knowingly" simply by committing the violation more than once. So, under the TCPA, I should actually be eligible for triple the damages, $22,500. That's great, because my wife's been bugging me to buy a new car!

What's the takeaway from all this?

One can be found in Commissioner Pai's dissent to the Declaratory Ruling:

> Rather than focus on the illegal telemarketing calls that consumers really care about, the *Order* twists the law's words even further to target useful communications between legitimate businesses and their customers. This *Order* will make abuse of the TCPA much, much easier. And the primary beneficiaries will be trial lawyers, not the American public.

There are already TCPA lawsuits out the wazoo. The Declaratory Ruling provides a goldmine of new schemes that can be employed in even more lawsuits. I doubt many of these lawsuits will actually serve to protect consumers from harm; it's all about the money.

Another takeaway is that the Declaratory Ruling establishes unrealistic expectations for businesses that are legitimately trying to communicate with customers. Even the FCC and the FTC aren't able to comply with the "clarified" obligations the FCC has established. Perhaps this is because, as government agencies (thanks to this thing called sovereign immunity), they probably don't have to concern themselves with TCPA liability. If the FCC were forced to defend itself in a few TCPA lawsuits, it might change its mind on some of the positions taken in the Declaratory Ruling.

Finally, for those businesses that do communicate with consumers using any modern technology, proceed with extreme caution. The Declaratory Ruling is here to stay ... for now.

[*Editor's Note: The opinions expressed in this article are those of the author alone.*]

Drone even go there, redux

The FAA, Drones and Newsgathering

By Kevin M. Goldberg
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As we reported earlier this year, the National Telecommunications and Information Administration (NTIA) has opened a proceeding looking at "best practices" for the commercial and private use of drones. NTIA's first multistakeholder confab was held here in Washington on August 3 to explore some of the questions on the table; more meetings are set for coming months.

The NTIA proceeding is looking to the future. But we here in the *Memo to Clients* bunker are still getting questions about what the ***present*** status of drone use is, particularly for newsgathering. The answer, it appears, is contained in a brief memo issued by an FAA official a few months ago.

The memo answers three questions about the "media use of UAS". As attentive readers will recall, "UAS" (short for "unmanned aircraft systems") is FAA-speak for what many of us know as "drones". The questions posed are:

> whether members of the media may use unmanned aircraft systems (UAS) for newsgathering;
>
> whether the media may use pictures, video, or other information collected by a person using UAS; and
>
> whether a person who sells images collected by UAS would need authorization for his or her operations.

The answers:

> No, a media organization may ***not*** itself use drones for newsgathering unless the organization holds an FAA authorization to do so.
>
> Yes, a media organization may use drone-collected images, video, etc. – and may even pay to acquire such material – ***as long as*** the material to be used was obtained from a drone operated by somebody who is ***not*** affiliated with the media organization.
>
> Maybe. If the drone operator obtained the images, etc., with the intent of selling them (whether to the media or any other buyer), then an FAA authorization would be required. However, if the drone operator were merely engaging in recreational flying, happened to get some excellent images, and only afterward decided to sell those images, no authorization would be necessary.

These answers, which are more or less consistent with the FAA's historic position, highlight some of the conceptual problems with that position.

As we have seen, historically the FAA has distinguished between two kinds of drones – those that are operated as "model aircraft", and those that aren't. The former are subject to some relatively light, voluntary, guidelines; the latter are subject to significant restrictions. In the FAA's view, any drone operated "for business purposes" does not qualify as a "model aircraft". (Whether or not that view is legally enforceable in its present posture is not 100% clear, but we won't dwell on that here.)

In the FAA's view, any drone operated "for business purposes" does not qualify as a "model aircraft".

In other words, if a media organization operates a drone as part of its newsgathering operations, the drone is being used "for business purposes" and, as a result, the organization could not use any drone-produced materials unless the FAA had provided its prior authorization.

By contrast, if a hobbyist happens to obtain newsworthy images while operating her drone as a "model aircraft", she can sell those images to media organizations (or anybody else, for that matter) without problems. Any purchaser of those images could use them for any purpose without fear of repercussions at the FAA.

But if that same hobbyist gets it into her head that she can make some cash by seeking out newsworthy footage with her drone, then that hobbyist would no longer be operating a "model aircraft", and FAA authority would be required.

As Berl Brechner, a pilot, former broadcaster and mastermind behind NewsDrones (a website focusing on the use of drones in newsgathering), observes, this can lead to odd scenarios. (Berl, an FHH client, has written extensively about aviation matters and FAA regulation. This article is based on an item Berl wrote for NewsDrones. BTW – Berl's site provides a host of useful resources for anyone looking for information about the FAA's drone-related activities.)

Suppose, for instance, that there's a major house fire. Three neighbors happen to be drone hobbyists. Each launches his drone, takes pictures and video of the dramatic fire-fighting efforts, and offers those to media or-

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ganizations. Legal? It depends.

Neighbor #1 is a pure hobbyist who has never used his drone for anything but taking pretty pictures. The notion of selling the fire-fighting shots occurs to him only after he has taken them. Under those circumstances he can sell them, no problem.

Neighbor #2, by contrast, has a history of selling his dramatic drone shots to various folks, including TV stations, newspapers, etc. When he launches his drone and sends it to the fire, he's already figuring out how he's going to approach potential buyers and how much he's going to ask for his images. In the FAA's view, he is not operating a "model aircraft", but rather is using it "for business purposes" – and therefore needs FAA authorization.

And Neighbor #3 is like Neighbor #1, ***except*** he also happens to be an account executive at a local TV station. Even if he has absolutely no intention of cashing in on his images, and even if his employer doesn't pay him for them, his employer may ***not*** use his images because he is "affiliated with that media outlet".

And an additional consideration: if the media organization itself did not take the images (directly or, presumably, indirectly), it can buy and use them even if it turns out that the drone operator needed, but didn't have, FAA authorization. That is, a media organization could purchase the handiwork of the hobbyists in either Example #1 or #2, above. In the words of the FAA memo,

> [t]he FAA does not regulate whether a third party not involved in the operation of an aircraft-manned or unmanned-can receive pictures, videos, or other information that was gathered using that aircraft, or how that third party can use those pictures, videos, or other information.

The FAA's policy seems oddly mis-focused. It doesn't discourage drone use near newsmaking events, because pure hobbyists can operate there to their hearts' content. And since it's based on the supposed intent of the drone operator, it threatens to embroil the FAA in cumbersome and difficult-to-prove questions of intent: how, after all, is the FAA going to be able to determine whether the drone operator really intended to market his or her images before launching, or whether that thought occurred only after the images had been obtained. And what happens if the operator, having launched without a thought of marketing the images, realizes mid-flight that maybe, just maybe, somebody might be interested in paying for them?

Perhaps most troubling, where does the FAA get off singling out media organizations – or anyone affiliated with them – as requiring government permission? Doesn't that raise First Amendment concerns? (Brechner certainly thinks so.) And why would the FAA want to discourage professional newsgathering organizations – who presumably have experience and professional standards – while encouraging amateurs whose conduct may not be governed by such considerations? On that point, Brechner expresses concern about a "host of new drone-video ambulance chasers (who will say they just happened to be at the scene)."

Of course, the FAA is still pondering its own formal rulemaking proceeding announced last February. For now, though, a media organization may use drone-obtained images, but only if organization (a) has FAA authorization or (b) did not itself take the images.

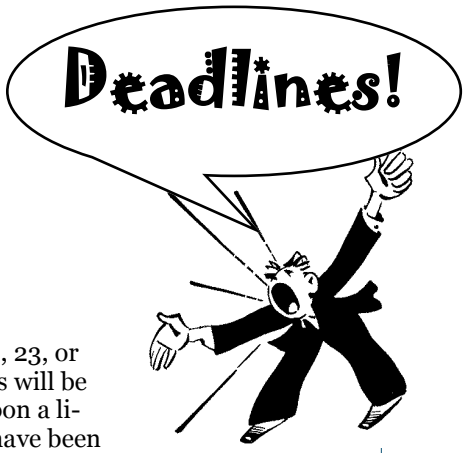
FHH - On the Job, On the Go

Frank Jazzo has been named Co-Chair of the Continuing Legal Education Committee of the Federal Communications Bar Association.

If you're going to be Las Vegas for the CTIA Show (that would be "Super Mobility 2015"), keep an eye out for **Jamie Troup** and **Tony Lee**. They'll be attending from September 8-11.

And while it may seem a bit early to mention the NAB Radio Show in Atlanta – after all, that's not happening until the end of September running over to October 2 – this is likely our last chance to get the word out (since next month's *MTC* won't hit the stands until immediately before the show starts). As of now, the Atlanta-bound contingent from FHH will include **Frank J**, **Scott Johnson**, **Dan Kirkpatrick**, **Susan Marshall**, **Harry Martin**, **Matt McCormick** and **Frank Montero**.

If you happened to be reading the *Philadelphia Inquirer* on August 7, you probably noticed our own **Peter Tannenwald** getting quoted extensively about participation by Philly-area TV stations in the upcoming Incentive Auction.



September 9, 2015

Revisions to Emergency Alert System (EAS) Rules – Comments are due with regard to the Commission's Notice of Proposed Rulemaking (PS Docket 15-94) inviting comments on proposed revisions to its EAS rules, as requested by the National Weather Service (NWS) of the National Oceanic and Atmospheric Administration (NOAA).

September 2???, 2015

Annual Regulatory Fees – On a date currently projected to be September 22, 23, or 24 – and certainly no later than September 30, 2015 – annual regulatory fees will be due. These will be due and payable for Fiscal Year 2015, and will be based upon a licensee's/permittee's holdings on October 1, 2014, plus anything that might have been purchased since then and less anything that might have been sold since then. The fees must be paid through the FCC's online Fee Filer, and once again this year, the FCC will not accept checks as payment of the fees but will require some form of electronic payment (credit card, ACH transfer, wire transfer, and the like). Please keep in mind that timely payment is critical, as late payment results in a 25% penalty, plus potential additional interest charges.

September 24, 2015

Revisions to Emergency Alert System (EAS) Rules – Reply Comments are due with regard to the Commission's Notice of Proposed Rulemaking (PS Docket 15-94) inviting comments on proposed revisions to its EAS rules, as requested by the National Weather Service (NWS) of the National Oceanic and Atmospheric Administration (NOAA).

September 30, 2015

Preserving One Vacant UHF Channel in Each Area for Unlicensed Use – Comments are due with regard to proposed rules that would preserve at least one vacant ultra-high frequency (UHF) TV channel in each area of the country for unlicensed use.

October 1, 2015

EEO Mid-Term Reports – All *radio* station employment units *with eleven (11) or more full-time employees* and located in the **Florida**, **Puerto Rico** and the **Virgin Islands** must file EEO Mid-Term Reports electronically on FCC Form 397.

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. 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 **Iowa** and **Missouri** 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 the **Alaska**, **American Samoa**, **Florida**, **Guam**, **Hawaii**, **Mariana Islands**, **Oregon**, **Puerto Rico**, the **Virgin**

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Islands and **Washington** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323-E.

October 13, 2015

Children's Television Programming Reports – For all *commercial television* and *Class A television* stations, the third quarter 2015 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, as the FCC bases its initial judgments of filing compliance on the contents and dates shown in the online public file. Please note that the FCC's filing system continues to require the use of FRN's prior to preparation of the reports; therefore, you should 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.

October 30, 2015

Preserving One Vacant UHF Channel in Each Area for Unlicensed Use – Reply Comments are due with regard to proposed rules that would preserve at least one vacant ultra-high frequency (UHF) TV channel in each area of the country for unlicensed use.

Gettin' down to bid-ness

Update: Auction 98, Now in the Books

By R. J. Quianzon
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Stick a fork into Auction 98 – it was done, as of August 6 (although the FCC's formal public notice to that effect didn't show up on your doorstep until August 12). The good news: if all the winning bidders actually pay, the guv'mint should be getting north of $4 million (from a total of more than $5 million bid – remember that you have to back out the bidding credits to which some of the bids were subject). And even better news: the FCC was able to cash out 11 re-treads that went unsold in past auctions. But 29 permits attracted no bids at all.

Of the 102 permits that did move, prices were all over the map. Nearly half sold for less than $10,000, with eight coming in at under $1,000. But 11 went for more than $100K each. Overall, the results of the latest auction are in line with previous auctions and indicate that there are still active and well-funded players in the FM game.

The highest ticket item on the block turned out to be a Class A permit in beautiful Westfield, New York, just across the Governor Thomas E. Dewey Throughway from Lake Erie. Bidders slugged it out for six full days before reaching the final high bid of $714,000. That wasn't the only pitched battle. It took four days to resolve bidding wars for Columbia, Missouri and Toquerville, Utah – $421K and $370K, respectively – and eight (count 'em, eight) days to get to the gavel for Llano, Texas ($231K).

At the lower range of the scale, for a mere $830 a Class C3 in Owyhee, Nevada could have been yours. (True fact: Owyhee gets its name from a 19th century spelling of "Hawaii".) Or you could have had yourself a Class A in Memphis – that's right, Memphis – for a paltry $610. (Did we mention that that would be Memphis, Texas, not the one in Tennessee?)

The successful bidders have until September 10 to get their final payments to Uncle Sam.

Auction 98 marks a decade of the FCC-conducted FM auctions. Through the auction of 1,100 FM radio permits over the years the government has raised more than a quarter billion dollars.

Over the years bidding patterns have changed. When the auctions began in 2004, pent-up demand, attractive markets and eager bidders combined to generate nearly $150 million for 250 permits. Things have calmed down since. The cheapest permit back in 2004 was sold for $5,500 (a Class A in Kotzebue, Alaska); during the most recent three auctions, numerous permits – including Memphis (Texas, that is) – have sold for less than $800. That's less than a pair of Tony Lama boots. Clearly, the days of repeatedly doubling your bid are over.

For readers who prefer a conveniently packaged historical perspective, here's a table showing some highlights by the numbers:

Auction Year	Auction Number	Number of Permits Sold	Number of Winning Bidders	Total Net Bids	Most Expensive Permit
2004	37	258	110	$147,876,075	Mesquite, NV ($7,131,000)
2006	62	163	96	$54,259,600	Indian Wells, CA ($6,657,000)
2007	68	9	9	$3,264,250	Kehei, HI ($1,109,000)
2007	70	111	60	$21,301,175	Aguila, AZ ($1,659,000)
2009	79	85	53	$5,253,025	Murietta, CA ($518,000)
2011	91	108	66	$8,537,655	Lawrence Park, PA ($2,068,000)
2012	93	93	56	$3,826,338	Tishomingo, OK ($309,000)
2013	94	93	55	$4,122,604	Lake Park, Florida ($2,015,000)
2015	98	102	59	$4,121,140	Westfield, NY ($714,000)