Fletcher, Heald & Hildreth®

Memorandum to Clients

September 2015

NEWS AND ANALYSIS OF RECENT DEVELOPMENTS IN COMMUNICATIONS LAW

No. 15-09

What to ask for and how to ask for it

The FAA's Drone Drill: An Introduction

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Let's be honest: you want a drone, just like the rest of us. (True fact: We here in the *Memo to Clients* bunker (which we share with the CommLawBlog folks) have frequently fantasized about flying our own – appropriately branded – drone straight to the FCC to deliver filings from the 18th floor rooftop patio here on the CommLawBlog Tower. We are not optimistic, however. We'll get to that in a minute.) But, also like the rest of us, you'd probably like to use your drone for something more than purely recreational purposes, and you've heard that the FAA expects you to jump through a number of hoops before you can do so.

What are those hoops and how do you jump through them? Read on.

First, though, an editorial observation. The FAA's current insistence on imposing stringent regulations on "commercial" drone use (as opposed to purely recreational, or hobbyist, drone use) is of dubious legality, as my colleague Kevin Goldberg noted last year. While Congress has implicitly authorized the FAA to impose rules on nonrecreational drone use, the FAA has not to date adopted any such rules. It did, at long last, launch a rulemaking proceeding last February looking to formally codify various policy statements and internal guidelines that it had issued over the years. But until that proceeding results in properly adopted rules, the interim enforceability of the FAA's earlier policy statements and guidelines could be challenged.

And, indeed, they were challenged, successfully, before an NTSB administrative law judge in 2013. That decision was reversed by the full NTSB on relatively narrow grounds not relating to the FAA's "commercial v. recreational" distinction, and the case was eventually settled, with the drone operator admitting to no violations of any rules. (For a collection of documents related to the case, including briefs setting out in detail arguments relative to the validity of the FAA's interim policies, see this site.)

But for now, the FAA is sticking to its guns. And while Congress has directed the FAA to get its new rules in place pronto (the initial target date specified by Congress was September, 2015), all signs are pointing to considerable delay on that front. So let's take a look at what you would need to do to get the FAA's blessing, today, to use your drone for commercial purposes.

First up, what kind of drone will you need? While we like the word "drone," in FAA-speak they are referred to as "unmanned aircraft systems" or UAS. You'd need a "small UAS," which is an unmanned aircraft weighing less than 55 pounds. (For those keen on drone facts, there is also a "micro UAS" class, which the FAA proposes to mean aircraft of up to 4.4 lbs., made of fragile materials that can break easily and not cause harm upon collision, and which cannot exceed an airspeed of 30 knots.)

As long as you won't be taking to the skies within certain distances of certain airports, in otherwise restricted airspace or in certain densely populated areas, you'll need three things to operate your drone commercially:

- An exemption, issued under a process pursuant to Section 333 of the FAA Modernization and Reform Act of 2012, which can obviate the need for a separate FAA-issued Airworthiness Certificate and will come with a limited Certificate of Waiver or Authorization (COA);
- An authorized pilot (*i.e.*, someone with an FAA-issued Airman Certificate); and
- A properly registered UAS.

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"Enhanced" Interference Complaint Process: Your Complaint is Important to Us … Please Remain on the Line.

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As we reported in July, the FCC is saying *sayonara* to 11 of its 24 Field Offices. Also as we reported, when it announced that cut-back on July 16, the Commission committed to issuing, within six weeks, "new procedures addressing how complaints can be 'escalated through the field offices'." Let's see – six weeks from July 16 would be, um, August 27. And sure enough, just like clock-work, on August 27 the Enforcement Bureau issued a public notice touting "enhance[d] procedures for public safety and industry interference complaints."

While the Bureau's adherence to its Commission-imposed deadline is admirable, its public notice leaves (a) many questions unanswered and (b) us less than impressed (favorably, at least).

According to the Bureau, under the new procedures, complaints will be submitted through an Internet portal on the FCC's website. Incoming complaints will be categorized as either "high", "medium", or "low" – but the notice doesn't shed much light on how any particular complaint will be assigned to one or another category. Complaints involving public safety will be treated as "high" priority, but we can all agree that "public safety" is a broad and non-specific concept. (Query: Would shutting down an FM pirate operation be "high" priority? What if the pirate is causing interference to FM service just as a hurricane is bearing down on the community – does that transform it to a "public safety" situation?) So that's not especially helpful. The categorization of other complaints will depend on such similarly imprecise considerations as the frequencies affected or the severity or frequency of the alleged interference.

The category to which a complaint is assigned will determine the Bureau's response time. Field office representatives will respond to high priority issues within one calendar day of filing, medium priority complaints within two business days, and low priority complaints within five business days. But "response" in this sense should not be mistaken for "resolution". The initial complaint response will include only: (i) the contact information for the field agent assigned to the matter; (ii) the expected nature and timeframe for investigation or other response; and (iii) a request for additional information, if necessary. Nowhere does the Bureau indicate anticipated follow-up times, an omission that naturally leaves us a bit wary. Thanks to the elimination of so many Field Offices, the availability of Bureau personnel to address complaints can logically be expected to be significantly reduced.

No problem. The Bureau has added an "escalation procedure" – sort of like asking to speak to a manager. Once you've filed a complaint through the portal, you'll be able to move up the line, first to the Regional Director (RD), and next to the Field Director (FD). But you've got to wait at least one week after the complaint is filed before you can get to the RD, and two weeks before you can get to the FD. And there's no time frame for hearing back from these higher-ups, much less any indication of whether, how and – perhaps most importantly, when – the complaint might be resolved.

The Bureau effusively claims that the new system will "improve the transparency, consistency, and predictability of its responses to such complaints and help complainants stay informed of the status of their complaint". Perhaps. But the new system seems to amount to little more than the equivalent of that annoying message while you're on hold, assuring you that your call is important and that an operator will get to you shortly. Again, being able to determine that your complaint is somewhere in the process isn't the same as knowing when your complaint is going to be resolved. With far fewer boots on the ground (in 13 fewer Field Offices) to respond to the complaints generated by this improved intake system, significantly longer resolution times can be expected.

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Inching into the 21st Century

Broadcast Contest Rule Moves Online

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If you're a broadcast station that conducts contests and promotes those contests on the air, the FCC has just ushered you into the 21st Century. Soon you will be able to advise your audience about the material elements of your contests by simply posting them online (as opposed to reading them on the air repeatedly during the course of the contest).

The only thing surprising about this rule change is that it took so long.

Since 1976, the contest rule (that would be Section 73.1216) has required (among other things) periodic on-air disclosure of all material elements of the contest. (You can find some examples of the rule in action here, here and here.) For many contests, that imposes a considerable burden on both stations (who must be sure to intone the rules on the air, often at auctioneer speed – or scroll them in infinitesimal print – regardless of how much that can interrupt program flow) and audience members (who have to suffer through the interruptions).

The new rule permits broadcasters to post contest rules online in lieu of broadcasting them.

Nearly four years ago, Entercom formally asked the Commission to allow broadcasters simply to post their contest rules online, so that the rules would be available to whoever might want to consult them whenever they might want to. As Entercom put it, this would be consistent with "how the majority of Americans access and consume information in the 21st century."

At long last, Entercom's proposal (with some tweaks) has been adopted.

Oddly, it took the Commission nearly three years to get the rulemaking process rolling (even though, during that intervening time, nobody objected to the proposal and multiple parties enthusiastically supported it). And then it took nearly a year to crank out the relatively straightforward 11-page (not including appendices) Report and Order.

But let's not look this particular gift horse in the mouth. Instead, let's look at the New and Improved Contest Rule:

Moving Contest Rules Online. The most prominent aspect of the new rule: it permits broadcasters to post contest rules online in lieu of broadcasting them. The posting would have to be in writing (obviously) and would have to include all the "material terms" of the contest. It would have to be available on some website that is "publicly accessible" – that is, a site that is designed to be available, for free (with no registration necessary) on a 24/7 basis. The site can be the station's, the licensee's, or some other site that meets the "public accessibility" criteria. The one thing that the website homepage will have to have: a "conspicuous link or tab" that leads directly to the contest information.

The new rule is permissive, not mandatory. That is, if a licensee prefers for one reason or another to stick with on-air announcements of contest rules for some contests or all contests, it may do so.

On-air Announcement of Web Address. If you're going to use an online site, you'll have to let your audience know how to get to that site. This doesn't need to be elaborate: on-air announcements like "for contest rules go to kxyz.com and then click on the contest tab" should do the trick, or anything else that will allow "a typical consumer easily to locate the website's home page". However you choose to announce the online site, you'll have to do it "periodically". This is the same less-than-specific requirement that has applied to the on-air announcement of contest rules. (The good news here is that the Commission declined to require that the website address be announced every time any on-air mention is made of the contest.)

Duration of On-line Disclosure. Online rules will have to stay online for at least 30 days following the conclusion of the contest. This is a change from the non-online rule, which imposes no requirement for on-air disclosure of contest rules once the contest is done. Of course, if a website features rules for a contest that has already come and gone, the potential for confusion arises. With that in mind, the Commission cautions that licen-

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Dancing Baby in the Ninth Circuit: A Twist on Takedowns

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Thanks to digital technology, copyright infringement is easier than ever – and the Internet provides a tempting place to display infringing uses of copyrighted material. Recognizing that, Congress passed the Digital Millennium Copyright Act (DMCA), creating a simple mechanism by which copyright owners could get infringing uses quickly removed from the Internet. That mechanism – the "Notice and Takedown" provision of Section 512 of the DMCA – has proven very effective at getting a wide range of materials removed, whether or not they were in fact infringements.

But now the U.S. Court of Appeals for the Ninth Circuit may have provided the targets of such "takedown" notices a way to fight back.

The somewhat unlikely protagonist here: Holden Lenz, or, more accurately, Holden's mom. You remember Holden. Way back in February, 2007, his mother, Stephanie, took a jumpy, hand-held video of Holden (who was then 13 months old) in what was presumably the Lenz's kitchen. Holden was dancing and running around to a recording of Prince's "Let's Go Crazy". If you don't remember, just control-click on the image above. (Or you can also refresh your recollection by checking out my earlier posts on CommLawBlog here and here.)

> *Before sending a DMCA takedown notice, a copyright owner **must** consider whether or not the alleged infringement is a "fair use".*

Stephanie posted the video to YouTube, and Holden has been known in copyright circles as the "Dancing Baby" ever since. (Tough break, kid.) That's because soon after his mom posted his antics for all the world to see, the folks at Universal Music (who were the "publishing administrators" for Prince) proved that they have no sense of humor – or maybe just that they hate cute children. They sent a DMCA takedown notice to YouTube, alleging that the use of "Let's Go Crazy" in Stephanie's video constituted an infringement of their client's song. The ensuing developments made Holden a celebrity.

YouTube immediately blocked access to the video, a not-uncommon reaction by YouTube (or any site which hosts third-party content). That's because taking such action, and notifying the poster of the content that the video has been removed, are crucial steps toward the immunity offered for a website operator under Section 512.

Lenz (*mère*, not *fils*) responded with a "counternotification" asserting that a 29-second snippet of "Let's Go Crazy" in a video featuring a kid literally "going crazy" was a "fair use" and not an infringement. But she didn't stop there.

As it turns out, Section 512(f) of the DMCA provides that, if a party demanding a takedown engages in misrepresentation with respect to the alleged infringement, that party may be liable for damages. So Ms. Lenz sued Universal under that section, alleging that the claim of infringement in its takedown notice constituted misrepresentation. Her theory: in order to validly claim that the use of the song was an infringement, Universal would have first had to have considered whether it was a "fair use". Since (according to Lenz) Universal had not even considered that question before firing off its takedown notice, Universal's claim of infringement was a misrepresentation.

Universal moved to dismiss Lenz's complaint. Its argument: Section 512 of the DMCA requires only that the party asking for a takedown represent that the alleged infringement is "not authorized by ... the law". In Universal's view, a "fair use" is technically not "authorized by law"; rather, it's an "affirmative defense" that a defendant can use to excuse infringements. (Yes, this is the kind of hyper-technical argument that has made lawyers the butt of zillions of lawyer jokes.)

The trial judge disagreed with Universal. But, presumably recognizing that this is a case of first impression, he stayed the trial and certified the question to the U.S. Court of Appeals for the Ninth Circuit, where some heavy hitters like the Motion Picture Association of America, Recording Industry Association of America, Facebook, Twitter, Google, and Tumblr, joined the fray as amici.

And now the Ninth Circuit has spoken, agreeing with the trial judge and Lenz. Judge Richard Tallman, writing for himself and Judge Mary Murguia, concluded that fair use is indeed a use "authorized by the law". They rely in particular on the fact that "fair use" is specifically identified and described in Section 107 of the Copyright Act. As a result, the court has held that, before sending a takedown notice under Section 512, a copyright owner ***must*** consider whether or not the alleged infringement is a "fair use".

Good news for the Lenz family, right?

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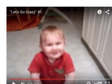

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Not necessarily.

Ms. Lenz argued that Universal could not have formed, and did not form, any subjective belief because it didn't consider fair use at all before firing off its takedown notice. But Universal argued that its pre-takedown notice procedures effectively took "fair use" into consideration, even if the term "fair use" was not formally referred to in those procedures. And that was enough for Judges Tallman and Murguia to send the case back to the District Court so that a jury could decide whether Universal's pre-takedown notice procedures were sufficient to allow it to "to form a subjective good faith belief about the video's fair use or lack thereof".

What kind of procedures would do the trick? Judge Tallman suggested that it might be enough to implement computer algorithms to process a plethora of content, if those algorithms were designed to consider the factors underlying a "fair use" determination. (It appears that Universal's procedures involved having a Universal employee (a) surf the Internet for uses of Universal music and then (b) determine simply whether a video embodied a Prince composition by making significant use of the composition – effectively a quantitative, not qualitative, review.)

The Court's standard is actually pretty low

So Universal has another chance to avoid liability by convincing the jury that, before sending the takedown notice concerning the Lenz video, Universal had (a) considered whether the video was a fair use and (b) had formed a "subjective good faith belief" that it was not. Note that this doesn't mean that the *court* would ultimately decide whether the video constituted fair use, but rather whether *Universal* did enough to form a good faith belief (with which the court might or might not agree) that the video wasn't a fair use. In Judge Tallman's words: "Universal faces liability if it knowingly misrepresented in the takedown notification that it had formed a good faith belief the video was not authorized by the law, *i.e.*, did not constitute fair use."

That standard is actually pretty low, and it seems to give Universal a fair amount of running room on remand.

(A third judge on the Ninth Circuit panel, Milan Smith, concurred in the result, but dissented from Judge Tallman's reasoning on a number of technical points. For example, Judge Smith would remand the case so that a jury could determine ***not*** whether Universal had done enough to form a good faith belief as to whether the Lenz video was a fair use, but rather whether the video was in fact a fair use. If it was a fair use, Judge Smith was satisfied that Universal's takedown notice was a misrepresentation.)

The Court also addressed one more question: even if Lenz wins, what would be the measure of the "monetary relief" to which she would be entitled? Universal argued that Lenz must show "actual monetary loss". But, as Judge Tallman opined, DMCA Section 512(k) defines monetary relief as "damages, costs, attorneys' fees, and any other form of monetary payment". Thus, Lenz may actually be compensated for her time, costs, attorneys' fees and other expenses incurred in this eight-year ordeal.

So what to make of this decision some eight years in the making. It did receive a fair amount of coverage when it was handed down. Is it really that important?

Well, yes, and no.

The DMCA Notice and Takedown process is widely used because it is wildly effective. Copyright owners know they don't have to go to court to protect their rights. Send a takedown notice and the video goes away. Few people targeted by a takedown notice ever file a counter-notification, for a range of reasons: among others, maybe they don't understand the process, or maybe they're worried about facing a lawsuit.

The Lenz decision may give pause to some copyright holders thinking about shooting off a takedown request. But it probably won't stop many of them. The "subjective belief" bar set by Judge Tallman doesn't seem that high. Fair use, being the fluid concept that it is, is very fact specific. A copyright owner who creates a plan for some substantive review of a video before filing a Notice and Takedown request – including documentation of the thought process leading to the final decision – seems pretty likely to meet Tallman's standard in most of the cases.

On the other hand, this should weed out the truly frivolous takedown notices. The ones, for instance, that are used to remove embarrassing material from the Internet, even where no copyright infringement applies – like when the subject of a video, who holds no copyright ownership, files a Notice and Takedown request despite having no legal right to do so. Or where the DMCA is used to attack trademark violations, which technically aren't covered under the Digital Millennium ***Copyright*** Act.

And, of course, the Ninth Circuit's decision may prove no more than temporary precedent. After all, I don't see either side giving up after eight years in court. Not when there's still the possibility of rehearing *en banc* and then filing a Petition for Certiorari with the Supreme Court. Imagine, by the time the Supreme Court actually takes the case, Holden Lenz might actually be old enough to argue it himself...

(Continued from page 1)

Section 333 Exemption, Airworthiness Certificate and COA. Historically, commercial drone operators had to apply for, and obtain, two different certificates from the FAA: an Airworthiness Certificate and a COA. The FAA's new and improved 333 Exemption process, a temporary process put in place until the agency issues permanent rules, expedites things by allowing would-be drone operators to obtain both certificates through a single process. The process essentially requires filing paperwork to show that a UAS is "airworthy" and that its proposed operation will otherwise satisfy the FAA's temporary rules.

With respect to airworthiness, note that while 333 Exemptions are issued to operators and not manufacturers, showing that the particular drone model that you happen to own has already been determined to be "airworthy" in other situations will help get you your authority faster. (Alternatively, a drone operator may still separately seek a formal "airworthiness certification" in one of three categories, but that could take a year to process.)

In recent months, the process has taken four to six months from initial petition to issuance of the COA.

On the operational side, an applicant for a 333 Exemption must describe in some detail the nature of its proposed operations, including the nature of the equipment to be used, the manner in which and the area in which it will be used, and the RF spectrum on which the drone controls and any related on-board gear (*e.g.*, cameras) will operate consistently with FCC requirements. It must also include the qualifications of the Pilot in Command (PIC) who will be responsible for the drone's operation. You can find a more detailed listing of the requirements for an exemption, as well as the process for getting your exemption petition filed, here.

A successful 333 Exemption petition will result in the issuance of a "blanket" COA that will permit you to operate your drone essentially nationwide (with some exceptions). Blanket COAs generally limit drone operation to no higher than 200 feet above ground level during daylight only, with drone weight of less than 55 pounds. Operation pursuant to a blanket COA is prohibited within certain distances of airports/heliports, otherwise restricted airspace and certain densely populated areas.

333 Exemptions also require that the PIC controlling the drone maintain visual line of site (VLOS) of the drone at all times, unaided by any device other than corrective lenses. No, you can't operate a drone from a moving vehicle, so you won't be able to maintain VLOS by following your drone around in a car. And no drone-flying over (or within 500 feet of) "nonparticipating" persons unless those persons (a) are protected by adequate barriers or structures or (b) have given their consent and the operation doesn't constitute an undue hazard to them.

(Pretty much any of those conditions would put the kibosh on the drone filing service we here at the *Memo to Clients* were contemplating. At 18 stories, our building is just around the 200 foot limit, so the roof-top is probably not a good launch point. While the FCC is less than three miles away from our bunker as the drone flies (according to Google, at least), and while we can make out the Portals from our roof-top patio on a clear day, it's doubtful that we could maintain the necessary VLOS. Also, our anticipated flight path would pass over sidewalks, streets, a river full of boaters and a Mall full of tourists, all of whom would be "nonparticipating" as far as the FAA is concerned. And let's not forget that we'd have to fly through a Reagan National Airport approach path and right past the White House, *i.e.*, areas where the Feds strongly discourage *any* drone use.)

If you want to fly in any of the no-fly areas not covered by the blanket COA, or if you want to operate beyond any of the other parameters specified in the blanket COA, you'll have to file separately for a stand-alone COA – but you'll still have to get a 333 Exemption first.

How long does it take to get a 333 Exemption? The FAA has sped up its 333 Exemption process significantly since first issuing them in 2014, and now has issued more than a thousand 333 Exemptions. It appears that, in recent months, the process has taken four to six months from initial petition to issuance of the COA. (You can find copies of all of those at this FAA website page.)

Authorized Pilot. While Congress has afforded the FAA some flexibility in the issuance of 333 Exemptions and COAs, it has not done so with regard to airman certification standards. As a result, individuals operating commercial drones in the National Airspace System must have an FAA Airman Certificate (though the FAA relaxed initial requirements and now allows those with sport or recreation pilot certificates to fly UAS). We understand that some available services provide qualified pilots for short-term hires.

A Registered Drone. In addition to the formal 333 Exemption, operators must also separately register their drone(s) with the FAA. Registration is accom-

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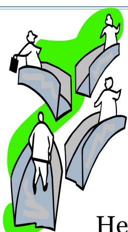
plished by submission to the FAA of an original (no computer-generated copies, please) AC Form 8050-1 and a plethora of other information. More paperwork, to be sure, but kudos to the FAA for charging only $5 for this process, a bargain compared to FCC filing fees which can run in the hundreds (or even thousands) of dollars.

Bear in mind that the 333 Exemption process is, in theory, in place only temporarily, until the FAA finalizes its anticipated UAS regs. So will those regs make drone authorization and operation any easier?

At this point, many are doubtful. While the proposed rules would eliminate the airworthiness certification requirements and make obtaining an airman's certificate for UAS operations easier, they also include a number of the limitations on commercial drone use that are currently in place. These include prohibitions on: flying at night; flying over people not associated with your project; and flying where the pilot lacks VLOS of the drone. This limits much of what the burgeoning industry wants to do, and what is being done in other countries, *e.g.*, delivering not just Amazon packages, but prescription medicines and medical equipment to rural areas; conducting search and rescue missions and sending drones out to obtain a better understand the state of a wildfire; inspecting pipelines and critical infrastructure like railroad lines and cellular towers; and precision agriculture.

Key industry players are pushing the FAA to allow for highly automated, non-visual line of sight operations (after all, our Defense Department is not shy about using these technologies overseas), but at this point the FAA does not appear open to the idea. So plans for a "drone superhighway" (Amazon has proposed low altitude – *i.e.* 200-400 feet – "transit pathways," with a "no fly zone" in 400-500 feet AGL to provide a protective space between drones and aircraft) and a drone air traffic control system (NASA is busy at work on this) are a bit premature. The FAA will have to be confident that drones operating in the superhighway could detect, communicate with, and avoid other drones, and generally be able to "see and avoid" and otherwise retain control while being operated from a distance. This will take time.

For now, then, if you want to use your drone for your business – such as newsgathering – it would probably be a good idea to get a 333 Exemption petition on file. Despite Congress's direction that the FAA's new rules be in place this month, a number of observers are estimating that those rules won't be ready until late 2016 or even 2017. If you apply for a 333 Exemption now, you'd be likely to be in operation by early 2016. Let us know if we can help in the process.



FHH - On the Job, On the Go

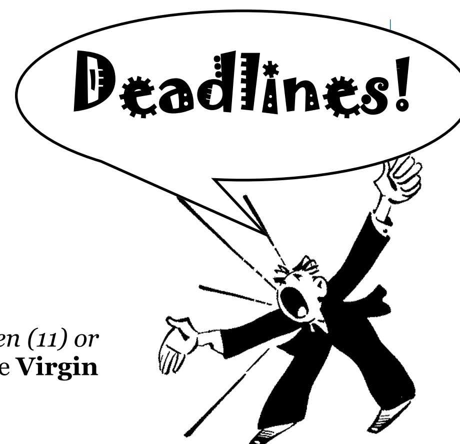
Hello, Hartsfield! If you're at the NAB Radio Show in Atlanta, be on the lookout for Team FHH. This year our Atlanta-bound contingent includes both **Franks** (**Jazzo** and **Montero**), **Scott Johnson**, **Dan Kirkpatrick**, **Susan Marshall**, **Harry Martin** and **Matt McCormick. Frank M** will also be attending the NASBA gathering there.

Hello, Just About Any Other Airport in the World! Not content with domestic travel, **Kevin Goldberg** will be heading to Norway (Lillehammer, to be precise) on October 10 to appear on a panel (title: "FOIAs, RTIs and Access to Information") at the Global Investigative Journalism Conference. Then it's back to the U.S. of A. – sunny Palo Alto – for two appearances at the ASNE-APME #Editors3d Conference: on October 17 **Kevin** will be participating in a live Q&A ("Coffee with Your Counsel") and the next day he'll be making a presentation on "5 Cardinal Sins and 5 Legal Issues to Bear in Mind".

Not to be outdone, **Kathy Kleiman** will be winging her way to the ICANN meeting in Dublin. She'll be there from October 16-22 and would love to get together if you're in town.

On October 13, **Frank J** will be attending the Rockefeller College Advisory Board meeting in New York City.

Meanwhile, the ol' perfessor, **Frank M,** will be giving a lecture at the University of Maryland School of Journalism on October 19. He'll be speaking about drafting and negotiating employment agreements with and for media organizations. Then he'll head up the coast to NYC for the Hispanic TV Summit on October 22. (**Frank** assures us that, notwithstanding his usual jam-packed travel schedule, he will continue his aggressive lobbying efforts in support of an FM translator filing window reserved for AM licensees. Anyone who has been reading the trades lately should by now be aware of **Frank**'s efforts on that front.)



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 **Alaska**, **American Samoa**, **Florida**, **Guam**, **Hawaii**, **Mariana Islands**, **Oregon**, **Puerto Rico**, the **Virgin 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 sta-

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tion'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.

December 1, 2015

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

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

EEO Public File Reports – All *radio* and *television* stations *with five (5) or more full-time employees* and located in **Alabama**, **Colorado**, **Connecticut**, **Georgia**, **Maine**, **Massachusetts**, **Minnesota**, **Montana**, **New Hampshire**, **North Dakota**, **Rhode Island**, **South Dakota** and **Vermont** must place EEO Public File Reports in their public inspection files. 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 **Colorado**, **Minnesota**, **Montana**, **North Dakota** and **South Dakota** must file a biennial Ownership Report (FCC Form 323-E). All reports must be filed electronically.

Noncommercial Radio Ownership Reports – All *noncommercial radio* stations located in **Alabama**, **Connecticut**, **Georgia**, **Maine**, **Massachusetts**, **New Hampshire**, **Rhode Island** and **Vermont** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323-E.

December 2, 2015

Biennial Ownership Reports – All *licensees* and *entities holding an attributable interest* in a licensee of one or more *commercial AM, FM, TV, Class A television, and/or LPTV stations* must file a biennial ownership report on the FCC Form 323. This requirement applies to all licensee entities, including corporations and LLC's, as well as sole proprietorships and partnerships composed entirely of natural persons. All reports must be filed electronically. The Ownership Report must reflect information as of October 1, 2015. For this purpose, all Class A TV and LPTV stations are considered to be commercial stations.

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sees "should timely label expired contest terms to make clear that a contest has ended, including the date that a winner was selected".

Mid-contest Changes in Rules. The Commission recognizes that, in some rare circumstances beyond the licensee's anticipation or control, a broadcaster might have to make some "limited" changes to a contest's material terms in the middle of the contest. When that happens, if the licensee is posting the contest rules online, it must revise the online version to reflect the change ***and***, within 24 hours of the change (and periodically thereafter), announce on the air that the rules have been changed. Such announcements must direct the audience to the website reflecting the changes. To help avoid confusion, the Commission suggests that online rules be labeled to reflect the dates of any updates. (In its discussion of mid-contest rules changes, the Commission observes – unnecessarily, we hope – that stations cannot in any event alter contest rules "unfairly or deceptively".)

Consistency of Contest Terms. Not surprisingly, and not unreasonably, the revised contest rule requires that any on-air disclosure of a contest's material term(s) be consistent with the online version of the rules. The Commission is obviously serious on this point: it declares that a "failure to disseminate consistent information about a contest" will be deemed a failure to (a) accurately disclose material contest terms, (b) conduct contests as announced, and (c) avoid false, misleading, or deceptive contest descriptions. And don't think ambiguity will get you off the hook. If any ambiguous language in contest disclosures gives rise to inconsistencies, the Commission will "construe such ambiguities against the licensee".

Before it can take effect, the new rule must be run past the Office of Management and Budget thanks to the hilariously-named Paperwork Reduction Act. Once that's been taken care of, the FCC will let us know the effective date through a notice in the Federal Register. Check back with CommLawBlog.com for updates. (Our best guess is that the official effective date is probably at least five-six months off, but you never know.)

Four of the five Commissioners felt compelled to pat themselves on the back for taking this step. We salute them for finally getting to this point, although we do wonder what took them so long. And now that they have, again, embraced the indisputable notion that the public does indeed routinely look to the Internet as a principal source of information, we also wonder when the Commission will revise its EEO rules along the same lines. As we have previously reported, the Commission has historically fined stations for advertising job openings solely or primarily on the Internet, rather than through other, more old-fashioned, means. With the adoption of online "local" public inspection files for television stations and, now, online publication of contest rules, the FCC has repeatedly confirmed its recognition that the Internet is a primary, if not *the*, go-to source of information. It doesn't seem to make sense that broadcasters aren't permitted to rely on it for EEO purposes as well.

We salute the Commissioners for finally getting to this point, but we do wonder what took them so long.

And finally, we have a couple of minor quibbles with the separate statement of Commissioner Pai – a Commissioner who, as we have previously observed, seems to be the kind of dude who doesn't roll on Shabbos. First, he says that he "proposed that the Commission modernize the Contest Rule" back in 2013. Perhaps, but credit where credit's due: Entercom had beaten him to the punch about a year and a half earlier.

And second, he opens his statement with a reference to an episode of *Saved by the Bell*. As always, Commission Pai deserves major props for such cultural allusions, but we think there is a more apt one here – the classic episode from *WKRP in Cincinnati* titled "The Contest That Nobody Could Win". But maybe that's just our age showing.

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And complaint *resolution* is more important here than mere complaint *status*. After all, while the Commission is cutting back on Field Offices and field personnel, it's simultaneously encouraging spectrum sharing, a concept that brings with it (among other things) the dramatically increased potential for unintended, unexpected interference. And what about radio piracy? Many fear that pirates will become more of a problem to licensed broadcasters in the wake of the Field Office closures. Common sense would suggest that the fewer the agents, the greater will be the opportunity for outlaws.

With these serious substantive concerns on the table, the announcement of a complaint process that appears to provide no assurance of prompt complaint resolution rings a bit hollow. Whether the new process will prove to be anything more than a cosmetic step that creates the illusion – but not the reality – of actual responsiveness remains to be seen.

[*Editor's Note: The Commission order reducing the number of Field Offices has made it into the Federal Register and is now in effect.*]