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# Memorandum to Clients

July 2017 No. 17-07


## One-Week FM Translator Filing Window for Class C and D AM Stations Opens July 26

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The long-awaited filing window for certain Class C and D AM stations to apply for new FM translators will open at **12:01 a.m. EDT on July 26, 2017**, and will close at **5:59 p.m. EDT (not at 11:59 p.m.) on August 2, 2017**.

A second window for eligible Class A and B AM stations (and for eligible Class C and D stations that for some reason do not file in the window just announced) will open at a later date.

The FM translator filing window is in essence an FCC auction. Indeed, it has been designated as "FCC Auction 99." That means most of the FCC's auction rules will apply to the process.

On June 6, 2017, the FCC released a detailed Public Notice announcing filing instructions for the "Cross-Service FM Translator Auction Filing Window for AM Broadcasters." (AU Docket No. 17-143, DA 17-533). The Commission also announced that between July 19th and the close of the filing window on August 2nd, there will be a temporary freeze on the acceptance of any FM translator minor change applications, Low Power FM minor change applications, and FM booster construction permit applications. The Media Bureau will dismiss any applications filed during the freeze.

Here's a brief summary of the June 6th Public Notice, as well as other requirements and restrictions relevant to this filing window.

***Inside this issue . . .***



### *Eligibility and Scope*

Only Class C and D AM stations that (1) did *not* apply for a cross-service FM translator during the 2016 modification windows (*i.e.*, the windows that allowed an applicant to move an FM translator up to 250 miles in order to be used to rebroadcast an AM station) and (2) were *not* listed as the primary station in an application filed during the 2016 modification windows are eligible to submit cross-service FM translator applications during this filing window. Eligible applicants may propose *only* one cross-service FM translator for *each* primary AM station to be rebroadcast. A Class C or D station that acquired one or more FM translators other than through the 2016 modification windows may file in this window. But the 60 dBu contour of the new translator must not overlap 50% or more of the 60 dBu contour of another translator rebroadcasting the same AM station.

*(Continued on page 2)*


***One Week FM Translator Filing Window*** — *(Continued from page 1)*

Any FM translator acquired in the filing window may only rebroadcast the AM station identified as its primary station on the applicant's FCC Form 349 Tech Box. Authorizations for new cross-service FM translators may only be reassigned in conjunction with the commonly-owned primary AM station that it rebroadcasts. In other words, an FM translator acquired through this window will be married forever to the AM station specified in the application, not just for four years as is the case for a translator relocated pursuant to a 2016 modification window application or a *Mattoon* waiver.

An applicant may designate *any* available non-reserved FM channel (*i.e.*, 92.1 MHz to 107.9 MHz) for its proposed cross-service FM translator. An applicant, however, may not propose a channel in the reserved portion of the FM band (*i.e.*, 88.1 MHz to 91.9 MHz).

***Cross-Service FM Translator Application Filing Instructions***

In order to apply for a new cross-service FM translator, eligible applicants must file a separate FCC Form 349 Tech Box for each *proposed facility*, and a single FCC Form 175 for each *eligible applicant*.

**FCC Form 349 Tech Box**

Applicants are required to complete only Section I, Section III-A's Tech Box, and the Section VI Certification of the FCC Form 349. Engineering information provided in the FCC Form 349 Tech Box will be used to determine which applications filed during the window are mutually exclusive.

**Short-Form Auction Application (FCC Form 175)**

Only *one* FCC Form 175 may be filed for *each eligible applicant* – regardless of the number of cross-service FM translators that a particular applicant files. The FCC Forms 175 filed during this window are subject to the following requirements and restrictions:

*Authorized Bidders*. An applicant must designate at least *one* authorized bidder, and no more than three authorized bidders, in its FCC Form 175. The same individual may *not* be listed as an authorized bidder in more than one FCC Form 175 by any applicant.

*Disclosure of Agreements*. An applicant must disclose any partnerships, joint ventures, consortia, or agreements or understandings of any kind relating to the applied-for cross-service FM translator in its FCC Form 175. An applicant must certify under penalty of perjury the accuracy and completeness of such disclosures, and that the applicant and any party that controls or is controlled by the applicant has not entered into and will not enter into any joint bidding arrangement with any other auction applicants – subject to the exceptions provided in Section 1.2105(a) of the Commission's Rules.

*Ownership Disclosures*. An applicant must fully disclose information on the real party or parties-in-interest as well as the applicant's ownership structure in its FCC Form 175.

*New Entrant Bidding Credit*. In this filing window, an applicant's attributable interests and maximum new entrant bidding credit eligibility are determined as of August 2, 2017. Events occurring after the August 2nd filing deadline that would diminish or extinguish an applicant's bidding credit, such as purchase of another station, must be reported to the Commission.

*(Continued on page 3)*

***One Week FM Translator Filing Window*** — *(Continued from page 2)*

*Red Light Status*. An applicant is required to certify under penalty of perjury in its FCC Form 175 whether it is a current or a former defaulter or is currently or formerly delinquent on any debts related to FCC construction permits or licenses, or non-tax debts owed to any federal agency. **If as of August 2nd, an applicant is flagged as having a "Red Light" in the FCC's Red Light Display System for an unpaid debt (*e.g.*, past due Regulatory Fees), its application will be dismissed.** An applicant that is a *former* defaulter or delinquent that has remedied all such defaults and cured all of the outstanding non-tax delinquencies prior to the August 2nd filing deadline *may* file an application for a cross-service FM translator. If it winds up that the applicant will have to go through an actual auction to secure the construction permit it has applied for, the applicant will need to make an upfront payment of at least 50% higher than other applicants.

*Noncommercial Educational Status Election*. An application identifying a proposed cross-service FM translator as a *noncommercial educational* ("NCE") station that winds up being *mutually exclusive* with any application filed during the window for a *commercial station* will be rejected by the Commission. Accordingly, the Commission cautions each applicant to consider carefully whether to file as an NCE applicant. The NCE election *cannot* be reversed after the August 2nd filing deadline.

***Prohibition on Communications by Auction Applicants***

The stringent prohibitions on certain communications found in the FCC's auction rules apply to the cross-service FM translator filing windows. Among other restrictions, applicants are prohibited from cooperating, collaborating, or communicating with other applicants regarding bids or bidding strategies, or discussing or negotiating settlement agreements until a special settlement window – discussed below – opens.

***Application Processing***

**Mutually and Non-Mutually Exclusive Applications.**

The Media Bureau will review all FCC Form 349 filings to determine which FM translator proposals are mutually exclusive, and will release a public notice listing the groups of FM translator proposals found to be mutually exclusive with one another.

Mutual exclusivity among FM translator proposals may be resolved through settlement and/or "minor change" technical amendments. The Commission will announce a "settlement window" during which the prohibited communications rule will be suspended for the purpose of resolving mutual exclusivity conflicts. **Settlement discussions between conflicting applicants may not begin until the settlement window opens.** Technical amendments to resolve mutual exclusivity – and all other application amendments – may not be filed until the release of the public notice listing the FM translator proposals that are mutually exclusive. If a group of mutually exclusive applicants cannot resolve their conflict through settlement negotiations and/or technical amendments, the matter will be resolved through the FCC's competitive bidding procedures at a later date.

*(Continued on page 4)*

***One Week FM Translator Filing Window —*** *(Continued from page 3)*

An AM station whose FM translator proposal is not mutually exclusive with any other proposal filed during the window will be directed to submit a complete FCC Form 349, and pay the FCC's $805 filing fee.

**FCC Form 175 Amendments.**

Following the August 2nd filing deadline, applicants for cross-service FM translators may make only minor modifications to their FCC Form 175 auction applications. Permissible minor modifications include: (1) deletion or addition of up to three authorized bidders; (2) revisions to an applicant's contact information; and (3) changes to an applicant's selected bidding option (telephone or electronic).

The FCC auction process can be complex, and the answers to questions are not necessarily intuitive. We are ready to guide you through Auction 99.

## See You Later, Local Correspondence File!

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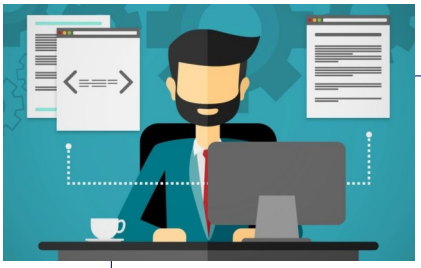
As Egon said in Ghosbusters, "print is dead." Okay, that may be a bit of an overstatement. But at least as to many broadcast stations' local public inspection files, it is essentially true as of today. Back in January, the FCC voted to do away with the requirement that commercial broadcast stations retain in their public inspection files copies of letters and e-mails from the public concerning their stations' operations. Because it dealt with a paperwork collection, however, the change could not go into effect until it received the approval of Office of Management and Budget (OMB). The FCC announced on June 29th that the OMB has signed off the proposal and, as a result, the rule changes adopted in January (which also included elimination of the requirement that cable operators include headend locations in their public files) are in effect as of ***June 29, 2017***.

Since the advent of the online public inspection file, this type of local correspondence had been the only thing broadcasters were still required to maintain in their physical public inspection file (due to privacy concerns, these documents were never included in the online public file). With this elimination of the correspondence requirement, at least for broadcasters who have transitioned to the online public file system, there is no longer any need to maintain a hard copy public file at their main studios (which may themselves not be required for much longer). In addition, the FCC clarified today that, pending additional OMB approval, commercial television licensees will no longer need to file a summary of comments received regarding violent programming as part of their license renewal applications.



***Registered agent contact information must be ELECTRONICALLY filed with the Copyright Office by December 31, 2017***

# Countdown Clock Ticking on Digital Millennium Copyright Act Designated Agent Registrations

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How much is peace of mind worth to you? Does $6.00 and less than an hour of your time sound about right? What if I told you that this alone would significantly reduce the likelihood that you will be sued for copyright infringement during the following three years?

I bet that last part got your attention, didn't it? Act fast – this great offer is only available for a limited time! Actually, that's not entirely true: you can (and should) act after December 31. But you expose yourself to monetary liability for copyright infringement after Baby New Year 2018 makes his or her appearance.

What we're talking about here is the need to register a "Designated Agent" with the United States Copyright Office in order to take advantage of certain safe harbor provisions of Section 512 of the Digital Millennium Copyright Act (DMCA). We've written about DMCA Section 512 many times in the past. If you haven't been following along, I strongly suggest that you at least read the most recent post explaining Section 512 in the context of a Copyright Office proceeding evaluating the future of this law (come for the legal explanation; stay for the multiple Prince references!).

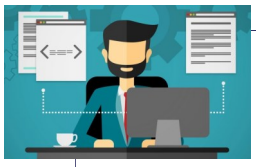
If you did the background reading, you'll know that Section 512's safe harbors protects online service providers from copyright infringement damages claims arising from certain actions that those service providers take regarding content published by third parties. For example, if you have a website and you allow others to post to your site (*e.g.*, comments to the stories you publish), following the requirements of Section 512 ensures that you will not be on the hook for copyright infringement damages arising from certain unauthorized uses of that third party content. Those requirements include (but are not limited to):

1. Designating a copyright agent, often referred to as the "DMCA Agent";

2. Adopting a copyright infringement policy that provides your DMCA Agent's contact information and your policies regarding copyright infringement – specifically, how you will deal with repeat infringers; and

3. Properly dealing with a Takedown Notice when received by your DMCA Agent.

*(Continued on page 6)*



***Digital Millennium Copyright Act*** — *(Continued from page 5)*

We have discussed numbers 2 and 3 in great detail in the past (both in the above-referenced posts and in presentations at various conferences and events; I even started explaining it once at a cocktail party, which pretty much cleared the room).

The changes we're discussing here, which require action by December 31, are relevant to # 1 – *i.e.*, designation of a DMCA Agent, or, more specifically, changes to the process of registering that DMCA Agent with the Copyright Office.

It has always been required that you:

1. Provide the contact information for your DMCA agent on your website (we generally suggest putting this, along with your copyright infringement policy, in your website Terms of Use and highlighting it on its own page); AND

2. File that same information with the Copyright Office.

That used to be enough to just file your DMCA agent's contact information with the Copyright Office (which maintained a current directory of all DMCA agents here) and only update that information upon a change in the DMCA agent.

Late last year, the Copyright Office announced that all DMCA agent information would have to be submitted via a new Copyright Office online registration system and, further, that the DMCA Agent information would have to be updated every three years. All entities seeking the safe harbor protection must comply, even those who already had DMCA agent information on file. As the Copyright Office states on its "DMCA Designated Agent Directory" landing page: ***Any designation not made through the online registration system will expire and become invalid after December 31, 2017.***

The clock is ticking. But the good news is that the registration process is incredibly simple. Leading by example, I've already completed the online registration process for Commlaw-blog and for two other entities and can confirm that it took mere minutes. And, as I mentioned, the filing fee is only $6.00.

You can access the registration form here. The Copyright Office has also been kind enough to provide answers to some Frequently Asked Questions as well.

And, of course, we are here to help as always. You can contact Kevin Goldberg or Karyn Ablin if you have questions.


*New procedures require all filers to register in the FCC's updated CORES system*

# FCC Releases Instructions for Registering for the 2017 EAS Test Reporting System

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On June 26, 2017, the Public Safety and Homeland Security Bureau (PSHSB) of the Federal Communications Commission released instructions for Emergency Alert System (EAS) Participants for registration for access to the 2017 EAS Test Reporting System (ETRS). The PSHSB also stated in its Public Notice that it will release a further notice in July announcing the opening of the 2017 ETRS, and the date by which EAS Participants must file their EAS reporting data.

The Commission launched the ETRS in 2016 as an improved and mandatory version of the voluntary electronic test reporting system implemented by the FCC in 2011 for the first nationwide EAS test. The EAS is a nationwide emergency communications systems allowing the President of the United States to provide immediate information to the general public during events of national emergency. The ETRS was used successfully again for the second national EAS test conducted last fall. However, based on participant's experience with that test, the FCC has mandated that filers using the 2017 ETRS must use a single account for filing their EAS reporting data based on multiple FCC Registration Numbers (FRNs).

Pursuant to Section 11.2(d) of the Commission's Rules, EAS Participants include: analog radio and television stations, and wired and wireless cable television systems, DBS, DTV, SDARS, digital cable and DAB, and wireline video systems. EAS Participants that are silent pursuant to a grant of Special Temporary Authority are also required to file in the ETRS. In order to file in the 2017 ETRS, EAS Participants must ensure that they create an FCC Username within the FCC's updated Commission Registration System (CORES), and associate all FRNs assigned to the participant and its reporting subsidiaries to its FCC Username.

As the PSHSB will be announcing the date of the upcoming 2017 ETRS later this month, all EAS Participants should register in CORES as soon as possible in order to ensure that they will be able to complete and file their required 2017 ETRS filings. While television station licensees have had to use the new CORES procedures for incentive auction-related filings, we recommend that other filers who have not used the system take some time to familiarize themselves with it in advance.

Should you have any questions regarding your filing responsibilities for the 2017 ETRS, please do not hesitate to contact Dan Kirkpatrick at kirkpatrick@fhhlaw.com or Keenan Adamchak at adamchak@fhhlaw.com.

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# Sinclair-Tribune Merger Open for Comments

*FHH Law*

As has been widely reported, Sinclair Broadcast Group reached a $3.9 Billion cash and stock agreement in May with Tribune Media Company. The agreement calls for Sinclair to acquire Tribune Media and its 42 broadcast television stations, among other media assets. Just before the July 4 holiday, the companies filed a series of transfer of control applications with the FCC seeking approval for the transaction. As has become customary with other large broadcast transactions, the Media Bureau has released a Public Notice establishing a docket for the proceeding, announcing the dates by which oppositions and comments on the applications must be filed, and according "permit-but-disclose" *ex parte* status to the proceeding.

In addition to announcing deadlines, the Public Notice also briefly describes a few of the issues presented by the applications which are certain to be the subject of any number of oppositions and comments. As described in the Public Notice, the proposed transaction would not, absent waivers, rule changes, or divestitures, comply with the local television ownership rules in ten markets in which Sinclair already owns stations. In an eleventh market, Sinclair would, due to the "top 4" prohibition in the local ownership rules, be unable to acquire a duopoly which Tribune currently operates in compliance with the rules. In addition to the local ownership issues in these markets, the applications also request continuation of satellite waivers in two markets and failing stations waivers in two other markets.

In addition to the local ownership issues, the proposed acquisitions also would put Sinclair over the current 39% national ownership cap, even after application of the recently–reinstated UHF discount. Because Tribune's ownership has been focused on larger markets, while Sinclair has focused on smaller to mid-size markets, difficulties with the national ownership cap were perhaps inevitable in this transaction. Indeed, the merger would give Sinclair its first stations in each of the top 5 national television markets (including a VHF in New York).

For both the local television ownership and national ownership cap limits, the transfer of control applications do not request waiver, but instead promise to "take actions" to the extent required to obtain FCC approval. Perhaps anticipating relaxation of the ownership rules in the near future, however, the applicants note that they may file amendments to the applications in the event changes to the local or national ownership rules are proposed or adopted.

Due to the high profile of this transaction, the issues it raises under the local and national television ownership rules, and political controversies surrounding Sinclair, it is almost certain that a large number of comments will be filed regarding the transaction. Petitions to Deny the applications, which require the filer to have specific legal standing to challenge the transaction (*e.g.*, local viewers or competitors in the affected markets), are due to be filed by no later than **August 7, 2017**. Oppositions from parties who do not satisfy the standard for Petitions to Deny are due by **August 22, 2017**. Finally, replies to Petitions to Deny and Oppositions are due by **August 29, 2017**. All pleadings are to be filed in newly established Media Bureau docket number 17-179.

# Slants Supreme Court Case Slays Ban on Registration of Disparaging Trademarks

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I am officially a big fan of The Slants. I've never seen them in concert. I don't own any of their albums (I've never even downloaded any of their individual songs). I'm actually still not entirely sure what "Chinatown Dance Rock" really is.

But I will forever be indebted to Simon Shiao Tam and crew. In the context of trying to "reclaim" the term "slant" by incorporating it into their band name, The Slants have restored – or at least solidified – significant aspects of the First Amendment. They took their fight against the "disparagement clause" of the Lanham Act (15 U.S.C. § 1052(a)), which prohibits the registration of trademarks that may "disparage…or…bring into contemp[t] or disrepute" any "persons, living or dead," to the Supreme Court; the resulting decision strikes that law as facially unconstitutional.

I've written about this particular case (and other related lawsuits involving the disparagement clause brought by parties that I'm not as enamored of) a few times in the past, so only a brief summary of the facts is necessary here.

Let's start with the origin of the band's name. I can't do the story justice, so I'll leave it to a real Justice, Samuel Alito:

Simon Tam is the lead singer of "The Slants." He chose this moniker in order to "reclaim" and "take ownership" of stereotypes about people of Asian ethnicity. The group "draws inspiration for its lyrics from childhood slurs and mocking nursery rhymes" and has given its albums names such as "The Yellow Album" and "Slanted Eyes, Slanted Hearts." (citations omitted).

Tam filed an application with the United States Patent and Trademark Office (USPTO) to register "The Slants" as a federal trademark. A USPTO examining attorney rejected the application because "there is . . . a substantial composite of persons who find the term in the applied for mark offensive." Attempts to overturn that ruling at the USPTO and the Trademark Trial and Appeal Board (TTAB) were unsuccessful.

Tam had better luck in federal court, where the United States Court of Appeals for the Federal Circuit found the disparagement clause to be facially unconstitutional under the First Amendment, mainly because rejecting disparaging marks while allowing registration of similar, but non-disparaging, marks constitutes "viewpoint discrimination" against certain speech. The government asked the Supreme Court to review the lower court decision. The Supreme Court granted certiorari and heard oral argument on January 18, 2017.

Unfortunately, I was out of town and couldn't attend the oral argument, which prevented me from offering my usual prediction as "The Supreme Court Swami." I can assure you, however, that I would have foreseen the June 19, 2017 decision in favor of The Slants in *Matal v. Tam* which would be written by Justice Alito, speaking for a unanimous court on the key issues, and for only a portion on others. Because, really, who *wouldn't* have seen that coming…

*(Continued on page 10)*

***Supreme Court Slays Ban*** — *(Continued from page 9)*

It's probably easiest to explain the Court's opinion and the separately written opinions in their component parts, after which I'll offer a few thoughts on the importance of this case in the greater scheme of things.

Since you can't tell the players without a scorecard, here's a little chart which may make it easier to follow along. The trademark symbol (®) means the Justice in question joined in Justice Alito's written opinion with regard to that section:

| | I | II | III-A | III-B | III-C | IV |
|---|---|---|---|---|---|---|
| **Roberts** | ® | ® | ® | ® | ® | ® |
| **Kennedy** | ® | ® | ® | | | |
| **Thomas** | ® | | ® | ® | ® | ® |
| **Ginsburg** | ® | ® | ® | | | |
| **Breyer** | ® | ® | ® | ® | ® | ® |
| **Alito** | ® | ® | ® | ® | ® | ® |
| **Sotomayor** | ® | ® | ® | | | |
| **Kagan** | ® | ® | ® | | | |
| **Gorsuch** | N/A | N/A | N/A | N/A | N/A | N/A |

(The "N/A" for Justice Gorsuch is because he didn't participate in the case, which was argued before he joined the Court).

Justice Kennedy wrote a concurrence in which he was joined by Justices Ginsburg, Kagan and Sotomayor. I'll explain that concurring opinion, and Justice Thomas' separate opinion, after I go through Justice Alito's work on a section-by-section basis:

**Section 1 (unanimous)**: This is just the basic factual background of the case; it's not really worth discussing in detail here.

**Section II (all except Justice Thomas)**: The Court rejects the argument that it *could* decide this case on narrower, non-constitutional grounds. Tam had argued that the disparagement clause does not apply to trademarks that disparage racial or ethnic groups and instead only prohibits the registration of marks that disparage individual "persons." He presumably advanced this argument as a hedge against the idea that the Court does not like issuing wide-sweeping constitutional proclamations unless absolutely necessary, offering the Justices an "out" to rule in his favor without striking down a decades-old federal statute.

Justice Alito rejected Tam's argument, in part because Tam had never raised this before the USPTO or in lower courts (in fact, the Court declined to grant certiorari on the issue when it took the case). Alito nonetheless spoke briefly to this question to note that a mark which disparages a substantial percentage of the members of a racial or ethnic group necessarily dispar-

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***Supreme Court Slays Ban*** *— (Continued from page 10)*

ages the individual persons within that group. So Tam loses this battle but, as we already know, wins the war.

**Section III-A (unanimous)**: We get to the meat of the decision. The Court holds that the USPTO is not engaged in "government speech" (which the government can regulate as it sees fit) when it issues trademark registrations. Among the key reasons supporting this conclusion:

The federal government itself does not invent – or even edit – the marks being registered;

If the federal registration of a trademark were government speech, the government would be "babbling prodigiously and incoherently." Justice Alito provides several examples of trademark registrations issued by the USPTO which provide directly contradictory messages (comparing "Abolish Abortion" with "I Stand with Planned Parenthood" as well as issuing both "Global Warming is Good" and "A Solution to Global Warming").

The USPTO has made it clear that its registration of a mark does not mean it approves of the mark.

A comparative example for this section also proves helpful: "[i]f federal registration makes a trademark government speech and thus eliminates all First Amendment protection, would the registration of the copyright for a book produce a similar transformation?" The danger of such a result should be apparent to just about anyone.

**Section III-B (Alito, Roberts, Thomas and Breyer)**: Having unanimously held that "[t]rademarks are private, not government, speech," Justice Alito moves to the government's next argument: that the government can regulate this speech because it is "government subsidized speech."

Justices Kennedy, Ginsburg, Sotomayor and Kagan generally agree with the rejection of this theory, but not Justice Alito's specific rationale — that the USPTO does not spend its own (or any government) money to parties seeking registration of a trademark. Thus, Justice Alito disputed the comparison to instances in which the government could legally take a position on one side of an issue (such as providing money for family planning services, providing grants to artists under the NEA or funding public libraries).

**Section III-C (Alito, Roberts, Thomas and Breyer)**: Justices Kennedy, Ginsburg, Sotomayor and Kagan again agreed in theory, but not exact rationale, with the other four Justices on the issue of whether federal trademark registrations are a "government program." Justice Alito states that the government's argument here is really nothing more than an attempt to merge the arguments put forth in support of trademark registrations being government speech and/or government subsidies.

**Section IV (Alito, Roberts, Thomas and Breyer)**: The government throws up one last hail mary (pun intended for reasons I shouldn't have to go into related to names I won't mention) to save the disparagement clause from being crushed under the weight of its viewpoint discrimination: that a trademark registration constitutes "commercial speech" and is therefore eligible for less protection under the First Amendment. Again, this part of the decision is lim-

*(Continued on page 12)*

***Supreme Court Slays Ban*** — *(Continued from page 11)*

ited to the "four amigos" (though I'm sure this combination of Justices has never before been referenced as such).

Justice Alito doesn't even touch the question of whether a trademark is commercial speech, in part because the trademark in this case shows that the commercial speech/expressive speech line is a really hard one to draw, but mainly because even if this were commercial speech, the government's clear (and clearly unconstitutional) viewpoint discrimination goes way too far.

Justice Kennedy's concurrence (joined by Justices Ginsburg, Kagan and Sotomayor) explains why the disparagement clause is so clearly viewpoint discrimination that it renders the discussion of III-B, III-C and IV moot. As Justice Kennedy explains, the disparagement clause allows an applicant to "register a positive or benign mark, but not a derogatory one. The law thus reflects the Government's disapproval of messages it finds offensive. This is the essence of discrimination." He rejects the government's argument that the law is viewpoint neutral because it applies equally to any derogatory mark, regardless of who the mark offends, saying "to prohibit all sides from criticizing their opponents makes a law more viewpoint based, not less so."

Justice Thomas wrote a very brief opinion (which no one joined) explaining that (1) he departed from the otherwise-unanimous Part II because he wouldn't have even touched the issue given that the Court declined certiorari in the first place and (2) he doesn't think there should be a distinction between commercial speech and expressive speech: both should be given equal protection under the First Amendment (though he agrees that the disparagement clause violates the First Amendment either way).

So why is this case so important? 3 reasons:

- The court is abundantly clear that viewpoint discrimination violates the First Amendment, regardless of type of speech involved or the standard of review that is applied. Justice Alito waxes eloquent on several different occasions.

Not only does he say:

Our cases use the term "viewpoint" discrimination in a broad sense and in that sense, the disparagement clause discriminates on the bases of "viewpoint." To be sure, the clause evenhandedly prohibits disparagement of all groups. It applies equally to marks that damn Democrats and Republicans, capitalists and socialists, and those arrayed on both sides of every possible issue. It denies registration to any mark that is offensive to a substantial percentage of the members of any group. But in the sense relevant here, that is viewpoint discrimination: Giving offense is a viewpoint.

But he follows a few pages later with:

Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express "the thought that we hate."

*(Continued on page 13)*

***Supreme Court Slays Ban*** *— (Continued from page 12)*

Strong words – and yet, as I note above – Justice Kennedy doesn't think Justice Alito goes far enough. Perhaps speaking to the times we are in, Justice Kennedy says:

The First Amendment's viewpoint neutrality principle protects more than the right to identify with a particular side. It protects the right to create and present arguments for particular positions in particular ways, as the speaker chooses. By mandating positivity, the law here might silence dissent and distort the marketplace of ideas

- The Court limits the breadth of its 2015 decision in *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, which the United States District Court for the Eastern District of Virginia relied on in ruling for the government in an ancillary case (which I shall not name). If extended further, the *Walker* decision threatened to blow apart the First Amendment by allowing government to control just about any discussion; Justice Alito made clear that Walker was the outer limit, not the starting point, for government speech:

This brings us to the case on which the Government relies most heavily, *Walker*, which likely marks the outer bounds of the government-speech doctrine. Holding that the messages on Texas specialty license plates are government speech, the *Walker* Court cited three factors distilled from *Summum*. First, license plates have long been used by the States to convey state messages. Second, license plates "are often closely identified in the public mind" with the State, since they are manufactured and owned by the State, generally designed by the State, and serve as a form of "government ID." Third, Texas "maintain[ed] direct control over the messages conveyed on its specialty plates."). As explained above, none of these factors are present in this case (citations omitted).

- Finally, the Court decided not to mess with the definition of commercial speech or the governing test set forth in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N. Y.* Not that I'm in love with Central Hudson, but this highly technical case wasn't the situation for the Court to revisit the entire commercial speech doctrine.

Though there are certain legal steps to be taken, one could certainly assume "The Slants ™" will soon become "The Slants ®." One would also assume other marks closely associated with this case will claim victory as well – in fact, the owners of those marks apparently have already set their plans in motion, claiming a victory the only way they've known how in recent years. #WinningOffTheField


## Upcoming FCC Broadcast Filing Deadlines

Do you know what FCC filing deadlines are coming up in July through early August? We do. Note our list is not comprehensive, and other proceedings may apply to you.

**July 17, 2017 —** *Elimination of Main Studio Rule* – Comments are due in response to the Commission's *Notice of Proposed Rule Making* in MB Docket No. 17-106, which proposed to eliminate the current rule which requires all AM, FM, and television stations to maintain a main studio located in or near its community of license and to keep that studio appropriately staffed.

**August 1, 2017 —** *EEO Public File Reports* - All radio and television stations with five (5) or more full-time employees located in California, Illinois, North Carolina, South Carolina, and Wisconsin must place EEO Public File Reports in their public inspection files. TV stations must upload the reports to the online public file. Radio stations in the top 50 markets and in an employment unit with five or more employees will have to place these reports in the new online public inspection file; all other radio stations may continue to place hard copies in the paper public file for the time being. 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.

*EEO Mid-Term Reports* – All radio stations with eleven or more full-time employees in California, and all television stations with five or more full-time employees in Illinois and Wisconsin must electronically file a mid-term EEO report on FCC Form 397, with the last two EEO public file reports attached.

**July 26 – August 2, 2017 —** *Cross-Service FM Translator Filing Window* - A filing window for applications for new FM translators will be open to licensees of Class C and D AM stations which did not participate in either of the FM translator modification windows opened last year. The filing window will be open from 12:01 a.m. EDT on July 26 until 6:00 p.m. EDT on August 2.

**September, 2017 —** ***Annual Regulatory Fees*** – On a date not yet determined but certainly before September 30, 2017, annual regulatory fees will be due. These will be due and payable for Fiscal Year 2017, and will be based upon a licensee's/permittee's holdings on October 1, 2016, 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 percent penalty, plus potential additional interest charges.

Please contact **Anne Goodwin Crump** or **Dan Kirkpatrick** if you have questions about any of these deadlines.

## FHH - On the Job, On the Go

On June 26th, in a ceremony at the Washington Post, **Francisco Montero** was named one of the *100 Most Influential People for the Hispanic Community in the Washington D.C. Area*

**Francisco Montero** will be attending and speaking at the National Federation of Community Broadcasters convention in Denver on July 17-19.

**Frank Jazzo** will be attending the Arkansas Broadcasters Association Annual Convention at the DoubleTree in Little Rock, July 20-21.

On July 26th in Washington, DC, **Francisco Montero** will be speaking at a panel titled *Privacy & Security Tech Policy for Minority Communities* hosted by Hispanic Technology and Telecommunications Partnership (HTTP), and then on August 24th you can find him attending and presenting at the Puerto Rico Broadcasters Association Radio Show in San Juan.

Since our last *Memorandum to Clients*, **Kathy Kleiman** traveled to Johannesburg, South Africa, for ICANN59 to continue her Internet policy work with the Internet Corporation for Assigned Names and Numbers (ICANN). The meeting included numerous discussions to formulate the rules for introducing new generic top level domains and ways to prevent abuse in the Domain Name System. If you have any questions or would like to know more about these topics, please contact Kathy, kleiman@fhhlaw.com or (703) 812-0476.

In August, **Scott Johnson** will participate in legal programs for the Annual Conferences of the Texas Association of Broadcasters ("TAB") and the Alabama Broadcasters Association ("ABA"). At the TAB Conference on August 10th, he will be on a legal panel focusing on the FCC's deregulatory approaches since Commissioner Pai was named Chairman of the FCC. Following that, **Scott** will present an FCC and Legal Review program, including treatment of political broadcast regulations, at the ABA Conference on August 18th.