



Broadcast Newsletter

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HCCB AT NAB LAS VEGAS

Hardy, Carey, Chautin & Balkin's managing partner Joe Chautin will be attending the NAB Convention in Las Vegas from April 18 to 23. If you or any of your staff, including technical staff, would like to arrange a meeting with Joe in Las Vegas, please contact him via at jchautin@hardycarey.com.

NAB AND SOUNDEXCHANGE REACH DEAL ON STREAMING RATES

The National Association of Broadcasters and SoundExchange have reached a deal under which radio stations that stream their signals on-line will end up paying a little less than the rates set by the Copyright Royalty Board. For the years 2009 and 2010, there will be a reduction of about 16% from the CRB rates. While the new rates increase through 2015 to \$0.0025 per performance, this is still likely less than what the CRB would have set for that time period.

It appears that these new negotiated rates, however, only apply to commercial webcasters. Non-commercial webcasters, which are any non-profit organization that streams (i.e., not just NCE broadcasters), are still subject to the rates set by the Copyright Royalty Board. Remember, though, that those new rates do not kick in for non-commercial webcasters unless and until they exceed their monthly allowance of 159,140 aggregate tuning hours that they receive in exchange for their \$500 annual license fee. The per-performance rates only apply to streamed performances that exceed this monthly allowance.

If you are streaming your station on-line, remember that you need a license to do so and you must pay royalties on that web stream to SoundExchange. You may also have to pay extra licensing fees to the performance rights societies, ASCAP, BMI and SESAC. Failure to properly license your stream could result in liability for copyright infringement.

DTV TRANSITION: A NEW DEADLINE, AND NEW RULES

Several extraordinary events related to the DTV transition occurred since our last newsletter. First, Congress voted to delay the DTV transition until June 13, 2009, with final analog transmissions allowed up to and including June 12, 2009. That legislation included flexibility for how the FCC would implement the plan, and incorporated some of the FCC's prior rulings on transition flexibility.

Before the new law was ever signed by President Obama, the FCC issued a Public Notice that allowed stations that had not already transitioned to make certain filings at the Commission if they still wished to transition on February 17, 2009. Certain stations with different pre- and post-transition channels were not allowed to transition on February 17th unless they obtained Special Temporary Authority (STA) to do so, with appropriate interference showings.

After stations had submitted filings to the Commission, the FCC disallowed the early transition of certain television network stations absent further showings of compelling reasons for the need to transition early. Independent stations were not affected by that order. Ultimately, the FCC recognized and authorized approximately 36% of full power stations to transition to digital-only operations on February 17, 2009. The FCC's call center received lower than expected calls related to the transition of certain stations in some markets. Overall, the early transition of some stations permitted a test of the FCC's ability to handle the transition. Approximately two thirds of the remaining licensed full-power television stations in the United States will transition to digital between now and June 13, 2009.

In a separate action on February 16, 2009, the FCC automatically extended the digital construction permits and analog authorizations for those stations that were not transitioning to digital-only operations on February 17th. In addition, certain types of temporary authority were automatically extended by that order. Late on February 20, 2009, the FCC issued yet another order, extending and modifying

DTV consumer education requirements, proposing rules revisions for stations wishing to transition earlier than 6/12/2009, discussing extension of maximized digital permits, and leaving in place current deadlines related to stations with phased transition temporary authority.

At this time, all full-power television stations, whether operating in digital-only mode or still operating with a digital and analog channel, are required to continue airing DTV consumer education PSAs and crawls, consistent with the FCC's February 20th order. Should you have questions regarding the content, number and frequency for these PSAs and crawls, contact your communications counsel immediately. Stations will have to certify their continued compliance with DTV consumer education on Form 388.

MORE FINES FOR UNDERWRITING VIOLATIONS

After issuing three decisions in December 2008 assessing monetary fines against non-commercial educational stations for violating the FCC's underwriting rules, the FCC has issued two more such decisions in February 2009.

Non-commercial educational stations are prohibited from airing broadcast advertisements, defined as material broadcast in exchange for any remuneration and intended to promote any service facility or product of for-profit entities. For-profit contributors of funds to NCE stations may receive on-air acknowledgements, but such acknowledgements may be made for identification purposes only, and not to promote the contributors' products, services or businesses. If such announcements contain comparative or qualitative descriptions, price information, calls to action, or inducements to buy, sell, rent or lease, they constitute prohibited advertisements and violate the Communications Act.

In the first decision, the FCC fined a non-commercial educational television station \$2,500 for broadcasting prohibited underwriting announcements in 2006. The case arose from a complaint made to the commission that included a transcript and a program log related to the program

material at issue. The FCC found that the announcements at issue had been aired on behalf of for-profit entities, and impermissibly promoted their services or products through the use of comparative and qualitative terms such as “something really special”, “at a special price,” “the world’s most loved,” “most trusted,” “most anticipated,” “exclusive,” “luxurious,” “inviting,” and “timeless.” In addition, one of the announcements sought to distinguish an underwriter favorably by referring to design awards it had received and other distinctions that it possessed. Another announcement improperly referred to pricing information by referring to a service provided free of charge (“open an account today and get a complimentary DVD”; and “to make an appointment for a free, in-home, no obligation design consultation”). Finally, some of the announcements included video captions on behalf of the underwriters that contained explicit calls to action (“for more information, call Sanjay [telephone number]; and “please call [telephone number]”).

In the second decision, the FCC fined an NCE radio station \$7,500 for airing prohibited underwriting announcements during broadcasts of university football games during the 2006 football season. The FCC’s inquiry to the licensee stemmed from a complaint made to the Commission about the announcements. The advertisements in this case were blatant commercials for sponsors of the university’s football broadcasts. From the text of the FCC’s Order, it did not even appear that the broadcast licensee had attempted to format the advertisements in the form of donor acknowledgements.

Several of the announcements aired during the games impermissibly referred to for-profit entities in comparative terms concerning the variety of product or service choices available, memorable quality, low prices, better results, size and luxury, or the relative quality of dining or entertainment. Others referred to convenient features of products or services, including the availability of credit, loans, discounts, or various payment options. Still others sought to encourage business patronage (“whatever your signage needs, be sure to go with the winner”; “visit our store”; “stop in at one of our offices”; and “visit agent Theresa Bush”).

Notably, some of the promotional messages aired were made on behalf of not-for-profit entities, and were explicitly deemed permissible by the Commission. The prohibition on broadcast advertisements for NCE stations is limited to for-profit entities. Stations are free to air promotional messages on behalf of not-for-profit entities.

NCE stations should carefully scrutinize all underwriting acknowledgements to make sure they comply with the FCC’s guidelines. While the violations cited here are somewhat blatant, NCE broadcasters are often faced with more subtle donor acknowledgement copy and language that is difficult to analyze under the FCC’s guidelines.

Typically, the FCC will issue 3-4 forfeiture decisions each year related to NCE underwriting issues. We have now seen five such decisions issued for both radio and television stations in the past two months.

CONSTRUCTION PERMIT EXPIRES FOR FAILURE TO COMPLY WITH SPECIAL CONDITION

In February 2009, the FCC issued a decision reconfirming its earlier dismissal of a license application for a low-power FM station because the station licensee had failed to comply with a special condition on the station construction permit.

The construction permit contained a condition that prior to construction of a tower and subsequent installation of the station antenna, a partial proof of performance was required to establish that the AM array of a nearby station would not be adversely affected. The results of that proof were to be submitted to the Commission. This condition is common on permits authorizing construction of towers or station facilities within certain distances of AM station transmission facilities.

In this case, the low-power FM permittee filed its license application without satisfying the permit condition requiring a partial proof of performance. In response, the FCC sent the permittee a letter requiring it to amend the application to demonstrate compliance with the condition. After significant delays, including the loss of the tower and construction of a new tower, along with a separate

tower being constructed by another entity near the AM antenna array, the FCC dismissed the LPFM station's license application because of the failure to submit documentation addressing this special condition. In response, the permittee requested that the Commission waive the construction permit condition because installation of this antenna would have a negligible effect on the AM station's antenna pattern.

The Commission, noting that 2.5 years had passed from the date the staff informed the permittee that it had to submit a partial proof of performance, took into account the loss of the tower, but still found that the permittee's excuses and delays were inadequate. As a result, the Commission upheld the staff's earlier decision to dismiss the application, ruling that the station's construction permit had expired as a matter of law and the station could no longer operate the facilities it had constructed.

Stations should carefully consult with engineering and technical staff to analyze whether proposed construction of facilities will be close enough to AM stations in order to require partial proofs of performance. Such proofs are complex and expensive, and require close coordination with the AM station in question. Whenever possible, construction in proximity to AM stations should be avoided. If not avoidable, stations should carefully plan ahead of time to perform the required proofs of performance and timely submit them to the FCC. The potential price of failing to do so is a loss of the authorization for construction or modification of station facilities.

PENALTY BOX

FAILURE TO DISCLOSE CONTEST TERMS: \$6,000

The FCC has fined KOST (FM), Los Angeles, California for promoting a contest over the air, but failing to disclose to the listening audience the contest's material terms, including the time and

means of selection of winners, when prizes could be won, and the total number of prizes.

The licensee had argued that disclosures on its website provided the material terms of the contest, but the FCC disagreed, finding that the website terms did not disclose how many pairs of tickets would be awarded or when drawings would be held. The station also argued that no substantive information about the contest was provided over the air, taking the position that the FCC's contest disclosure rules did not apply. The Commission disagreed, finding that a mention of the contest on the air and a requirement that listeners stay tuned to the radio station was enough to trigger the contest disclosure rules, and contradicted the licensee's position that the contest was conducted exclusively over the station's website.

Under the FCC's contest disclosure rules, stations that broadcast or advertise information about a station contest must fully and accurately disclose the material terms of the contest, and conduct the contest substantially as announced or advertised. The obligation to disclose arises at the time of the audience is first told how to enter or participate in the contest, and continues until the conclusion of the contest. Stations should pay close attention to this rule in order to avoid complaints or fines for noncompliance.

FAILURE TO TIMELY FILE LICENSE RENEWAL: \$3,000

The FCC has fined KKFI (FM), Kansas City, Missouri for filing the station's license renewal application approximately 3.5 months after the deadline for doing so had passed. The FCC's rules require that applications for renewal of license for broadcast stations must be filed "not later than the first day of the fourth full calendar month prior to the expiration date of the license sought to be renewed." Here, the station inaccurately believed that it had to file its license renewal application by the actual license expiration listed on the station license. It did so one week before that deadline. In actuality, the deadline for filing it was approximately 3.5 months earlier.

BROADCASTING A LIVE TELEPHONE CONVERSATION: \$6,000

The FCC has fined WTWR-FM, Luna Pier, Michigan for violating the FCC's rule prohibiting the recording for broadcast of a live telephone conversation without giving prior notice to the recipient of the call that the station intended to broadcast the conversation. In this case, station personnel called a local restaurant, but did not identify the call as originating from a morning radio show, then broadcast a telephone conversation with a restaurant employee without the consent of the employee or the restaurant. In response, the licensee argued that because the station used a digital delay system, which "dumps" the content of the conversation if the call recipient objects to broadcast of the conversation, no rule violation occurred. The system at issue operated on a 10-second delay basis and the conversation is only aired if the station obtains the consent of the called party.

The FCC rejected that argument, holding that its requirement for prior notification to call recipients ensures the protection of an individual's right to answer the telephone without having his or her voice or statements transmitted to the public by a broadcast station live or by recording for delayed airing. The FCC found that the licensee had clearly not obtained consent before it began the recording process, notwithstanding the delay system that was in place. The FCC took the opportunity to rebut the allegation by the licensee that a prior decision had deemed the dump function to be an acceptable recording approach that did not violate the FCC's rule.

The FCC's rules are clear that *before* broadcasting or recording a telephone conversation for later broadcast, a station must inform any party to the call of its intention to broadcast the conversation, except where the party is aware, or may be presumed to be aware from the circumstances of the conversation, that it is being or likely will be broadcast. The FCC always favors a person's privacy interest over a station's enhanced program appeal in these situations.

DATES TO REMEMBER

April 1, 2009

Class A TV Stations in Delaware, Indiana, Kentucky, Pennsylvania, Tennessee & Texas: if employee threshold is met, complete annual EEO public file report, place in your public inspection file and post on website, if station has one.

TV Stations in Indiana, Kentucky & Tennessee: If employee threshold is met, complete and e-file mid-term FCC Form 397 EEO Report. Also, complete annual EEO public file report, place in your public inspection file and post on station's website. In addition, unless exempt, complete and e-file biennial ownership report on form 323 or 323-E, and place copy in station public file.

TV Stations in Delaware & Pennsylvania: If employee threshold is met, complete annual EEO public file report, place in your public file and post on station website, if station has one. In addition, unless exempt, complete and e-file biennial ownership report on form 323 or 323-E, and place copy in station public file.

TV Stations in Texas: if employee threshold is met, complete annual EEO public file report, place in your public inspection file and post on website, if station has one.

AM & FM Stations in Delaware, Indiana, Kentucky, Pennsylvania & Tennessee: if employee threshold is met, complete annual EEO public file report, place in your public inspection file and post on website, if station has one.

AM & FM Stations in Texas: If employee threshold is met, complete and e-file mid-term FCC Form 397 EEO Report. Also, complete annual EEO public file report, place in your public inspection file and post on station's website, if one exists.

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Actual resolution of legal issues depends upon many factors, including variations of facts and applicable Federal laws. This publication is not intended to provide legal advice on specific subjects, rather, it seeks to provide insight into legal developments and issues that we feel could be useful to our clients and friends.

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