Virginia Association of Broadcasters Legal Review

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Legal Memorandum

In this issue, link to information about

Developments: GAO Compulsory Copyright Licenses Report: Threat to Must Carry?
FDA Issues New e-Cigarette Rules: Advertising Affected?

General Accounting Office Issues Report on Potential Phase-out of Compulsory Copyright Licenses for Cable and Satellite

In the Satellite Television Extension and Localism Reauthorization Act of 2014 ("STELAR"), Congress authorized the General Accounting Office ("GAO") to study and report on the potential effects of phasing out of the statutory compulsory copyright licenses for cable and satellite providers. Broadcasters traditionally have supported the retention of "local" compulsory licenses but, in recent years, have favored repeal of the "distant signal" compulsory license. These licenses enable MVPDs to retransmit local broadcast stations' signals without engaging in direct copyright license negotiations with the owners of each copyrighted program contained within the signal. Instead, MVPDs pay blanket, government-set license fees (totaling $320 million in 2014, according to the Report) for the right to distribute copyrighted television programming. The U.S. Copyright Office collects those royalty payments and distributes fees to copyright owners. When they were originally enacted beginning in 1976, the statutory licenses were intended to facilitate transmission of broadcast stations' signals by reducing cable companies' and, later, satellite providers' transaction costs.

The GAO has completed its evaluation, which included meetings with dozens of industry stakeholders, including broadcast networks, local station owners, and MVPDs, and released its report on May 4, 2016. That Report, entitled "Statutory Copyright Licenses: Stakeholders' Views on a Phaseout of Licenses for Broadcast Programming," concludes that phasing out the

compulsory licenses "may be feasible for most market participants but could have implications for carriage requirements."

The Report notes that U.S. households increasingly access video programming online, which enables viewers to watch preferred programming at times and places and on devices of their own choosing. Cable and satellite providers are adapting to that trend by increasingly offering online access to video content, through services such as TV Everywhere and subscription-based online linear video services like DISH's SlingTV. The trend toward online and on-demand video services means that MVPDs increasingly engage in private, market-based negotiations for the rights to make copyrighted content available on those platforms. In fact, as the Report observes, at present, "the only rights in the video marketplace not licensed through market-based negotiations are the secondary transmission rights for broadcast content."

The GAO concluded that a similar market-based mechanism for licensing secondary transmission rights for broadcast content could be developed if the statutory licenses were phased out. Such a market-based approach need not consist of individual negotiations between cable and satellite providers, on the one hand, and copyright owners, on the other. Instead, for example, the Report suggests that broadcast stations could acquire the right to "sublicense" a package of programming and negotiate secondary transmission rights for the copyrighted content in their signals at the same time they negotiate retransmission consent, or organizations representing groups of copyright owners and MVPDs could engage in collective licensing. The Report also argues that transaction costs that originally prompted the creation of the statutory licenses have become more manageable in the intervening years.

On the other hand, the Report identifies potential negative consequences that could arise from the elimination of the statutory licenses—primarily, the potential threat to the "must carry" regime. Without the compulsory license, cable providers could be placed in an untenable position: required to carry a station's signal but unable to negotiate licenses for all of the copyrighted content within that signal. Phase-out of the statutory license would also eliminate the satellite "carry one, carry all" requirement, which is expressly predicated on the Section 122 statutory license. Moreover, the Report concludes, the logistical and financial challenges of conducting individual negotiations with the rights-holders of the multitude of copyrighted programs contained in an individual station's signal would be particularly burdensome for public television stations and small cable operators.

According to the Report, the 42 "selected stakeholders" interviewed by the GAO varied in their support for a potential phaseout of the statutory licenses, citing such practical considerations as potential increases in programming (and other transaction) costs, the potential for disruptions of programming when an MVPD is unable to obtain the necessary licenses from copyright owners, and uncertain impacts on programming diversity. Stakeholders, according to the Report, generally recognized that it would be difficult, however, to speculate on potential effects on consumer prices. MVPDs also raised concerns that, in the absence of the statutory licenses, broadcast networks would have little incentive to allow affiliates' signals to be transmitted outside their local markets—a concern the GAO Report finds less compelling given that the most widely viewed distant signal is WGN, a superstation that has recently converted into a cable network.

Obviously, elimination of the local compulsory copyright license would have immediate adverse consequences for "must carry" stations. It would also have adverse implications for network affiliates in that it would (1) increase their transactional costs in securing copyright clearance, (2) give one or several programmers the ability to hold MVPD carriage of the complete linear signal hostage while negotiating for increased payment, leaving holes in a station's program schedule, and (3) pave the way for networks to negotiate carriage of affiliates' signals directly with MVPDs, leaving affiliates in a "take it or leave it" position, as is now the case for digital distribution of each affiliate's linear signal.

No doubt the Report will surface in next year's congressional review of copyright law and the cable/satellite compulsory license. We will keep you apprised of further developments on this important issue.

New FDA Rules Governing e-Cigarettes, Pipe Tobacco, and Cigars May Result in Fewer Local Advertising Opportunities

The Food and Drug Administration ("FDA") last week adopted sweeping new, "final" regulations (which were subsequently published on May 10 in the Federal Register), which for the first time use the FDA's authority to regulate e-cigarettes; dissolvables, gels, vape pens, and related nicotine products; cigars; and pipe, waterpipe and hookah tobacco.

The new rules do not directly regulate broadcasters, and, generally, they do not prohibit the broadcast advertising of these newly-regulated products. (In that regard, the FDA's new rules are different from the existing laws that specifically prohibit broadcast stations from airing advertisements for cigarettes, "little cigars," and chewing tobacco.) Instead, the new rules regulate, among other things, the manufacturers and retailers of such products and restrict certain aspects of their advertisements. As a result, stations may begin to notice a change in the nature of advertising copy for everything from cigars to vape shops and the appearance of new disclosures in advertising for these nicotine and tobacco products.

Also of interest to broadcasters is a requirement in the rules that manufacturers of all newly-regulated products must go through a "pre-market review" with the FDA to prove that the products meet applicable public health standards, unless the product was on the market as of February 2007. As a practical matter, this rule means that most e-cigarettes and other vaping products will have to go through this retroactive review. And, the new rules clarify that e-cigarette retail stores and vape establishments will be considered "tobacco product manufacturers" subject to the pre-market review requirement if they mix or prepare e-liquids or create or modify aerosolizing apparatus for direct sale to consumers. Many industry members have publicly stated the costly review process will force many manufacturers and even retail shops—who, in recent years, have become a source of local advertising for broadcasters—out of business. Only time will tell whether such predictions will come true.

The FDA's new rules that are most relevant to broadcast advertising will take effect in a staggered manner—some take effect in August 2016, others in August 2017, and still others further down the road. Here's a brief summary of some of the new rules that will affect advertising:

Effective August 8, 2016:

- E-cigarettes and the other newly-regulated products cannot be sold to people under 18. (Some states and localities already regulate such sales in a similar manner.)
- Free samples of the newly-regulated products are prohibited (i.e., promotional giveaways by vape shops and stations will no longer be allowed).
- Advertisements (and labels) for these products cannot:
    - Explicitly or implicitly represent that the product presents a lower risk of tobacco-related disease than other commercially marketed tobacco products (e.g., an ad cannot leave the impression that the product is safer than cigarettes);
    - State that the product or its smoke contains a reduced level of, or presents a reduced exposure to, a substance (such as nicotine or tar);
    - State that the product or its smoke does not contain, or is free of, any substance.

Effective August 8, 2017, labels and advertisements for the newly-regulated products cannot contain the descriptors "light," "low," or "mild," or any similar descriptors.

Finally, within two years (i.e., by May of 2018), new health warnings will be required on all advertisements and labels for such products.

- For e-cigarettes, dissolvables, pipe and hookah tobacco, and other similar nicotine products, the following warning will have to appear in all ads: "WARNING: This product contains nicotine. Nicotine is an addictive chemical."
- Cigars will have to have even more specific health warnings. The following six statements will have to be rotated quarterly in cigar ads:
    - WARNING: This product contains nicotine. Nicotine is an addictive chemical.
    - WARNING: Cigar smoking can cause cancers of the mouth and throat, even if you do not inhale.
    - WARNING: Cigar smoking can cause lung cancer and heart disease.
    - WARNING: Cigars are not a safe alternative to cigarettes.

- WARNING: Tobacco smoke increases the risk of lung cancer and heart disease, even in nonsmokers.

- WARNING: Cigar use while pregnant can harm you and your baby. (Or, as an optional alternative statement: SURGEON GENERAL WARNING: Tobacco Use Increases the Risk of Infertility, Stillbirth and Low Birth Weight.)

- The rules regarding the health warnings for the products listed above apply to all forms of advertising, regardless of the medium in which they appear, including television, radio, online, email, social media, and mobile platforms.

- In addition, for "visual" ads, these warnings must take up at least 20 percent of the advertisement and appear in at least 12-point Helvetica bold or Arial bold font. It is not clear at this juncture whether those specific requirements would apply to TV ads.

The FDA stated in its rules that it "intends to provide further guidance on how to comply with the health warnings on unique types of media." We will be watching for that guidance and will provide you with relevant updates when they become available.

To reiterate, broadcasters are not subject to these new rules. Familiarity with them is important, however, so that stations may help advertising clients by identifying spots that may be inconsistent with the new requirements. Moreover, when stations provide copy writing and production services for advertisers of these newly-regulated products, extreme caution must be used; stations should require their advertising clients to take full responsibility for all required regulatory disclosures and for the compliance of the ad copy with applicable regulations. Stations may wish to contact their communications counsel for ad-specific questions and issues when they arise.

If you have any questions concerning the information discussed in this memorandum, please contact your communications counsel or any of the undersigned.

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