Virginia Association of Broadcasters Legal Review

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DOJ AND FCC CHAIRMAN SUPPORT RESTRICTIONS ON JOINT SALES AGREEMENTS FOR TELEVISION STATIONS

FCC Chairman Tom Wheeler recently announced that the Commission will consider at its March 31, 2014, meeting an item to address arrangements in which television stations in the same local market share sales and other certain resources. (The meeting was originally scheduled for March 19 and postponed by the FCC.) Such deals typically involve Joint Sales Agreements (JSAs), Shared Services Agreements (SSAs), and other resource-sharing arrangements.

Chairman Wheeler has been critical of JSAs and other similar arrangements, and it is expected that the Commission will propose at the meeting to make JSAs attributable under the FCC's ownership rules and to increase regulation of sharing agreements generally.

Further bolstering the Chairman's position, on February 21, 2014, the United States Department of Justice (DOJ) similarly announced support for new FCC restrictions on such arrangements. DOJ made the following recommendations to the Commission:

* The Commission should prohibit JSAs and similar arrangements proposed by television stations if the two stations could not be commonly owned under the FCC's ownership rules;

* The Commission should evaluate all other sharing arrangements, such as SSAs, on a case-by-case basis to determine if the extent of sharing significantly reduces the stations' incentive to compete with each other; and

* To facilitate review by the Commission, broadcasters should be required to file all "side-car" agreements with the FCC.

Particularly now in light of DOJ's recommendations, which support the Chairman's views, it is expected that the Commission will significantly restrict "side-car" deals by prohibiting JSAs and regulating other sharing agreements. Suggestions have been made that the Chairman would also attribute loan guarantees and certain stock options, which, if adopted, would have adverse implications for both radio and television stations—in particular, small businesses and individuals who rely on such financing arrangements to facilitate their ownership of broadcast stations.

A likely possibility is that the Commission will attribute JSA arrangements in which more than 15% of ad inventory is sold by another television station in the same market (as is the case under the current ownership rule for radio stations), and to allow two years for television stations to "unwind" existing JSA arrangements that would be otherwise impermissible under the new rule. It is difficult to envision how SSAs would

be regulated since these arrangements vary widely in terms of the scope and nature of the services and facilities that are shared, but, presumably, new restrictions might include, for example, limitations on the sharing of sales staff and other sales resources. The Commission may also require SSAs and other "side-car" deal agreements to be filed with the Commission for review by the FCC staff.

It appears that Commissioners Pai and O'Rielly oppose any action on these issues, while Democratic Commissioner Clyburn, who is concerned with the potential impacts on minority broadcasters, could be the swing vote.

Commissioner O'Rielly recently noted on his blog that JSAs and SSAs allow television broadcasters, especially in small and mid-sized markets, to "streamline certain overlapping functions in order to increase efficiencies and reduce costs." He said, "[T]here is evidence of significant benefits from these arrangements, including saving stations from going dark, adding diverse voices to a market, and enabling local news where it would otherwise be cost prohibitive," and that tightening the sharing rules would "harm the public interest if fewer stations could offer local news, especially in smaller communities."

Indeed, if adopted, new restrictions could have a significant impact on the ability of television stations to realize these important efficiencies and public interest benefits. We will keep you apprised of developments in this important proceeding.

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RADIO STATION FINED $44,000 FOR SPONSORSHIP ID FAILURES

The FCC has fined a radio station in Chicago for failing to air required sponsorship identification announcements in violation of the Commission's rules. The FCC released a Forfeiture Order announcing that it will impose a $44,000 fine on the licensee for the station's violations.

The Commission's enforcement activity was the result of a complaint in 2009 that the station aired program matter on behalf of an organization called Workers Independent News (WIN) without adequately disclosing the fact that the program material was an advertisement rather than a news story. According to the Forfeiture Order, the problematic advertisements were 11 of 45 spots from WIN that were aired, each 90 seconds in length. Those spots referenced "Workers Independent News" but did not expressly specify that the program matter was sponsored, paid for, or furnished by WIN.

The Commission's rules require stations to broadcast an announcement if content is aired in exchange for valuable consideration at the time the material is aired. The

station must announce (1) that such matter is sponsored, paid for, or furnished, in whole or in part, and (2) by whom or on whose behalf the consideration was supplied.

In this case, the station argued that the violations were the result of inadvertent employee errors, but the Commission refused to reduce the fine on those grounds. The station did not indicate that it has taken particular measures or specific additional steps intended to ensure future compliance with the sponsorship identification rules or to ameliorate the effects of its violations (such as, according to the FCC, airing announcements notifying listeners that the 11 90-second advertisements previously aired were not, in fact, news stories, but rather had been paid for by WIN). According to the Forfeiture Order, such steps might have mitigated—but not eliminated—the fine. Thus, all told, the station will face a hefty $44,000 fine for airing the 11 spots without proper sponsorship identification.

This case is an important reminder for stations to evaluate their internal policies and procedures to ensure compliance with the sponsorship ID rules. Please contact your communications counsel with any questions.

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FTC TO BROADCASTERS: "GUT CHECK" ON WEIGHT LOSS ADS – IF IT'S TOO GOOD TO BE TRUE, DON'T RUN IT!

The Federal Trade Commission ("FTC") has issued more guidance to broadcasters and other media outlets in its latest move to crack down on deceptive weight loss advertising.

The new publication, called "Gut Check: A Reference Guide for Media on Spotting False Weight Loss Claims" (the "Guide") offers guidance to broadcasters and other media outlets on spotting—and rejecting—bogus weight loss ads.

The Guide revisits guidance on bogus weight loss claim detection released nearly ten years ago. At that time, the FTC cautioned broadcasters to avoid running advertisements that are "too good to be true," including seven categories of ads that should be "red flagged" because they are false, scientifically infeasible, unable to be substantiated, or otherwise potentially harmful to consumers. In its updated guidance, the FTC now reiterates these categories as well as its admonition against airing ads with bogus claims.

The Guide reminds broadcasters to reject ads that fall into these "red flag" categories. The seven categories of ads are those that claim the advertised products will:

* Cause weight loss of two pounds or more a week for a month or more without dieting or exercise;

* Cause substantial weight loss no matter what or how much the consumer eats;

* Cause permanent weight loss (even when the consumer stops using the product);

* Block the absorption of fat or calories to enable consumers to lose substantial weight;

* Safely enable consumers to lose more than three pounds per week for more than four weeks;

* Cause substantial weight loss for all users; and

* Cause substantial weight loss by wearing it on the body or rubbing it into the skin.

The FTC defines "substantial weight" as "a lot of weight" and would include weight loss of "a pound a week for more than four weeks or total weight loss of more than 15 pounds in any time period." Substantial weight loss can also be suggested by references to dress size, inches, and body fat, and ads may convey substantial weight loss without using specific numbers.

The new Guide is available online at the following URL: *http://www.business.ftc.gov/documents/gut-check-reference-guide-media-spotting-false-weight-loss-claims/*.

While the FTC takes the view that following the recommendations of the Guide "does not obligate the media to investigate the accuracy of the wide array of advertising they disseminate to the public," stations are well-advised to request documentation to support any questionable assertions made in any ad. If your station identifies suspect claims in an ad after reviewing such materials, you should consult with counsel before agreeing to run the ad.

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FTC ACTION AGAINST AUTO ADVERTISERS MAY IMPACT BROADCASTERS WHO PRODUCE LOCAL SPOTS

The FTC has recently taken several separate enforcement actions against advertisers in the auto industry, reflecting a new emphasis on weeding out unfair practices in this industry. Late last year, the FTC entered into settlements with ten different auto dealers to resolve deceptive advertising charges against the dealers. Now that a public comment period has passed, the settlements are expected to be formally approved in the coming days. The FTC also formally approved consent orders against two more auto dealers in February.

In each of the auto dealer cases pursued by the FTC, advertising by the dealers misrepresented the terms of sale, financing, and leasing of motor vehicles in various states. According to the FTC, one dealer even misrepresented that consumers had won prizes they could collect at the dealership. Nearly all of the cases involved deceptive claims regarding down payments and monthly payment terms. In North Carolina, for example, one auto dealer claimed that consumers could finance a purchase with low monthly payments when, in fact, the payments were temporary "teasers" after which the consumer would owe a much higher amount.

In light of these settlements, broadcast stations that produce spots for auto dealers need to be wary of aggressive content that may be unlawful or require additional disclosures. Stations may wish to consult with counsel to confirm they have processes and contractual protections in place to avoid creating liability when the station is producing spots for an advertiser.

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FCC CONTINUES ENFORCEMENT AGAINST FALSE ALERT SIGNALS IN ADVERTISING

As previously reported, the FCC recently fined a major cable network for transmitting advertisements that contained simulated Emergency Alert System (EAS) sound-alikes. For the second time in less than three months, the Commission released a *Notice of Apparent Liability* (the "*Notice*") against the same network for another violation—this time it will cost the network a whopping $200,000.

The FCC's rules prohibit the broadcast of false, deceptive, or simulated alert signals in any circumstances other than in an actual national, state, or local area emergency or an authorized test of the EAS. The rules against false alert signals apply to a station or network that transmits the signals or sounds even if that station or network did not create or produce the prohibited programming.

In this case, the Commission investigated new complaints regarding the cable network and found that the network aired advertisements that included simulated EAS tones. The advertisement aired 14 times over a six-day period in early 2013. In its investigation, the Commission concluded that "the sounds used . . . are substantially similar to the sounds made by the transmission of EAS codes such that an average audience member would reasonably mistake the sounds for the sounds made by actual EAS codes." As a result of the repeat violation occurring less than a year after the first incident, the FCC proposed another $200,000 fine against the network.

The Commission noted in the *Notice* against the network that complainants in this case were alarmed and confused by the advertisement, thinking that the sounds signified an actual emergency. The *Notice* warned that such false distress signals create a "cry wolf" scenario in non-emergency situations. According to the *Notice*, "The nature of EAS violations requires particularly serious consideration because such violations undermine the integrity of the EAS by desensitizing viewers to the potential importance of warning tones and therefore implicate public safety concerns."

As a result of the repeat violations—and in light of the network's representations to the Commission that it had changed and improved its internal review practices—and combined with the network's audience reach and ability to pay, the Commission imposed another massive fine against the network.

Last November, in connection with its enforcement activity, the Commission released an Enforcement Advisory to caution broadcasters against the misuse and simulation of EAS alert signals. A copy of the Commission's Enforcement Advisory is available at the following URL: *http://transition.fcc.gov/Daily_Releases/Daily_Business/2013/db1106/DA-13-2123A1.pdf*.

In light of the ongoing enforcement activity, broadcast stations may wish to consider new or improved protocols for review of advertising spots and other programming for false alert signals and sound-alikes. Please contact your communications counsel if you have questions about the EAS rules.

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ONLINE REVIEWS ON TRIAL IN VIRGINIA DEFAMATION CASE

A recent Virginia case serves as a reminder to broadcasters of liability risks in interactive content, opinion pieces, and other reporting activities, especially in digital media where false claims may spread quickly and endure online.

The case arose from a seemingly mundane consumer interaction—complaints about a contractor by a former client. The contractor sued his dissatisfied former client,

whom he claimed defamed his business in a negative review on Yelp and another consumer review website. The case went to a jury trial in early February. The jury returned a verdict that the former client defamed the contractors, but awarded no damages for an alarming reason—the contractor *also* defamed the former client in an online reply to the comment thread!

In addition to the legal risks inherent in reporting activities, the case reminds broadcasters that comments and reviews posted on Internet platforms by third parties may be rife with potential claims. When users are posting on your station's website and social media platforms, your station may be exposed to potential liability for the content posted by third-party users. And the temptation to reply may not serve you well.

The law affords some protection for websites from liability for claims based on user-generated content ("UGC"). For example, Section 230 of the Communications Decency Act protects websites from defamation claims when the website has not participated in creating or editing the content. Indeed, Section 230 is often the "shield" against liability for host sites such as Yelp that do not create the content of the user reviews that appear on their website.

However, if station personnel make edits to UGC on its website that becomes the subject of the lawsuit, the station's role in contributing to those edits may threaten the loss of Section 230 immunity. For example, if the website operator modifies a user's comment in a manner that is defamatory, the website operator is exposed to liability for creating or developing the defamatory content. And station websites are certainly responsible for the content of any reply that station personnel may post in response to UGC. Accordingly, station websites must take care when reposting, editing, or interacting with UGC on Internet platforms. Station websites must also avoid any actions that might be interpreted as encouraging defamatory content. Station websites have broad discretion to remove any content that they deem to be objectionable. Because Section 230 is still the subject of evolving interpretation by the courts, stations should consult with legal counsel when dealing with potentially defamatory or objectionable content.

The online reviews case in Virginia is just one example of the ways that UGC can land a website in hot water. Stations should take care that their websites have current terms and conditions and privacy policies in place and periodically review these policies with counsel.

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DEADLINE FOR REPLY COMMENTS IN AM REVITALIZATION PROCEEDING EXTENDED UNTIL MARCH 20, 2014

The FCC announced that it has extended the deadline for interested parties to submit reply comments in the AM revitalization proceeding. As previously reported, radio broadcasters may wish to comment on important issues in this proceeding, including the following proposals:

* Opening an FM translator filing window only for AM licensees and permittees;

* Relaxing the daytime and nighttime community coverage standards for existing AM stations, to give existing AM broadcasters more flexibility to propose antenna site changes;

* Eliminating the AM "ratchet" rule, which currently requires an AM station seeking to make facility changes that would modify the station's signal to demonstrate that the improvements would result in an overall reduction in interference to certain other stations;

* Permitting wider implementation of MDCL (modulation-dependent carrier level) technologies, which are transmitter control techniques that allow AM stations to reduce power consumption, by adopting a procedure only requiring stations to give notice to the Commission 10 days in advance of such implementation; and

* Modifying AM antenna efficiency standards, which would reduce minimum effective field strength values, thus allowing the use of shorter AM antennas.

For more information on how to submit comments in this proceeding for consideration by the FCC, please see our legal review dated January 13, 2014.

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

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This Legal Review should in no way be construed as legal advice or a legal opinion on any specific set of facts or circumstances. Therefore, you should consult with legal counsel concerning any specific set of facts or circumstances.

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