Virginia Association of Broadcasters Legal Review

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Legal Memorandum

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Stations Must Be Aware of New DMCA Safe Harbor Registration Process

All Stations Must Report Multilingual EAS Alerting Practices to State SECCs by November 3, 2017

As we reported several months ago, the FCC earlier this year resolved a decade-old petition relating to multilingual EAS messages by declining to adopt any multilingual EAS alerting requirements. However, as you may recall, the FCC did adopt a new rule that requires all EAS Participants—including all broadcast stations—to furnish certain information to their respective State Emergency Communications Committees ("SECCs"). On November 3, the FCC published a notice in the Federal Register that establishes a **November 3, 2017**, deadline for stations to furnish the required information to SECCs. In turn, SECCs will be required to revise State EAS Plans to include a description of the steps that have been or will be taken by EAS Participants (whether individually or in conjunction with state and local emergency authorities) to disseminate, broadcast or otherwise make available EAS alert content to non-English speaking audiences in the primary language of such audiences.

What Must Be Reported to SECCs. More specifically, broadcast stations will be required to provide, by November 3, 2017, the following information to their respective SECCs:

- Actions Already Taken. A description of any actions **already underway** by the station (acting individually, in conjunction with other EAS Participants in the geographic area,

and/or in consultation with state and local emergency authorities), to make EAS alert content available in languages other than English to the station's non-English speaking audience(s).

- Actions Planned for the Future. A description of any **future** actions planned by the station to provide EAS alert messages in languages other than English to the station's non-English speaking audience(s), along with an explanation for the EAS Participant's decision to plan or not plan such actions.

- Other Relevant Information. Any other relevant information that the station may wish to provide, including state-specific demographics on languages (other than English) spoken within the state, and identification of resources used or necessary to originate current or proposed multilingual EAS messages. The FCC urges stations and SECCs to include information about any pilot projects or other initiatives that involve translation technologies or other innovative approaches to providing non-English alerts and emergency information to the public.

Material Changes Must Be Reported—Ongoing Reporting Requirement. If/when there is a "material" change to the information previously submitted, stations are required, within 60 days of the occurrence of such material change, to submit a letter describing the material change to the respective SECC and to send a copy of that letter directly to the FCC. A SECC receiving such an update from a station will be required to amend the State EAS Plan to include the information (and file the amended version with the FCC).

Brief Statements Acceptable. According to the FCC, a broadcaster may satisfy its reporting requirements by advising the SECC that "no steps have been taken" (if, in fact, a station has taken no steps, and has no future plans to take steps, toward multilingual EAS messaging).

November 3, 2017, Deadline. As noted above, all stations must provide the required information to their respective SECC no later than November 3, 2017. Each SECC will then have six months to review and process the information and revise its State EAS Plan accordingly to account for the multilingual alerting information provided by EAS Participants.

What Should Stations Do Right Now? Some stations may be unaware how to contact their SECC, and many SECCs may have not yet set up a system or process by which to collect, track, and compile the requisite information. Because the Association has a relationship with the [Ohio, Virginia, or North Carolina] SECC, you will be hearing in the future either from the Association or directly from the SECC. In the meantime, stations may wish to begin to assess their current and future multilingual EAS messaging efforts in order to be prepared to report them to the SECC. Because it is a year in the future, this is one of those deadlines that may very easily "fall through the cracks"; thus, stations should also go ahead and calendar the November 3, 2017, deadline and set themselves up a reminder for some logical date in advance of the deadline in order to ensure that they ultimately send the required information to the SECC.

More Rules Coming? To reiterate, the FCC has not adopted any rules to require stations to engage in multilingual EAS messaging. However, at some point after SECCs have collected the required

information from EAS Participants and have filed amended State EAS Plans, more regulation may be forthcoming from the FCC which may attempt to address, as an operational matter, the use of multilingual EAS alerts.

"New" FCC Ownership Rules Become Effective December 1, 2016

As you know, over the summer, the FCC adopted its Second Report and Order (the "Order") in its quadrennial media ownership proceeding, leaving its media ownership rules intact and making only what Chairman Wheeler referred to as "targeted modifications." Of course, the so-called "targeted modifications" did not become immediately effective, but now that the FCC published the Order in the Federal Register on November 1, the effective date will be December 1, 2016. The material below provides a brief, general review of the most significant media ownership rules that resulted from the FCC's Order.

Local Television Ownership Rule. The Order (1) retained the existing rule, modified to address the 2009 transition to digital broadcasting; (2) extended the current ban on co-ownership of two top-four television stations in a market to apply to network affiliation "swaps" between such stations. (Other than the network affiliation swap limitation, there is no restriction on having multiple network affiliations via multicast.) Thus, a company may own two commercial TV stations in a DMA only if:

(1) No more than one of the two stations is among the DMA's top four rated stations, and at least eight independently owned television stations would remain after the merger (this continues the "eight voices test"); or

(2) There is no Noise Limited Service Contour ("NLSC") (previously, Grade B contour) overlap between the two stations sought to be commonly owned.

Local Radio Ownership Rule. The Order retained the existing local radio ownership rule with minor clarifications to assist the Media Bureau in processing license assignment/transfer applications. (For example, the Order adopted a new Puerto Rico market definition and clarified the grandfathering rules applicable to community of license changes.) The number of radio stations in a radio market that may be commonly owned remains tiered, depending on the total number of full-power commercial and noncommercial radio stations in the market, as follows:

- In markets with 45 or more radio stations, an entity can have an attributable interest in no more than eight commercial radio stations, no more than five of which may be in the same service (AM or FM).
- In markets with 30-44 radio stations, an entity can have an attributable interest in no more than seven commercial radio stations, no more than four of which may be in the same service.
- In markets with 15-29 radio stations, an entity can have an attributable interest in no more than six commercial radio stations, no more than four of which may be in the same service.
- In markets with fewer than 15 radio stations, an entity can have an attributable interest in up to five commercial radio stations, no more than three of which may be in the same service, provided, however that an entity cannot own more than 50 percent of the radio

stations in the market. (The AM/FM combo exception continues to allow common ownership of an AM and FM station in one market even if such common ownership would exceed the 50 percent limit.)

Radio/Television Cross-Ownership Rule. The Order retained the existing rule with a minor modification to address the 2009 transition to digital television broadcasting (i.e., to change the "Grade B contour" measurement to the NLSC for television stations). Thus, the number of commercial radio and television stations an entity may own in the same market remains tiered, with the amount of common ownership permitted depending on compliance with the local TV and radio ownership rules and the number of independently owned media voices (television and radio stations, cable systems, and newspapers) that would remain in the relevant market if the stations at issue are commonly owned. In general, the limits are as follows:

- An entity can have an attributable interest in up to two TV stations and one radio station in the same market (regardless of market size, but common ownership is subject to limits based on market size).
- If at least 10 independently owned media voices would remain in the market after the common ownership, an entity may have attributable interests in up to two TV stations and four radio stations.
- If at least 20 independently owned media voices would remain in the market after the common ownership, an entity may have attributable interests in up to two TV stations and six radio stations, or one TV station and seven radio stations.

Newspaper/Broadcast Cross-Ownership Rule. The Order retained the existing ban on newspaper/broadcast cross ownership ("NBCO"), but provided a limited exception for "failed or failing entities" in which situations the FCC will consider NBCO waiver requests. The Order replaced the prior analog television Grade B contour measurement with the digital NLSC to reflect the 2009 digital transition. Thus, under the rules, a full-power broadcast station (TV or radio) and a daily newspaper may not be commonly owned if the station's NLSC completely encompasses the newspaper's city of publication. (Existing NBCO combinations remain grandfathered.)

Readoption of TV Joint Sales Agreement ("JSA") Attribution Rule. The Order readopted the TV JSA attribution rule that the Third Circuit Court of Appeals had, in May 2016, remanded to the FCC for further consideration. As you will recall, the FCC in 2014 made TV station JSAs that allow for the sale of 15% or more of the advertising time on a competing local station attributable to the TV station as an ownership interest. Thus, the JSA attribution rule will, once again, be in effect as of December 1, 2016.

Shared Services Agreements ("SSAs"). The Order adopted a rule to define SSAs and imposed on stations an obligation to maintain copies of SSAs in public inspection files. (The Order did not make an SSA relationship, by itself, into an attributable interest in another station.) The new rule defines an SSA as any agreement (written or oral) in which

(1) a station provides any station-related services, including, but not limited to, administrative, technical, sales, and/or programming support to a station that is not

directly or indirectly under common *de jure* control permitted under the FCC's regulations; or

(2) stations that are not directly or indirectly under common *de jure* control permitted under the FCC's regulations collaborate to provide or enable the provision of station-related services, including, but not limited to, administrative, technical, sales, and/or programming support, to one or more of the collaborating stations.

Under the new rule, SSAs cannot be oral; they must be put into writing. And, under the new rule, commercial television stations will be required to upload SSAs to the stations' online public files. However, it is important to note that the public file requirement does not become effective on December 1; instead, the FCC will announce the effective date of the public file requirement for SSAs after OMB (the Office of Management and Budget) approves that requirement.

Further Court Challenge. The FCC's Order is almost certain to be challenged by multiple stakeholders, which means there will be more to come on these issues. The publication of the Order in the Federal Register on November 1 means that the time has begun ticking for stakeholders to file petitions for reconsideration or judicial review.

Stations with Websites Must Take New Registration Steps to Ensure "Safe Harbor" Protection from Copyright Infringement Liability

Because many broadcast stations maintain a digital presence via websites, mobile apps, and other online platforms, it is important to understand that the U.S. Copyright Office has announced a new online filing system for registering websites, apps, and other online platforms for so-called "DMCA safe harbor" protection from copyright infringement liability. (To be clear, the FCC does not require stations to have a website or mobile app.) If your station's website or app—like most online platforms—provides links to material on other websites, or if your station's website or app hosts material submitted by users ("user-generated content" or "UGC"), this development is important, and you will want to consider taking action to protect the station. The new filing process and online filing system, which the Copyright Office anticipates will open for business on December 1, 2016, will apply to you even if you have previously registered a "designated agent," and, in a new wrinkle, it will require triennial renewal.

Of course, the applicability of the DMCA safe harbors is heavily dependent on the type of material and content provided by a station on a website or in a mobile app, the practices and procedures of the station, and other particular circumstances, which are beyond the scope of this article. In other words, understanding and following the new registration process will not, by itself, guarantee applicability of the DMCA safe harbors. Here is a summary of the principal points that broadcasters need to understand about the Copyright Office's new registration process and filing system.

Safe Harbor Protection Generally. Section 512 of the Digital Millennium Copyright Act ("DMCA") provides safe harbors from copyright infringement liability for online service providers (including stations that operate websites and apps) when certain eligibility requirements are

satisfied. For example, the safe harbors may protect a station from copyright liability in situations where the station is not aware that a hyperlink on its website is directed to infringing content hosted on another site. For station websites that host UGC, the safe harbors may also protect the station if the broadcaster is not aware that a particular item of such UGC infringes the copyright of another.

Designated Agent Contact Information. Among several other requirements and conditions, a station seeking to avail itself of the DMCA safe harbors is required to designate an agent to receive notifications of claimed copyright infringement by making contact information for the agent available to the public on its website and by providing such information to the Copyright Office. A service provider that fails to maintain current and accurate designated agent contact information, both on its website and with the Copyright Office, may lose the safe harbor protections.

Filing of Designated Agent Information. Historically, agent designations were required to be filed with the Copyright Office on a paper form either in hardcopy, or as a scanned submission of the paper form via email. The Copyright Office has maintained agent designations as PDFs, posting them to the Copyright Office website. The new electronic filing system significantly updates this process and will fully replace the paper-based system.

New Electronic Filing Requirement for Designated Agent Information. Beginning **December 1, 2016**, stations will be **required** to use the new online registration system to electronically submit the requisite station and designated agent information to the Copyright Office. The new system will be (but is not yet) available on the Copyright Office's website.

Prior Registrants Must Re-File By December 31, 2017. Even if your station has previously designed an agent using the "old" paper/email process, you will be required to submit a new designation using the new online system within one year—i.e., by **no later than December 31, 2017**.

Updates to Designated Agent Information Required. As under the "old" registration system, stations will be required to keep their designations current and accurate by timely updating information in the online filing system when the information changes.

Renewal of Registrations Required Every Three Years. In the new filing system, agent designations will expire and become invalid three years after registration. Accordingly, you must plan to renew your designations every three years. Stations must be acutely aware of this "gotcha"—**if you don't timely renew the registration, you risk losing the DMCA safe harbor protections**.

The Filing Fee Will Decrease Dramatically. As under the "old" paper/email system, there will be a fee to file an agent designation with the Copyright Office using the new online system. However, the Copyright Office has reduced the fee to a flat fee of $6 per designation (which is a significant drop from the old fee of $105 plus an additional fee of $35 for each group of one to ten alternate names used by the service provider). The new flat fee of $6 will apply irrespective of whether the station is registering a new designation, or renewing, amending, or resubmitting a previously registered designation.

Online, Searchable Directory. The Copyright Office will maintain agent designation information in a public, searchable directory. Members of the public will be able to access the directory through the Copyright Office's website and search the directory either by service provider name or alternate name to obtain contact information for a designated agent. The search results will show not only service provider names and alternate names matching the search query, but will also indicate whether the agent designation is still active.

Registration, By Itself, Does Not Guarantee Safe Harbor Protection. Again, the agent designation filing is only one of many conditions and requirements that a station must satisfy to be entitled to the protection of the DMCA safe harbors. In addition to compliance with the registration requirements, the applicability of the DMCA safe harbors will ultimately depend on the type of material and content provided on your online platforms, your practices and procedures, and other particular circumstances.

Consult with Legal Counsel! Because copyright infringement comes with significant liability exposure, stations should contact legal counsel with questions about the DMCA safe harbors or the new designated agent registration system. Stations that operate online platforms and have never designated an agent and registered with the Copyright Office should consult counsel immediately to determine whether to go ahead and make a paper/email filing using the "old" system even before the new system launches online.

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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