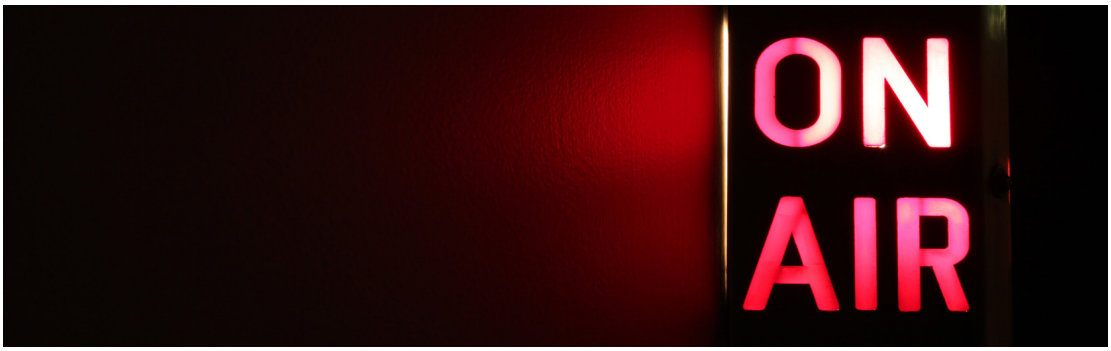
VAB Newsletter

July 2013

Congressman Vows to Introduce Bill on Radio Royalties



Representative Melvin L. Watt, a Democrat from North Carolina, said on Thursday that he planned to introduce a bill requiring broadcasters to recognize the performance rights of record companies and musicians, the latest effort in a decades-old fight by the music industry to extract greater royalties from radio.

Radio broadcasters in the United States — almost alone in the world — pay royalties only to music publishers and songwriters for terrestrial airplay, meaning when songs are played over the air on AM or FM radio. They don't pay royalties to record companies or performing artists, under the argument that the promotional value those parties receive is sufficient compensation.

The music industry has tried numerous times over the years to change this situation — Frank Sinatra was a leading advocate — but has always failed.

Mr. Watt said that he planned to introduce a bill before Congress's recess in August that would establish this performance right for sound recordings. Mr. Watt told the Washington publication The Hill that this could lead to private licensing negotiations between broadcasters and record companies.

Such a bill would not go as far as the last effort at forging a performing rights bill. That bill was introduced in 2009 and would have mandated a royalty. It never came to a full vote in Congress, and although it led to negotiations between broadcasters and music groups, the talks fell apart in 2010 amid acrimony on both sides.

Music groups and broadcasters on Thursday quickly stated their opposing stances over the proposed bill.

"We applaud Ranking Member Watt for taking leadership to end the decades-long injustice that denies performers' compensation when their work is played on AM/FM radio," the musicFIRST Coalition, representing record labels, musicians' unions and other groups, said in a statement.

The National Association of Broadcasters, which has been gearing up for a new fight by promoting a nonbinding resolution in Congress against a change, said that it "strongly opposes a new performance tax that would kill jobs at America's hometown radio stations while diverting millions of dollars to offshore record labels."

Mr. Watt's announcement came just as more news of a growing alternative to royalty legislation emerged. Clear Channel Communications, which has struck a number of private licensing deals with independent record companies, paying royalties for terrestrial airplay in exchange for lower online streaming rates, announced on Thursday that it had made a similar arrangement with the label Innovative Leisure, whose acts include Bass Drum of Death, Crystal Antlers and Classixx. ▮

Article courtesy of Ben Sisario from The New York Times.

Inside

Applications for the 2014 Best of the Best Leadership Program will be accepted until **September 15, 2013**. For more information, visit the website at www.vabonline.com.

250 West Main Street, Suite 100
Charlottesville, VA 22902
434.977.3716 • 434.979.2439
www.vabonline.com

VAB Newsletter
Published monthly by the
Virginia Association of Broadcasters
250 West Main Street, Suite 100
Charlottesville, VA 22902
434.977.3716 • 434.979.2439 (f)
www.vabonline.com

NAB Expresses Support for Rockefeller Violence Research Bill

On the news that Sen. Jay Rockefeller (D- W. Va.) planned next week to mark up his Violent Content Research Act of 2013 -- it was referred to committee July 24 and is scheduled for a July 30 markup-- National Association of Broadcasters president Gordon Smith, himself a former senator, said his members support the inquiry.

"Given the conflicting scientific data, NAB supports chairman Rockefeller's bill requiring more research to determine whether a link exists between violent content and real-life violence. Broadcasters support community decency standards attendant to our broadcast licenses," Smith said in a statement. "In response to horrific acts of violence, NAB has worked with the White House, the Department of Health and Human Services and a bipartisan group of lawmakers to produce public service announcements focused on youth mental health issues. We have done so in hopes that greater civility can be restored to society and that incidences of societal violence can be reduced."

NAB from the outset has said broadcasters were willing to be part of a national conversation about the impact of gun violence on society and its possible causes, and would help with a Rockefeller-proposed study, though suggesting it was a tall order. The issue of mental health has been both a public and private conversation, and mission, for Smith, whose son suffered from mental illness.

Rockefeller reintroduced the bill back in January. It would require the National Academy of Sciences to direct the Federal Trade Commission, Federal Communications Commission and Department of Health and Human Service to study the impact of violent video games and violent video programming on children and figure out if there is a causal connection between either and real-world violence.

After the shootings, Rockefeller said he would push for the bill. The Senator has been one of the most consistent voices in Congress sounding an alarm about the impact of media, particularly violence, on children. He had originally signaled the effort in the aftermath of the Sandy Hook School shootings.

Article courtesy of John Eggerton from Broadcasting & Cable.

NAB: FCC Needs to Collect Comprehensive Wireless Spectrum Use/Efficiency Data

The FCC asked for input on the state of the wireless industry and the National Association of Broadcasters has some advice for it: Figure out how, where and to what extend wireless carriers are using the spectrum they already have. NAB argues that neither the FCC nor Congress can advance sound spectrum policy -- that would appear to include holding a broadcast spectrum auction to relieve the perceived crunch -- until it collects that data. In comments filed this week, NAB says that while wireless carriers are busy telling the FCC in their comments that they need more spectrum, the FCC should instead be focused on "whether and how intensely licensees use spectrum and where," NAB says. "Without this critical information, the Commission cannot make optimal -- or even rational -- spectrum management decisions." The FCC is in the midst of an effort to reclaim broadcast spectrum for auction to meet what is a projected shortfall of capacity for the admittedly exploding mobile broadband ecosystem. It wants the FCC first look into how efficiently carriers are using the spectrum they already have. Without that, NAB argues, "the Commission cannot rationally determine whether more efficiency or more spectrum is the better answer to a perceived spectrum crunch in the nation's largest markets."

Article courtesy of John Eggerton from Broadcasting & Cable.

Celebs, Fans React to Radio Host Kraddick's Death

The sudden death of nationally syndicated radio talk show host David "Kidd" Kraddick has drawn a social media explosion of sorrow and condolences.

Kraddick, whose Texas-based show airs on scores of stations across the nation, died Saturday after falling ill at a charity golf tournament he was hosting in a suburb of New Orleans. Kraddick, 53, was raising money for his Kidd's Kids foundation.

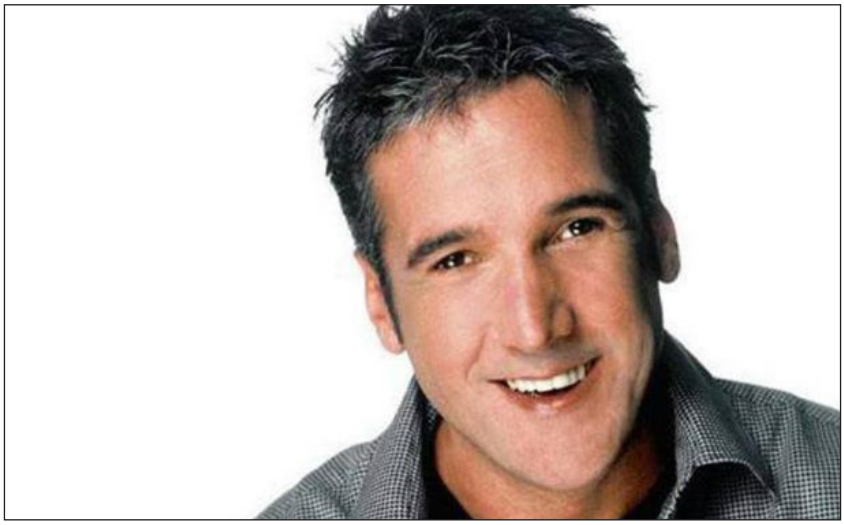
"He died doing what he loved, and his final day was spent selflessly focused on those special children that meant the world to him," a statement on Kraddick's Kidd Nation website said.

The statement said Kraddick "devoted his life to making people smile every morning, and for 21 years his foundation has been dedicated to bringing joy to thousands of chronically and terminally ill children."

By Sunday afternoon, the statement posted on the Kidd Kraddick Facebook page had drawn more than 60,000 "likes" and more than 15,000 comments. Ryan Seacrest tweeted condolences: "So sad hearing about my radio brother Kid Kraddick. One of a kind and one of the best at what he did every morning. U will be missed Kidd"

Texas lawmaker Wendy Davis, who recently made nationally news with a one-woman fillibuster against a Texas abortion bill, tweeted that "my family and I are truly heartbroken over the unexpected loss of the legendary radio host Kidd Kraddick."

Heartthrob Harry Styles of the Twitter-fave band One Direction tweeted that he was "Absolutely devastated to hear about the sad passing of Kidd Kraddick. He was always so nice and will be incredibly missed. Lovely man. RIP." Not surprisingly, the tweet was "favorited" more than 45,000 times.



New Orleans media outlets reported that Kraddick had been taken to a New Orleans hospital, where he died Saturday afternoon. The network statement said the cause of death would be released "at the appropriate time."

Richie Tomblin, head golf pro at the Timberlane Country Club in Gretna, said Kraddick wasn't looking well when he saw him getting ready for Saturday's charity tournament. "He came out and he borrowed my golf clubs and went out to the driving range," Tomblin said. "It's kind of a freaky situation. He came out. He practiced a little bit. He hit the ball at the first tee and wasn't feeling good and after that I didn't see him."

The show's cast is seen weeknights on nationally syndicated TV show Dish Nation. Kraddick recently did a humorous segment on what he'd say if he knew he was on his deathbed.

"When I die, you have permission to take a bunch of creepy pictures of my body," he said. "I want to thank all of you guys for being at my deathbed today. I'm going to miss you so much."

Article courtesy of John Bacon from USAToday.

"He died doing what he loved, and his final day was spent selflessly focused on those special children that meant the world to him."

HUMAN RESOURCES

Good News for Employers: Harassment Just Got Tougher to Prove

John G. Kruchko is a Partner with the Management Labor & Employment Law Firm of Kruchko & Fries, PLC in Tysons Corner, Virginia; Kevin B. McCoy is also a Partner with the Firm. For more information, please contact Mr. Kruchko or Mr. McCoy at (703) 734-0554 or JKruchko@KruchkoandFries.com, or KMcCoy@KruchkoandFries.com. This article is published for general information purposes, and does not constitute legal advice.

Last month, the Supreme Court issued its decision in a highly-anticipated employment case, *Vance v. Ball State University*. The Court held that a "supervisor," for purposes of Title VII harassment suits, is an employee who has the power to impose a "tangible employment action" on a co-worker, such as termination or reassignment. Since employers can be held liable for harassment by supervisors, the distinction is an important one. Previously, lower courts disagreed on the definition of "supervisor" in Title VII discrimination cases, leaving the door wide open to employers' vicarious liability, but last month's decision narrows that gap considerably.

In general, when an employee is harassed by a co-worker, the employer is only liable if they were negligent in response to the offending behavior – if it knew or should have known of the conduct but failed to take appropriate corrective action. Unreasonably ignoring such conduct and allowing it to continue makes the employer, in the eyes of the law, directly liable for its employees' discriminatory actions.

Different rules apply, however, when the accused individual is a "supervisor." Courts have previously held that employers face strict liability for workplace harassment by a supervisor only if it results in a "tangible employment action" like termination, failure to promote, major reassignment or a significant change in benefits. Absent such tangible action, the employer can still be held liable unless it can establish that it took reasonable care to rectify and prevent any harassing conduct, and that the aggrieved employee refused any remedial measures made available by the employer.

Clearly, since the actions of certain employees can leave employers directly vulnerable to harassment suits, the distinction between co-worker and supervisor is an extremely important one. Yet courts have long been divided on the precise definition of "supervisor" in this context. Some jurisdictions have asserted that a supervisor is an employee with the authority to affect a tangible employment action on the harassed employee, while others – including the EEOC – defined it more broadly as someone who has the power to exercise significant direction over another's work. Without a precise definition under the law, determining the status of an accused employee often became the dominant issue in litigation, even before addressing the harassment facts themselves.

The word "supervisor" is not even mentioned in the text of Title VII, but years of judicial interpretation have created exceptions to the usual rules of employer liability. The reasoning behind holding employers liable for acts of a supervisor is rooted deep in the laws of agency, that realm of justice governing the relationship between authorized representatives and the companies or individuals they represent. Supervisors and managers who have been bestowed by their employer with authority to make significant employment decisions are expected to do so as representatives of the company's interests. So when they exceed those interests and abuse their position to harass a sub-

ordinate – even without causing a tangible employment action – they are aided in accomplishing the harassment by the existence of the agency relationship. The harms created by discrimination and a hostile work environment then become official acts of the company itself, exposing it to liability.

The recent Supreme Court decision drew upon previous Supreme Court cases that laid the framework for discriminatory harassment claims, none of which had directly addressed the issue at hand because by the time those cases reached the high court, the harasser's status as a supervisor was uncontested. The Court therefore took this opportunity to clear up what it saw as too much ambiguity in an oft-litigated field.

The plaintiff in this case, Ms. Vance, accused a co-worker of creating a hostile work environment via racial animosity. The co-worker, a white woman, did not have the power to hire or fire Ms. Vance, an African-American woman, nor was she able to cause any other kind of tangible employment action. Yet the plaintiff asserted that the co-worker held a leadership role in the workplace, occasionally handed out assignments, and was therefore a supervisor who was using her position to create a hostile work environment. Defendant Ball State argued that regardless of the co-worker's behavior, it should not be held vicariously liable because she did not have the necessary authority to be considered the plaintiff's supervisor for purposes of Title VII. If the defendant prevailed on that issue, its liability would only be judged by the negligence standard, i.e. how they responded to the situation once they were made aware of it.

Numerous definitions of "supervisor" have cropped up in lower court decisions and government agency opinions: authority to assign more than a certain number of tasks, authority that is exercised more than occasionally, various standards of "sufficient" authority, influence on corporate decision-makers, etc. But the Court chose to decline those measures of an employee's status, citing the inevitable battles over defining the definitions themselves, and opting for what it believes to be a clear and concise standard that is unlikely to elicit different interpretations from different courts. Whether or not an employee has the power to inflict "tangible employment actions" is, according to the decision, easily determinable even at the summary judgment stage and thus might help lighten the load on court dockets.

The dissent penned by Justice Ginsburg and joined by the three remaining Justices, worries that such a narrow definition will leave victims of harassment with little recourse if their tormentors lack specific powers of authority. Employees who oversee others can still inflict significant psychological harm short of demotion or termination, and unless the employer can be proven negligent, the victim will have no choice but to withstand the abuse or quit the job. The employer is negligent with regard to harassment only if it knew or should have known of the conduct but failed to take appropriate corrective action. Yet it is rather common for employers to be unaware of discriminatory behavior and harassment. The minority opinion believes a narrower view of supervisors will simply encourage employers to take back authority to make employment decisions from its "supervisors" and thus avoid liability by technicality.

Rather than removing or reassigning the authority to make tangible employment decisions, the Court appears to hope that employers will be motivated to keep a better watch on their employees at all levels, especially those who represent the company interests and are empowered to act on its behalf, to ensure a safe and tolerant work environment for all.

For now, the Supreme Court has handed a clear victory to employers. The pool of potential "supervisors" has diminished and the degree of difficulty for plaintiffs establishing vicarious liability under title VII has risen. Should you be confronted by harassment allegations, please consult experienced employment counsel to assist in wading through how the Supreme Courts' decision might impact your compliance efforts. ▮

Article courtesy of John G. Kruchko and Kevin B. McCoy, Kruchko & Fries.

The reasoning behind holding employers liable for acts of a supervisor is rooted deep in the laws of agency, that realm of justice governing the relationship between authorized representatives and the companies or individuals they represent. Supervisors and managers who have been bestowed by their employer with authority to make significant employment decisions are expected to do so as representatives of the company's interests.

LEGALREVIEW

LUC Window for November General Elections Opens September 6

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.

The general election in Virginia is scheduled for November 5, 2013, when Virginians will be voting for Governor, Lieutenant Governor, Attorney General, and numerous county, city, and other local officials. This means that the general election's "lowest unit charge" ("LUC") window will open on September 6. It is critical to remember that the LUC requirements apply to state and local candidates in the same way they apply to federal candidates. That leaves just about a month for broadcast stations to refresh their protocols for ensuring compliance with the FCC's LUC requirements.

Under the LUC requirement, during the 45-day period preceding the date of a primary or primary run-off election and during the 60-day period preceding the date of a general or special election, the charges made for the "use" of a broadcast station by a "legally qualified" candidate may not exceed the LUC of the station for the *same class and amount of time for the same time period*. Remember, the LUC requirement does not mean that a station must sell prime or drive time at a non-prime or non-drive time rate. Nor does it mean that "fixed position" announcements must be sold at "run of schedule" or "preemptible" rates. The LUC requirement applies only to charges made for the same "class" and "amount" of time for the same "period." Thus, a candidate who purchases a fixed position announcement in drive time may be charged the same rate charged other advertisers for a fixed position announcement in drive time—except the candidate is entitled to the benefit of a frequency discount even though he or she might not have purchased enough time to have "earned" it.

When determining the LUC, stations must remember that, generally, all spots, including bonus spots, must be allocated some value in a package arrangement. To minimize any adverse impact on your station's LUC during the political windows, stations should have allocated, in good faith, some value to bonus spots included in package arrangements through a separate writing at the time the contract was signed. On the other hand, not all types of advertising must be factored into a station's LUC analysis; for example, station trade-outs, "billboards," and program sponsorships are generally not required to be factored into LUC computations.

Candidates may complain if they suspect a station has not provided them with the LUC. Such a complaint may be informal (a phone call to the station or FCC, written demand, etc.) or it may involve a formal written complaint to the FCC. In order to invoke the FCC's enforcement procedure, the candidate must do more than merely accuse the station of overcharging—but not much more. In order to avoid expending the resources and energy necessary to respond to a formal FCC complaint, stations may wish to follow these guidelines:

If a station receives a candidate's letter demanding the rebate of alleged overcharges, the station should immediately consult with its own communications counsel and consid-

er how best to respond. (Failure to respond promptly to such a letter may provoke the candidate into filing a formal complaint with the FCC.)

- In order to respond to a written inquiry or complaint concerning overcharges, stations should evaluate the specific allegations made by the candidate. Determine if the station actually did overcharge the candidate—if so, refund the overage immediately with an explanation of how the mistake occurred.
- An ongoing review of rates charged political advertisers should be conducted by stations throughout the election period. The FCC has suggested that a weekly review would be sufficient. Such ongoing reviews will enable the station to determine if an overcharge has occurred and refund all overcharges in a timely fashion.
- In other circumstances, usually in response to a formal complaint, a station may opt to conduct an internal audit. This should not be done without advance consultation with the station's own communications counsel. Full internal audits can be time consuming and expensive. They involve a review of all advertising sold to the particular candidate and other advertisers in the time periods, and an evaluation of whether the price charged the candidate was the "lowest unit charge."

If your station has not already done so, now is a good time to review your political disclosure statement and ensure that it is up-to-date—for example, you will want to be certain that you have added a non-discrimination provision to your disclosure statement. For detailed information on the LUC and other political broadcasting requirements, please contact the Association for the latest version of the publication *Nuts 'n Bolts of Political Broadcasting*, which was previously distributed. ▮

Article by Stephen Hartzell, Attorney, Brooks, Pierce, McLendon, Humphrey & Leonard LLP.

When determining the LUC, stations must remember that, generally, all spots, including bonus spots, must be allocated some value in a package arrangement.

Ninth Circuit Rules Against Broadcasters in "AutoHop" Case

The U.S. Court of Appeals for the Ninth Circuit has issued an unfavorable ruling for the broadcast industry in ongoing litigation against Dish Network.

Last year, Fox sued Dish to challenge a service that records primetime network programming with a feature called "AutoHop," which allows viewers to automatically skip commercials in broadcast network programs. The trial court denied Fox's request for an injunction to stop the service while the case moves forward, and Fox appealed.

Today, the Ninth Circuit affirmed the district court decision denying Fox's motion for a preliminary injunction. The Ninth Circuit's opinion made clear that, in its view, "commercial-skipping does not implicate Fox's copyright interest" because Fox does not own the copyrights to the advertisements contained in its programming. The Court further concluded that Dish is likely to succeed on its claim that recording of programming by its subscribers was a "fair use" under copyright law.

The Ninth Circuit's ruling does not foreclose the possibility that Fox might be able to prove copyright infringement, for which Fox could be compensated by money damages. As the Ninth Circuit observed, its decision does not "determin[e] the ultimate merits of the case." Nevertheless, the ruling clearly is a setback, however temporary, for the broadcast industry.

This case is important to ongoing efforts to protect broadcasters' copyright interests and right to control distribution of their content. We will keep you informed of further developments on these important issues.

If you desire additional information, please give one of our FCC attorneys a call. Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P may be reached at (919) 839-0300. ▮

VAB JOB|BANK

How to Submit to the VAB Job Bank

Jobs that are printed in the newsletter are pulled directly from the online Job Bank. To include your listing:

- Go to **www.vabonline.com**. Login with your user name and password.
- Be sure to include your station ID or company name, information on how the applicant can apply and where to send the applications materials.

News Talk Marketing Consultant
Arlington, VA
Salem Communications currently has a full-time position available at WRC Radio for a News Talk Marketing Consultant. This person will be focused on selling our local WRC broadcast radio and 1260WRC.com digital products. They will target and prospect local businesses that have an affinity for a conservative political audience and be able to develop and oversee the execution of multi-faceted campaigns using online, social media, broadcast and other cutting-edge media. Bachelor's Degree is preferred. Candidates must have a valid Driver's License and a clean driving record. For more details, visit WAVA.com, Keyword: Jobs. EOE.

Digital Sales Account Executive
Roanoke, VA
WDBJ7 has an immediate opening for a digital sales account executive for their website. The successful candidate will be familiar with digital products, possess strong presentation and communication skills, be highly-motivated, and display the ability to build strong client relationships. Previous sales experience desired, with a college degree preferred. Must have a valid driver's license with a good driving record. Background and pre-employment drug screen required. Interested candidates please visit the following web site: http://schurz.com/careers/career-opportunities/?fuseaction=mExternal.showJob&RID=1486. EOE.

Social Media Marketing Consultant
Arlington, VA
Salem Communications currently has a full-time position available at WAVA/Family Talk/WRC Radio for a Social Media Marketing Consultant. This person will work with local businesses to identify and provide social media marketing solutions as a part of a larger comprehensive marketing plan. Candidates are expected to be proficient in marketing, current social media best practices, social media management (Facebook, Twitter, LinkedIn, Pinterest) and demonstrate the ability to prospect and work with a variety of clients. Candidates must have a valid Driver's License and a clean driving record.Bachelor's Degree is preferred. No relocation is offered. For more details, visit WAVA.com, Keyword: Jobs. EOE.

Assistant News Director
Richmond, VA
WWBT-NBC12 seeks an Assistant News Director to lead an award-winning team. Perfect candidate must possess a dynamic personality and great people skills and will manage the day-to-day operations of the newsroom on all platforms (on air, online and on mobile). Successful candidate must be a good leader, teacher and coach for staff; with the ability to execute a winning breaking news and breaking weather strategy. Experience in a metered market is a must. Send resume to Frank Jones, News Director, at fjones@nbc12.com or mail to WWBT-NBC12, Attn: Frank Jones, 5710 Midlothian Turnpike, Richmond, VA 23225. No phone calls please. EOE-M/F/D/V.

News Content Specialist
Richmond, VA
NBC12 seeks a FT news/content specialist. Qualified candidates should have experience in all areas of broadcast operations including microwave, tape editing, graphics, camera and audio. Good computer and internet skills. Send cover letter and resume to Frank Jones (fjones@nbc12.com), Assistant News Director, NBC12, P.O. Box 12, Richmond, VA 23218. Drug Screen and Motor Vehicle Record check required. EOE M/F/D/V.

Interactive Media Coordinator
Virginia Beach, VA
Work within the Interactive Department on coordinating various web components. Implement and facilitate digital packages and sales orders. Work with the sales team to brainstorm solutions for clients. Create and edit graphics and videos for web. Requirements – Must have a BS/BA in Marketing, Graphic Design or similar. Photoshop experience and video editing is necessary. Web development software a plus. Email your resume to Erin Galant at egalant@maxmediava.com. EOE.

Account Executive
Richmond, VA
CW Richmond is looking for that ideal person who can talk about the hottest shows on television to businesses around Richmond. CW Richmond is now interviewing for Account Executives. If you are an energetic and creative problem solver who is not afraid of hard work, we want to meet with you! Send resume with cover letter and salary requirements to: CW Richmond, 5710 Midlothian Turnpike, Richmond, VA 23225. ATTN: Adam Brown or email abrown@cwrichmond.tv. CW Richmond is an Equal Opportunity Employer. Drug Screen and Motor Vehicle Record check required. EOE M/F/D/V

For a complete list of career opportunities, please visit www.vabonline.com/careers.