



Virginia Association of Broadcasters Legal Review



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Legal Memorandum

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AT&T Invests in Free Internet Streaming Service “Locast”; Broadcasters Keeping Watchful Eye

Many television broadcasters are keeping an eye on Locast—an Internet-based streaming service that picks up over-the-air broadcast signals and streams them live over the Internet on Locast’s website and apps as well as on digital media players like Roku. The Locast service is similar in many respects to the now-defunct Aereo and FilmOnX, with one major difference: Locast does not charge subscription fees to users because it is operated by a non-profit advocacy group called Sports Fans Coalition NY.

Locast relies on its nonprofit status to take advantage of an exception in the Copyright Act that permits nonprofits and government agencies to retransmit broadcast signals if (1) they do not benefit financially (i.e., if their transmissions are made without any purpose of direct or indirect commercial advantage), and (2) any fees charged to users are limited to covering operational costs. To take advantage of the exception for nonprofits, Locast asks users for donations rather than charging fees.

Broadcasters believe that Locast’s service goes beyond what the Copyright Act exception is intended to allow. To date, though, broadcasters have not challenged Locast in court, preferring to evaluate Locast’s purported non-commercial bona fides. Although Locast has now expanded to more than a dozen markets and claims to be available to more than 30 million viewers in those markets, broadcasters have suspected that the service was facing operational funding challenges.

A recent development may change the landscape. On June 27, 2019, AT&T announced that it was donating \$500,000 to Sports Fan Coalition, ostensibly to support its “mission to make free broadcast content available to consumers and offer them more choice.” That announcement comes on the heels of word late last month that AT&T had added the Locast app to all DIRECTV and U-verse receivers. (The app is also available on DISH receivers.) The AT&T donation may alleviate any funding challenges Locast might have been facing.

Locast’s announced plans to expand its service to all 210 markets, coupled with AT&T’s making the Locast app available to DIRECTV and U-verse subscribers, threaten to undermine the retransmission consent regime. Widespread deployment of the Locast service could allow traditional MVPDs to make broadcast stations’ signals available to subscribers “free of charge,” allowing MVPDs to avoid paying broadcasters retrans fees—a result plainly at odds with the Communications Act. With AT&T’s announcement, it appears that “commercial advantage” is flowing to *both* Locast and AT&T. Accordingly, networks and broadcasters are evaluating their options. We’ll keep you posted on further updates regarding broadcasters’ response to Locast’s expansion.

FCC Seeks Comment on Improving EEO Compliance and Enforcement

The FCC recently issued a [Notice of Proposed Rulemaking](#) (the “Notice”) seeking comment on how the Commission can improve its equal employment opportunity (“EEO”) compliance and enforcement efforts. The Notice follows the FCC’s recent elimination of broadcasters’ obligation to file EEO Form 397 (the Broadcast Mid-term Report), which came as part of the Commission’s Modernization of Media Regulation Initiative. Various EEO-related issues were raised by commenters in that EEO Form 397 proceeding, and the Notice tees some of them up for further discussion and inquiry.

To that end, the Notice seeks comment regarding potential improvements that can be made to EEO compliance and enforcement with respect to broadcasters (and MVPDs). The Notice reminds broadcasters of their EEO obligations (i.e., that station employment units subject to the EEO rules to establish and maintain a continuing EEO program, which includes carrying out widespread recruitment for full-time job vacancies and to undertake a variety of non-vacancy-specific EEO outreach initiatives). Among other things, the Notice seeks comment on:

- analyses of the effectiveness of or potential improvements to the Commission’s current EEO enforcement efforts;
- whether elements of the FCC’s EEO enforcement program should be eliminated or added to increase enforcement effectiveness;

- how, if at all, the Commission’s EEO audit process should be modified to allow the FCC to better verify whether hiring decisions were made before or after the posting of job openings, and to ensure that the audit process uncovers discrimination at the distinct points of recruitment, interviewing, and selection; and
- any other suggested types of enforcement or compliance initiatives that would help deter discrimination in the broadcast and MVPD industries.

In addition, the Commission requests particularized support for any commenter’s proposals, including relevant data or studies, suggestions for overcoming any implementation difficulties, and a comparison of the relative costs and benefits of such proposals.

Comments on the Notice will be due within 30 days after its publication in the Federal Register, and Reply Comments will be due 45 days after such publication. As of June 28, 2019, the Notice has not yet been published.

Repack Reimbursement Getting Closer for LPTV, TV Translator, and FM Broadcast Stations

The wheels of government bureaucracy are continuing to turn (albeit slowly) when it comes to the FCC’s recently adopted rules regarding reimbursement for LPTV, TV translator, and FM broadcast stations that have incurred costs due to the spectrum repack.

No, stations cannot yet begin submitting reimbursement requests. But at least we’re now a step closer to that being the case. That’s because the FCC recently [formally submitted](#) the LPTV/TV translator/FM broadcast station reimbursement rules to the Office of Management and Budget (“OMB”). The rules have to go through OMB because they require the addition of new questions the current repack reimbursement form (FCC Form 2100, Schedule 399), and OMB has to approve the revised form.

Although the time it takes for such forms to go through the OMB approval process varies, the earliest that the revised repack reimbursement form could be approved is July 29, 2019, which marks the expiration of the thirty-day comment period regarding changes to the form. (Realistically, however, it is not likely that the form will be approved on July 29.)

What’s the upshot of all of this? These repack reimbursement rules are moving in the direction of becoming effective, which is good news for those LPTV, TV translator, and FM broadcasters eager to avail themselves of the reimbursement funds, but we’re not there yet. (FCC Staff has informally suggested to us that it’ll likely be autumn of this year when stations will be able to begin making reimbursement submissions.) We’ll keep an eye on this and let you know of further developments.

FAA Seeks Comment on New Web-Based Frequency Coordination Request System

Some recent activity at the Federal Aviation Administration (“FAA”) ought to get broadcasters’ attention. The FAA recently issued a [Notice and Request for Comments](#) regarding its new Web-based Frequency Coordination Request system (the “WebFCR” system). The WebFCR system is designed to replace means by which the FAA has previously collected certain broadcast frequency information. (The information has been collected via the FAA’s Form 7460-I, “Notice of Proposed Construction or Alteration.”)

As you may know, if a broadcaster proposes to use a radio frequency that impacts civil aviation (i.e., certain designated frequency bands between 190 kHz and 9200 MHz) the broadcaster must obtain both FCC authorization and FAA concurrence. Ensuring this frequency coordination is of paramount importance, as the safe transport of flights between airports is based on radio frequencies being available and interference-free so that all aviation systems function properly. Such frequency coordination also benefits broadcasters by helping to ensure that signals and programming aren’t disrupted.

The FAA hopes that the rollout of its WebFCR system will increase the expediency of information collection and also allow for the collection of some information that wasn’t being capture properly using the prior FAA Form 7460-I.

WebFCR’s information collection requirements have been submitted for analysis and potential approval by the Office of Management and Budget, with a comment deadline of July 26, 2019; accordingly, any interested parties have a little less than a month left to formally weigh in on the new WebFCR system. We will keep you apprised of any further developments.

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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