Virginia Association of Broadcasters
Legal Review

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Legal Memorandum

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- July 31, 2019: TV Station Copyright Royalty Claims Due

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TV Station Copyright Royalty Claims Due July 31, 2019

It's again that time of year for television stations to file distant signal copyright royalty claims. Claims for 2018 must be filed **no later than 11:59 p.m. EST on July 31, 2019**.

As you may recall, a television station is considered the copyright owner of its locally produced programming, such as news and public affairs coverage. And, when a television station's copyrighted programming is retransmitted by cable or satellite as a "distant" signal, the station may be entitled to receive payment of copyright royalties. The United States Copyright Royalty Board collects copyright royalties from cable systems and satellite carriers and then distributes them to the copyright holders. NAB oversees the distribution of individual royalty shares to qualifying stations.

The Copyright Royalty Board encourages stations to file claims online, using its electronic filing system called eCRB. The Copyright Royalty Board provides online filing instructions here.

Claims can also be filed in hard-copy form, but stations who opt to file paper claims should note that there are special certified mail or hand delivery procedures that must be followed.

For this filing—where thousands of dollars (and even more) can be at stake for each station—meeting the deadline is serious business: A copyright owner once lost $10 million in copyright fees because its claim for copyright royalties was filed late!

Copyright law generally defines "distant" carriage as follows:

> **Cable Systems:** With respect to cable systems, a station's programming is considered "distant" if it is carried on a system that is (1) outside of the station's DMA, and (4) in a county where the station is not "significantly viewed."
>
> **Satellite Carriers:** With respect to satellite carriers, a station is considered "distant" if it is provided by the satellite carrier to subscribers located outside of the station's DMA.

To claim copyright royalties, a station's locally produced programming must satisfy at least one of the above definitions. In order for television stations to receive their 2018 copyright royalties for distant carriage, stations must file a claim with the Copyright Royalty Board by the deadline referenced above. If a station can claim both cable and satellite royalties, the station must file a separate claim for each type of distant carriage.

Stations may wish to confer with their communications counsel for information about how to timely complete and file their claim(s).

FCC Reminds TV Stations to Make EAS Messages Available to Viewers with Hearing and Visual Impairments

With next month's nationwide test of the Emergency Alerts System right around the corner (it's set to take place on August 7 at 2:20 pm, ET), the FCC issued a public notice (the "Notice") this week reminding television stations (and other video service providers, including cable and satellite entities) of their obligation to provide accessible EAS alerts.

Specifically, the Notice reminds television stations that they are required, under FCC rules, to ensure that individuals who are deaf or hard of hearing and individuals who are blind or visually impaired have full access to EAS messages, including all of the content therein. Accordingly, such alerts must be broadcast in in a manner that is easily digestible—both aurally and visually.

For television stations, that means a visual alert must (1) appear at a location where the alert does not interfere with other visual messages, (2) be composed in readily readable and understandable font size, color, contrast, location, and speed, and (3) not contain overlapping lines of EAS text or extend beyond the viewable display (except in the case of video crawls that intentionally scroll on and off the screen).

Audio alerts, meanwhile, must be transmitted on the main audio channel, and, for DTV stations, must also be transmitted on all program streams.

In addition, both the visual and audio portions of an EAS message must play in full at least once during any EAS alert. Note also that, although the FCC has not formally adopted any requirement that that the audio and visual content be identical (i.e., there is no "audiovisual synchronicity" requirement), EAS participants should generate both the audio and visual elements of an alert in a manner that provides viewers and listeners with equivalent information within the same or similar timeframes.

Again, as mentioned, the FCC and FEMA will conduct a nationwide test of the EAS—in which ***all broadcasters*** must participate—on August 7, 2019, at 2:20 p.m. Eastern Time. (The backup date, if necessary, will be August 21, 2019).

We'll provide further updates regarding the nationwide test over the next few weeks.

Federal Court Sets Aside Recent DHHS Drug Pricing Regulation

A federal district court recently overturned a rule issued in May by the Department of Health and Human Services ("DHHS") that sought to regulate the marketing of prescription drugs by requiring drug manufacturers to disclose the list price of a 30-day supply of a drug when advertising it in certain television spots. Absent the court's decision, the rule would have taken effect this summer; for now, at least, the rule is on hold.

Note: Although the rule sought to impose obligations on *advertisers*—rather than the TV broadcasters airing the spots—broadcasters are generally best served if they are aware of pertinent rules, and that is especially true if they are involved in the production of advertisements for products subject to regulation.

Three drug manufacturers and a marketing trade association filed suit to stop the rule from taking effect shortly after DHHS issued it this past spring. Although the drug companies and the trade association argued (among other things) that the rule violated the First Amendment because it required drug manufacturers to disclose pricing information (they contended that the rule unlawfully mandated so-called "compelled speech"), the court decided the case on a narrower basis—without addressing the constitutional issue.

Simply put, the court determined that, in issuing the rule, DHHS took action that fell beyond the scope of authority that Congress has given the agency. Fundamentally, the court reasoned that DHHS' attempted regulation of private drug manufacturers did not fit within the agency's authority to "administer"—i.e., to "run" or to "manage"—the Medicare and Medicaid programs, finding that private drug manufacturers are not direct participants in those programs and are instead only indirectly affected by the Medicare and Medicaid programs through drug pricing.

So, what's the ruling mean for broadcasters?

For now, it just means that the disclosure-in-advertising rule will not take effect. Whether the court's decision will shelve the rule (and similar pricing disclosure regulations) in the longer term remains to be seen. DHHS now has the opportunity to appeal the court's ruling to a federal appeals court; there are pros and cons to such an appeal (e.g., letting the court's decision stand likely curtails the agency's ability to issue another, similar rule, but losing an appeal would arguably be worse for DHHS from a precedential standpoint). We will continue to monitor this case and keep you apprised of any further developments.

Recently Introduced Federal Legislation Would Require Broadcasters and MVPDs to Disclose Content That is Generated by Foreign Agents

Recently "re"-introduced legislation in the House of Representatives would require broadcasters and MVPDs to make certain disclosures relating to content generated by foreign entities, with the goal of preventing such entities from clandestinely influencing United States elections. Titled the Foreign Entities Reform Act, the bill would amend the Communications Act to require broadcasters and MVPDs to disclose when any entity registered as a "foreign agent" under the Foreign Agents Registration Act requests to purchase time from or disseminates content via a broadcaster or an MVPD. The bill was originally introduced last year.

The bill would impose disclosure obligations on broadcasters that are in many respects similar to the obligations which stations already deal with when it comes to political advertisements. That is, if the legislation were to become law, any request for time made by a "foreign agent," including the disposition of such a request, the rate charged for the spot, its broadcast date(s), the class of time purchased, and information regarding the foreign agent and the entity directing the foreign agent would have to be maintained in a station's online public inspection file for at least two years.

However, the bill would impose further burdens on broadcasters, in addition to those public-file obligations. Stations would be required to submit quarterly reports to the FCC, the Attorney General, and the Secretary of State regarding the content, as well as to disclose certain information during the actual broadcast of any such foreign-generated content.

At this point, there is little indication that the bill will get any more traction this time around than it did when it was originally introduced in 2018. That said, we want to make sure that the legislation is on your radar. Of course, we will keep an eye on the bill and let you know of any important 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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