

## FCC Enforcement Monitor

By Scott R. Flick and Lauren A. Birzon

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*Special Issue: Recent FCC Actions Provide a Detailed (and Expensive) Look at Section 73.1206, the Prohibition on Recording Telephone Calls for Broadcast*

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### **FCC Issues a Total of \$41,000 in Fines for Broadcaster Airing Prank Telephone Calls**

The close of August in Washington, DC has brought with it a surge of beautiful weather, baseball excitement (for the first time in recent memory), and ... forfeiture orders related to the improper recording of telephone calls for broadcast. On August 22<sup>nd</sup>, the FCC issued two forfeiture orders assessing a combined \$41,000 in fines against licensees owned by the same parent company for violations of the telephone broadcast rule.

The telephone broadcast rule, Section 73.1206 of the Commission's Rules, requires that, "[b]efore recording a telephone conversation for broadcast, or broadcasting such a conversation simultaneously with its occurrence, a licensee shall inform any party to the call of the licensee's intention to broadcast the conversation, except where such party is aware, or may be presumed to be aware from the circumstances of the conversation, that it is being or likely will be broadcast." While the rule language only talks about providing notice to the party called, the FCC has reiterated many times that when a station employee intends to record a call for broadcast or broadcasts the call live, the employee must also obtain the party's consent before recording the call or going live.

Both orders released on August 22<sup>nd</sup> involved a finding that the licensee had violated this rule. The first order involved prank calls made in April 2006 by radio personalities to members of the public during a comedy segment of the station's morning show. In one conversation, the caller pretended to be an intruder hiding under the bed of the person receiving the call; in another, the caller pretended to be a loan shark bent upon collecting a debt.

The FCC began investigating the prank calls after receiving a complaint from a station listener. During the investigation, the licensee indicated it was unable to confirm or deny whether the prank calls aired on its morning show, and could not provide a recording or transcript of the program. The licensee acknowledged, however, that the program identified in the complaint was aired on the station and was simulcast on two co-owned stations.

The second forfeiture order released on the 22<sup>nd</sup> also involved the broadcast of an alleged prank call in which the caller pretended to be a hospital employee who then informed the call recipient that the recipient's husband had been in a motorcycle accident and died at the hospital. When questioned about the incident, the licensee told the FCC that its parent company had contracted with an outside vendor who made and recorded the call. The licensee admitted that it broadcast the call on multiple occasions.

In the first case, the FCC had proposed a \$25,000 fine. In the second case, the FCC had proposed a \$16,000 fine. In both cases, the licensee urged cancellation of the proposed fines, to no avail. In batting down a myriad of arguments raised by the licensees, the FCC affirmed not only its broad investigative powers to enforce Section 73.1206, but also the licensees' responsibility to both adhere to and demonstrate their adherence to the Commission's Rules.

These two decisions provide an excellent primer for broadcasters on the FCC's enforcement of the "telephone call rule", as between them, the FCC addressed a multitude of defenses raised by the licensees, ultimately concluding that none of those defenses could prevent the imposition of very substantial fines. More specifically, the FCC shot down each of the following licensee arguments:

*The FCC could not have concluded from a preponderance of the evidence that the licensee violated the rule.* The FCC wrote that the licensee offered no evidence to dispute the facts alleged in the complaint and could not deny having aired the calls. As a result, the absence of a recording of the material at issue was not an obstacle to a finding that a violation had occurred. In making this ruling, the FCC rejected the following three licensee arguments to the effect that the FCC had "insufficient evidence" of a violation.

*The complaint was deficient because it did not come from the call recipient and did not allege a specific violation of the FCC's rule. Therefore, the complaint did not provide a sufficient basis for FCC action.* The FCC had previously entertained, in analogous cases, both third party complaints and complaints that did not allege a violation of a specific rule. The FCC therefore found no merit to this argument.

*The FCC could not have concluded that a violation occurred when the program was not recorded and the station's employees were not able to recollect any facts relevant to the case.* The FCC noted that while these facts made it more difficult to establish whether the station broadcast the calls, the existence of recordings or transcripts were not vital to establishing a violation where other evidence supported the FCC's conclusion. Moreover, the FCC "has consistently ruled that a licensee may not avoid liability for a rule violation by claiming ignorance as to what was broadcast over its station."

*The FCC did not rule out the possibility that the call recipients were actors who were part of a theatrical performance, not members of the public.* The FCC found this argument unpersuasive, noting that it was never raised in response to the Commission's earlier inquiries. At no time did any station employee suggest that the calls were part of a prearranged skit.

*The FCC misapplied the forfeiture guidelines by failing to consider the unique geography of the market (Puerto Rico) or the profitability of the parent company.* The FCC rejected the licensee's argument that the broadcast of the prank calls on multiple stations should have been treated as only a single violation because of the unique geography of the station's market which, the licensee argued, required use of multiple stations to reach the entire radio market. The FCC cited to other cases in the same market that evaluated the broadcast of a call on multiple stations as a factor in assessing a larger fine. The FCC also rejected the licensee's argument that the forfeiture was improper because, despite having reported nearly \$140 million in revenue, the parent company was actually operating at a loss. "The Commission has previously determined that, in general, gross revenues are the best indicator of a licensee's ability to pay a forfeiture."

*The "plain language" of the rule makes it applicable to recordings made by a licensee—not to recordings made by a contractor.* The licensee was unable to feign innocence where it specifically contracted with the vendor for its programming and was aware that the prank calls were part of the programming. The FCC has

consistently held licensees liable for programming aired on their stations, regardless of the source. “To hold otherwise would allow a licensee to circumvent the Commission’s rules with impunity by simply having an agent perform, on its behalf, any acts that violate Commission rules.”

*The call recipient gave permission to air the call afterwards, so the call was consensual and did not “impinge on the call recipient’s legitimate expectation of privacy.”* The rule requires notice be given and consent obtained before beginning to record a call for broadcast, and consent obtained after the fact does not comply with the rule.

Given that the “base” fine for a violation of Section 73.1206 of the FCC’s Rules is \$4,000, the \$41,000 in fines issued here is an indication of the FCC’s strong distaste for the broadcast of such material, and its lack of patience with licensees engaged in multiple violations of the same rule. Stations should continue to be diligent about getting consent before recording a call or going live with that call. As this month’s forfeiture orders indicate, stations will be hard pressed to successfully defend such broadcasts before the FCC, and the FCC is not hesitant to increase the fine to whatever amount it believes necessary to “get the attention” of offending licensees.

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If you have any questions about the content of this Advisory, please contact the Pillsbury attorney with whom you regularly work, or the authors of this Advisory.

Scott R. Flick (bio)  
Washington, DC  
+1.202.663.8167  
scott.flick@pillsburylaw.com

Lauren A. Birzon (bio)  
Washington, DC  
+1.202.663.8366  
lauren.birzon@pillsburylaw.com

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