
Drawing the Line: A Guide to Avoiding Illegal Content for the On-Air Performer

by Scott R. Flick

As the sources of content available to the public proliferate, attracting and retaining an audience grows more challenging. A common strategy is to use provocative or “attention-getting” on-air elements to increase station awareness among media-saturated listeners and viewers. However, stations must be mindful of the numerous legal restrictions on content, particularly given that illegal on-air content can garner fines as high as \$325,000 per violation. In addition, certain types of illegal on-air content can subject a broadcaster to civil and criminal liability, as well as loss of its license.

Introduction

Familiarity with the FCC’s rules regarding on-air content is not optional for on-air talent, station programmers or station management. In most cases, editorial judgments made in advance, especially in the case of syndicated or pre-recorded programming, can prevent illegal content from reaching the air. It is therefore important that those involved in airing broadcast programming be up-to-date on the boundary lines that the FCC and the courts have drawn to distinguish legal from illegal on-air content.

This guide is not meant to constitute legal advice or to represent an exhaustive survey of permissible and impermissible on-air activity. Rather, it is intended to provide general information to the on-air performer regarding FCC rules and policies in the following eleven areas directly affecting on-air speech:

- Obscenity
- Indecency
- Fairness Doctrine
- Libel, Commercial Disparagement, and Invasion of Privacy
- Rebroadcasting Telephone Conversations
- Rebroadcasting Emergency Communications

- Airing "Bartnicki" Material
- News Crew "Ride-Alongs"
- Payola and Plugola
- Promoting Lotteries, Casinos, and Station Contests
- On-Air Hoaxes

Often, a violation in one of these areas can result in fines, broadcast license renewal difficulties, or challenges under civil and criminal laws. If a planned on-air activity raises questions of potential liability for the station, do not hesitate to contact us, since legal advice should always be obtained for the specific facts and circumstances presented.

Obscenity

The First Amendment grants broad freedom to a licensee and its on-air performers to choose the content of speech. However, this freedom is not absolute. Obscene speech is not protected by the First Amendment and its broadcast is prohibited. Broadcast speech is deemed obscene if (a) it appeals to the prurient interest, (b) it describes or depicts sexual conduct in a patently offensive manner, and (c) taken as a whole, it lacks serious literary, artistic, political, or scientific value. Under this definition, speech is deemed to appeal to the "prurient" interest if it appeals to lustful ideas or desires.

Broadcasting obscenity can result in severe fines and the very real possibility that the FCC will not renew a station's broadcast license. In addition, the FCC has previously indicated that any complaints involving obscene broadcast material will be turned over to the Department of Justice for possible prosecution. If convicted under federal law, a violator may receive up to two years' imprisonment in addition to very substantial fines.

Indecency

Indecent speech, unlike obscenity, is legally entitled to First Amendment protection. However, the Supreme Court has held that government may nonetheless "channel" indecent speech to times when children are not expected to be in the viewing or listening audience. The official definition of "indecent" is "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs."

In response to the Supreme Court's ruling that indecent speech may not be prohibited, but may be channeled to times when children are not likely to be in the audience, the FCC created the concept of a "safe harbor" for indecency—a period of nighttime hours when indecent speech may be broadcast without risk of FCC liability on the assumption that unsupervised children will not normally be viewing or listening. Currently, the "safe harbor" runs from 10:00 pm to 6:00 am local time.

The existence of a "safe harbor" in which indecent content is absolutely protected from governmental interference suggests that there might be times outside of the safe harbor when indecent content is still somewhat protected. In other words, if a station airs indecent content at 6:01 am and can demonstrate that the number of children in the audience was no greater than at 5:59 am, it seems reasonable to argue that the indecent content is constitutionally protected. As a practical matter, however, the FCC has treated the safe harbor hours as the outer boundary for any indecent content, rejecting all efforts to protect indecent content airing outside of the safe harbor hours.

Identifying precisely what constitutes indecency has become increasingly challenging for programmers. In the early days of indecency regulation, indecency was generally regarded as the broadcast of one or more of the "seven dirty words" memorialized in George Carlin's famous comedy routine—the broadcast of which led to the 1978 Supreme Court decision allowing government to regulate indecency. Beginning in the 1980s, however, the FCC substantially broadened its definition to include innuendo, coded sexual references, and other references to sexual and excretory matters that do not include the "seven dirty words." This resulted in numerous case-by-case FCC determinations as to the "offensiveness" of references and the context in which they were made. Many stations that have been fined, as well as program producers, have complained that the FCC's case-by-case indecency approach does not provide sufficient notice of what actually constitutes indecent content. Admittedly, broadcasters have good reason to be frustrated with the FCC's inability to provide more precise guidelines. Nonetheless, this broad interpretation of indecency remains intact today at the FCC.

While it is difficult to define with great precision what constitutes actionable indecency, some general conclusions can be drawn from past indecency decisions, giving programmers and on-air performers guidance regarding the types of material that could be found to cross the indecency line.

First, recognize that the FCC evaluates the overall programming context of a broadcast when making indecency determinations. The FCC has said that "an indecency determination must include review not only of the express language or depiction involved and its topic, but also a careful consideration of the various factors that comprise the context in which the material was presented." The Commission also considers whether the words or depictions are "vulgar" or "shocking," and whether the reference is isolated and fleeting. Therefore, even seemingly "non-graphic" sexually-oriented terms can be grouped in such a way as to create a patently offensive context sufficient for an indecency finding. In a number of its indecency decisions in radio cases, the Commission has found that verbal references, when taken in context, were made in a "pandering and titillating fashion." Implicit in language such as this is the notion that the amount of on-air time devoted to "dwelling on sexual matters" will be viewed as a factor contributing to an indecency finding. This also has been the case in several indecency decisions where fines were levied against popular morning shows that present a daily diet of thinly-disguised sexual humor.

Not even asserted newsworthiness will necessarily serve as a defense against an indecency violation. When two St. Louis disk jockeys read an entire *Playboy* magazine account of the Jessica Hahn seduction of televangelist Jim Bakker, including graphic sexual language, the Commission found an adequate basis for an indecency finding. On the other hand, the FCC found that a profanity-laden wiretapped conversation aired on National Public Radio featuring convicted mobster John Gotti was not actionably indecent. The FCC thus appears to be more tolerant of potentially indecent material when it is presented in a serious journalistic context rather than in a comedic "morning zoo" framework.

Second, the FCC has rejected the defense that broadcasts containing potentially indecent content garner exclusively adult audiences. In the past, stations have contended that the ratings for the programs in question indicated that children were not in the audience, and that the programs should therefore be allowed greater freedom in selecting content without running afoul of the Commission's indecency restrictions. The FCC has been unwilling to accept this argument. The fact that a show may be extremely popular with an adult audience, says the FCC, does not lessen the likelihood that children could happen across the program on a regular basis. To the FCC, daytime hours mean a high probability that unsupervised children could be watching or listening. As a result, statistics regarding actual audience composition will likely be deemed irrelevant in the FCC's assessment of whether indecent content merits sanctions.

Third, the FCC has also rejected the argument that the popularity of an allegedly indecent program indicates community acceptance of sexually explicit material. The FCC has made quite clear that indecency, unlike obscenity, will be measured by a national standard (i.e., the views of the FCC Commissioners in Washington), not a local standard. Local popularity will therefore not influence the Commission's evaluation of broadcast content. Instead, the FCC will employ its own judgment to determine what is indecent to the average listener. Judging by the FCC's indecency decisions in recent years, lengthy or daily sexual content will be subject to FCC indecency scrutiny whether broadcast in a major metropolitan city or in a small rural town. Similarly, the FCC has rejected the notion that different cultural standards should be applied in determining what is indecent in, for example, a foreign language broadcast program.

The FCC has not been hesitant to fine broadcasters for airing indecent programming. It has imposed fines ranging from \$20,000 to upwards of half a million dollars for indecency violations. There have been even larger indecency "settlements." In 1995, after the FCC delayed approval of a major station acquisition by a large radio group owner, the company was persuaded to contribute \$1,715,000 to the federal treasury to settle outstanding indecency fines against broadcasts by Howard Stern.

In 2006, the FCC released an Omnibus Order addressing "hundreds of thousands" of indecency complaints involving programs that aired between February 2002 and March 2005. The FCC found ten separate programs indecent, but only proposed fines with respect to six of these programs. Fox Television Stations, Inc., CBS Broadcasting, Inc., the ABC Television Network, and Hearst-Argyle Television, Inc., filed separate petitions for review of the Omnibus Order, which were later consolidated in the United States Court of Appeals for the Second Circuit. Subsequently, the FCC asked the court to suspend its briefing schedule for 60 days and remand the case to the FCC to give any interested parties an opportunity to comment and ensure that all licensees were afforded a full opportunity to be heard before the FCC issued a final decision. The court granted the motion on September 7, 2006, and the FCC requested further comment by September 21, 2006. On November 6, 2006, the FCC issued its decision. While no fines were issued, the decision provides a clearer understanding of the FCC's analysis of indecency complaints. With regard to "The Early Show," the FCC reaffirmed its earlier finding that being classified as a news program is a factor weighing against finding an indecency violation. In "NYPD Blue," the FCC limited indecency complaints considered by the FCC to those where the complaining party actually viewed the program.

Most controversially, in reviewing its ruling on "The 2003 Billboard Music Awards," the FCC found that implementing a five-second delay for live performances is not an adequate defense under all circumstances. In analyzing the use of two expletives by Nicole Richie during the awards show, the FCC specifically indicated that Fox was culpable because the network knew that Ms. Richie frequently used profane language and should have taken greater precautions before giving her a script that "called for her to make excretory references." In reviewing its ruling on "The 2002 Billboard Music Awards" (same show, different year), the Commission reaffirmed that "non-literal uses of the 'F-word' come within the subject matter scope of [the] indecency definition." The Commission further found that "Cher's use of the 'F-Word' to reference a sexual act as a metaphor to express hostility to her critics is inextricably linked to the sexual meaning of the term." This ruling served to confirm that the word "fuck" will be found indecent by the FCC in virtually any context, and that the FCC could find indecency in even a "fleeting expletive." For many years prior to this ruling, the FCC had considered fleeting expletives in live programming to fall outside of its definition of actionable indecency.

Following this decision, appeals were filed by multiple broadcasters regarding the sudden change in the FCC's treatment of fleeting expletives. Ultimately, the Second Circuit Court of Appeals overturned the FCC's decisions against stations where an isolated profanity was uttered during a live program. The Court

of Appeals found that the FCC had not justified its departure from prior Commission decisions where such conduct was deemed not to be an actionable offense. The court also suggested that the FCC's decisions had not given broadcasters enough guidance as to when the use of such words was permissible.

However, in reviewing the matter in 2009, the Supreme Court reversed the Second Circuit, finding that the FCC had indeed adequately justified its change in policy toward fleeting indecency. The Supreme Court sidestepped the First Amendment issues involved, instead remanding the case back to the Second Circuit Court of Appeals for a review of whether the FCC's new prohibition on fleeting indecency is constitutional, even if the FCC's procedures in adopting it were appropriate.

On the heels of its decision overturning the Second Circuit, the Supreme Court also vacated and remanded a Third Circuit Court of Appeals decision relating to the 2004 Super Bowl halftime show "wardrobe malfunction" in which Janet Jackson's breast was briefly exposed. In July 2008, the Third Circuit ruled that the FCC had acted arbitrarily and capriciously in imposing a \$550,000 indecency fine on CBS for the fleeting exposure. Subsequently, the Supreme Court vacated the lower court decision and remanded the case to the Third Circuit to address various other issues, including whether the fine should be reinstated.

We continue to monitor these cases, but until the courts release a ruling to the contrary, broadcasters must continue to be vigilant in avoiding the airing of indecent content outside of the safe harbor hours, even if the material is fleeting and unintended, or occurs during coverage of a live event. The Supreme Court's decisions, as well as the numerous stiff fines handed down for indecency, require on-air performers and programmers to craft programming that maintains a safe distance from the indecency line in order to reduce the risk of substantial liability for the licensee. Given the sheer size of the potential fines involved, any questions regarding current or proposed on-air programming should be discussed thoroughly with communications counsel as soon as possible.

The Former Fairness Doctrine

In 1987, the FCC repealed its 38-year-old policy known as the Fairness Doctrine. The Fairness Doctrine required broadcasters to provide coverage of controversial issues of public importance and to afford a reasonable opportunity for the presentation of contrasting viewpoints on such issues. Declaring the Fairness Doctrine unconstitutional, the FCC held that the requirement of airing opposing viewpoints chilled the willingness of broadcasters to cover issues in the first instance.

Subsequently, the FCC and the courts eliminated an offshoot of the Fairness Doctrine that required balanced presentations of opposing points of view with respect to ballot issues. Until 2000, two vestiges of the Fairness Doctrine remained: the personal attack rule and the political editorializing rule. However, pursuant to a decision by the United States Court of Appeals for the District of Columbia Circuit, these two rules have now also been repealed. Thus, broadcasters are more or less free from official requirements to present opposing viewpoints on controversial issues of public importance (except in the case of "uses" by legally qualified candidates for public office, which still trigger an obligation to provide "equal opportunities" for the purchase of time by a candidate's opponents). However, it is never advisable to provide just one viewpoint on a controversial issue to the exclusion of all others. Such a practice invites a finding by the FCC that the station is not serving the public interest and its local community, and will often require the station to expend resources fending off complaints and petitions to deny from the public, particularly at license renewal time.

Libel, Commercial Disparagement, and Invasion of Privacy

The laws of libel and invasion of privacy are governed by individual state law and are not enforced by the FCC. However, on-air performers, editors and producers should be cognizant of some general principles in this area and should seek to develop a broadcast climate aimed at avoiding on-air remarks that are potentially libelous or which violate another's privacy.

Libel

Libel is a complex area of the law where distinct guidelines can be difficult to draw, as libel law encompasses both state law and constitutional protections of the First Amendment. This section provides only a very general outline of libel laws. When in doubt as to whether a specific statement intended for broadcast is actually libelous, the advice of legal counsel should always be obtained prior to the statement's broadcast. In this area of the law, it is best either to err on the side of caution by omitting potentially libelous material or, in the alternative, to establish and confirm the facts through careful reporting before the material is aired.

In the broadcast context, libel is a false statement of fact concerning an identifiable person or group that is broadcast to an audience, and which tends to injure that person's or group's reputation. In addition, the false statement must be made with some element of fault on the part of the broadcaster in order to be actionable. The key element is the presence of a false statement of fact. Opinion that does not contain or strongly imply false facts is not libelous—but the line between opinion and a false statement of fact is not always easy to draw. The courts will continue to protect "pure opinion" as long as false facts are not mixed in with the statement of opinion.

Also receiving constitutional protection are statements amounting to mere name-calling or "rhetorical hyperbole." The rationale is that these statements are the byproducts of free and open debate and are entitled to First Amendment protection. However, insults can create problems when they include factual statements that are sufficiently false and defamatory to give rise to a libel action. Generally, insults should be made only with extreme caution. Remember that many aspects of libel law are governed by state law and, therefore, liability for insults could vary from state to state. For instance, Virginia has an Insulting Words Statute that creates liability for any insults that could lead to violence and a breach of the peace.

In the libel context, a false statement of fact must be "of and concerning" a person in order for that person to recover damages. It is not necessary that the false statement of fact actually "name" an individual. For instance, members of a group can show that they were "identified" in a false statement made about the group. To state a claim, a libeled party need only show that the audience could recognize the unstated identity of the person or entity being referred to in the broadcast statement.

The level of "fault" required for a successful libel suit against a station varies depending on the laws of that state, whether the person complaining is a public official, a public figure, or a private person, and whether the statement in dispute involves a matter of public concern. For a statement concerning a public official or public figure involving a matter of public concern to be libelous, the on-air performer must make the statement with actual malice—that is, broadcast the statement knowing it was false or broadcast it with "reckless disregard" of whether it was true or false. Statements concerning a private person in a matter of public concern will be judged by a negligence standard in most jurisdictions—that is, whether such statements would have been made by a reasonable person. The types of statements most likely to bring about a libel action are statements about private individuals and private concerns. In some states, the mere fact that this last type of false statement was broadcast is sufficient to show fault on the part of the broadcaster.

While a station's goal obviously should be to avoid making any libelous statements in the first place, actions taken after-the-fact can also help to limit liability. A University of Iowa study indicated that an in-house system for the courteous resolution of complaints appears to be one of the best ways of reducing libel suits. The research showed that half of all libel complainants only go to an attorney after they have first contacted the media outlet and received poor treatment. Selecting one person with good human relations skills to deal with complaints can help to prevent a complaint from escalating into a lawsuit.

Another precaution that will help to limit the effects of a libel suit is an errors and omissions insurance policy. The policy will usually contain certain substantive and procedural requirements that have to be followed to maintain coverage. Upon receipt of a complaint alleging expressly or implicitly that someone was defamed or insulted by the station or that their privacy was violated, the station's insurance policy should be reviewed immediately to determine whether the insurer must be contacted. It is important to treat all such complaints seriously, sensitively and promptly. Any response should be cleared with the station's attorney before it is sent.

Commercial Disparagement

Closely related to libel is the tort of commercial disparagement. Also known as trade libel, commercial disparagement occurs when: (1) a broadcast statement falsely disparages a party's property or product; (2) the statement is made with the intent to cause economic harm to the disparaged party; and (3) the broadcaster knew that the statement was false or acted with reckless disregard of its truth or falsity. Not only can individuals sue for commercial disparagement, but companies can sue for the broadcast of false statements that disparage the company or its product. This form of libel could impact an on-air performer when the performer attacks a competing radio station with statements that are false and which are made with an intent to cause economic loss to that station. Therefore, if your station frequently "attacks the competition," carefully examine the substance of the statements being made. Avoid any false or malicious statements that could cause economic harm to a competitor.

Invasion of Privacy

There are four principal types of invasion of privacy: (1) intrusion upon the seclusion or solitude of another; (2) public disclosure of embarrassing private facts; (3) publicity which shows a person in a false light; and (4) appropriation of a person's name or likeness for commercial advantage. As with libel, the specific elements of each privacy breach are largely governed by individual state laws. In fact, invasion of privacy is so closely related to libel that actions for insults or other libelous statements broadcast about "private persons" can often implicate both libel and privacy laws.

Common to all state laws is the notion of consent as a complete defense to an invasion of privacy claim. Consent is absolutely necessary when using a person's likeness or voice for the station's commercial benefit. Maintaining a "master" tape of all telephone contest winners can assist in this regard. For example, if the station wishes to replay a contestant's on-air participation for a station promo, permission can be sought and recorded on the telephone "master" tape to preserve the contestant's consent to subsequent uses of the contestant's voice.

Rebroadcasting Telephone Conversations

Section 73.1206 of the FCC's Rules governs the broadcast of pre-recorded and "live" telephone conversations. The rule states that prior to recording a telephone conversation for broadcast and prior to broadcasting a "live" conversation, the party must be given notification of the station's intent to tape or broadcast that conversation. For purposes of the rule, a "conversation" begins with the party's first spoken words

on the telephone. Therefore, the station generally may not record or broadcast any portion of the party's conversation, including messages left on an answering machine or in voice mail, until it first provides notification. The FCC has not hesitated to fine stations for violations of the "phone call rule," with the base fine being \$4,000.

The rule, however, provides for two exceptions to the general prior notice requirement: (1) if the other party is associated with the station, and (2) if the other party places the call to the station and "it is obvious that it is in connection with a program in which the station customarily broadcasts telephone conversations." The first exception applies to situations such as where station personnel (e.g., street reporters, traffic reporters) provide reports via telephone for on-air broadcasts. The second exception applies to situations such as programs that customarily feature listener call-in conversations.

Before recording or airing telephone conversations without providing prior notification to the caller, a station must determine whether the broadcast of telephone conversations is "customary" during the program/airshift in question. Unfortunately, the FCC has never stated precisely how many broadcast conversations are needed to support a conclusion that airing such calls is "customary" during that program or airshift.

One way to analyze a station's compliance with the rule is on a sliding scale of risk. The daily use of telephone calls from listeners or viewers in a broadcast is much more likely to represent "customary" usage. Arguably, a program's use of telephone conversations that is not daily, but which is otherwise regular and predictable (i.e., frequent on-air contests or a weekly "all request" program), could also be viewed as "customary." However, when an airshift only occasionally airs telephone conversations from station callers, a station's risk of being found in violation of the rule increases significantly, as the callers may have no reasonable expectation that their conversations will be recorded or broadcast. Stations should never presume that callers "must surely know" that their telephone conversations with the station might be recorded and broadcast.

Several protective measures can serve to reduce a station's risk of violating the telephone rule where a program's "customary" use of telephone conversations is in doubt. The most foolproof method is to routinely provide prior notification to all callers. For instance, an intern or producer can alert callers to the possibility of their conversation being recorded or broadcast prior to passing the caller along to the on-air talent.

While the rule only indicates that a station should "inform" callers of an intent to record/broadcast the call, FCC enforcement actions clearly interpret the rule to require that the caller also consent to the recording/broadcast. As a result, even though a program may "customarily" feature telephone conversations, the station should not record or broadcast a caller who obviously does not expect to be on the air (i.e., callers asking to speak with the station manager rather than the on-air personality or where the caller indicates on a request line message tape that they do not wish to be aired). The FCC has also held that where an individual is informed during a broadcast conversation that he or she is being put on hold, the prior consent effectively ceases. Therefore, if a station wishes to broadcast any conversations that occur while the caller is on hold, the station must provide explicit notification of this to the caller.

Rebroadcasting Emergency Communications

Traditionally, news departments of radio and television stations nationwide were satisfied with simply listening to police and fire scanners so that they could quickly be at the scene of breaking news. With the competitive trend toward news being presented as quickly and as dramatically as possible, news departments now want to record and broadcast over the air the communications of police, fire, and other emer-

gency services intercepted on their scanners. Can they do it? Stations need to understand the important limitations.

The interception, recording, and rebroadcast of emergency services traffic received over a scanner is a violation of the law unless the emergency services authorities have authorized such rebroadcast. Section 705 of the Communications Act states that: "No person not being authorized by the sender shall intercept any radio communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person. No person having received any intercepted radio communication or having become acquainted with the contents, substance, purport, effect, or meaning of such communication (or any part thereof) knowing that such communication was intercepted, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of such communication (or any part thereof) or use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto."

Generally, officials responsible for public safety seek to cooperate with news media, and will authorize the monitoring of public safety radio transmissions for the more efficient gathering of news, and will indicate the conditions under which such transmissions may be divulged to the general public. Therefore, licensees should contact officials of the public safety agencies whose radio transmissions are being monitored in order to obtain the necessary authorizations and to ascertain the conditions under which rebroadcast of such content is permitted.

Airing "*Bartnicki*" Material

On May 21, 2001, the United States Supreme Court ruled that broadcast reporters are protected by the First Amendment if they air recordings of telephone conversations that were illegally intercepted as long as the recordings are legally obtained by the broadcaster. The case, *Bartnicki v. Vopper*, supports the view that reporters cannot be punished for airing material that is true, no matter how the material was originally obtained, as long as the reporters themselves broke no laws in obtaining the material.

The *Bartnicki* case involved an intercepted cellular telephone conversation which was recorded and anonymously given to a third party, who in turn gave it to the radio reporter, who broadcast the recording on his radio show. *Bartnicki* keeps alive the principles stated in the famous "Pentagon Papers" case, *New York Times Co. v. United States*, where the Supreme Court held that the press has the right "to publish information of great public concern obtained from documents stolen by a third party," and extends that right to electronic information aired by broadcasters.

TV News Crew "Ride-Alongs"

TV news crew "ride-along" stories can provide dramatic news clips, but they often occur in situations that raise challenging legal issues. News directors and station managers should be carefully advising their reporters, producers, and ENG crews about station policies regarding ride-along stories and practices. Here are some basic guidelines:

Most importantly, riding with the police, fire department, or EMTs does not permit any station employee to trespass on private property, and there is no inherent privilege for newsgathering under the First Amendment or otherwise that permits such trespassing. The field producer or reporter should ask a person with authority over private premises for permission to enter those premises—this could be a homeowner, a business owner, a landlord, or a tenant, but not the police or a passer-by at the scene. However, filming can occur from outside the property looking in for most purposes.

There are situations where broadcast material will be found to be either defamatory or “private” if it discloses private and embarrassing facts about private persons without attendant newsworthiness, or inflicts emotional distress by invasive “outrageous” behavior, even if consent has been obtained to be on the premises or the event takes place in a quasi-public place. Many of these can occur in ride-along stories, such as:

- filming of arrests of persons who are later not charged with a crime for reasons of mistaken identity, lack of evidence, or erroneous information—including persons who were merely at the scene and rounded up;
- filming of persons found in an embarrassing state, such as being undressed when a night arrest occurs, or being injured and distraught as an accident victim, or in a hospital emergency room; or
- involving persons in a story by implication, such as bystanders or those involved but not charged in arrests for drugs, prostitution, or domestic violence.

The best protection against liability under these circumstances is at the editing stage. A standard technique is to “mosaic” or otherwise blur faces of people portrayed in stories that might carry liability for the reasons described above.

On rare occasions where the police and TV reporters/producers have worked very closely together in developing a story, if the police are subsequently sued for misconduct, false arrest, etc., the news media may also be sued, essentially as “agents” of the police.

Finally, station management should consider that some ride-along assignments are inherently very dangerous and may expose reporters or ENG crews to serious injury. Although it is rare that injuries occur, station management that knows of the dangers and still makes the assignment, without appropriate guidelines for limiting exposure to the danger (i.e., stay in the truck if there is shooting), creates potential liability for the station and the managers involved.

Payola/Plugola

The payola prohibition and plugola policy both stem from a provision of the Communications Act, incorporated into the FCC’s Rules, known as the sponsorship identification rule. The rule states that if a broadcast station or a station employee receives anything of value, directly or indirectly, in exchange for causing material to be broadcast, the sponsorship and the identity of the sponsor must be disclosed on-air. The underlying premise is that members of the public have a right to know when a party is paying to have material aired by a broadcast station or cable programming service. Thus, it is improper for a station to air program material where consideration was paid to the station or its employees for its airing unless a full, over-the-air disclosure of the sponsorship is made.

“Payola” is defined by the FCC as an undisclosed agreement to accept anything of value in return for on-air promotion of a product or service. Payola is always illegal. It is not the payment of money or other valuable consideration that creates the violation, but the lack of public disclosure of the sponsorship identification information that makes the transaction illegal. Payola usually occurs when someone makes a gift or payment to a person involved in station programming in exchange for favorable exposure. Both the person making the gift or payment and the recipient are required to disclose the arrangement to the licensee, and both can face criminal sanctions for a failure to disclose. When told of such an arrangement, the licensee must exercise its judgment as to whether to allow the program material to be aired. If the material is aired, the station must give complete sponsorship identification on-air. Thus, there are two levels of disclosure. The employee and the person giving the consideration must disclose to station management the

existence of a "payment" , and the station must then disclose the "sponsorship" on the air if the material is aired.

However, a station licensee is not allowed to assume that no payola is occurring merely because it has not been notified of it by an employee or outside party. Licensees have a legal duty to exercise diligence in uncovering and preventing payola, which is the reason that stations regularly have their employees execute affidavits stating that they are not aware of, and have not participated in, any form of payola or plugola.

"Plugola" is the on-air promotion or "plugging" of goods or services in which the programmer/on-air talent has a financial interest. Plugola is similar to payola, except that it need not involve an outside party or payment of any kind. It can be accomplished by a single station employee. For instance, if a radio announcer has an financial interest in a local nightclub, and the announcer mentions who will be playing at the club (presumably to bolster club attendance) without disclosing that he or she has a financial interest in the club, plugola has occurred. Although it is less likely, even people who are not on-air performers can engage in plugola. For example, the person who prepares program logs could schedule extra announcements for a company in which he or she has a financial interest.

Plugola is legal only when (1) station management is made aware ahead of time of the nature and extent of the financial interest that is being promoted, and (2) the required over-the-air disclosure is made.

Like payola, plugola can take many forms and should be guarded against carefully. Penalties for payola/plugola violations can be substantial and threaten a station's license. Stations that do not have payola/plugola guidelines in place are particularly vulnerable to sanctions since they may have difficulty demonstrating that they exercised adequate diligence to uncover and prevent inadequate sponsorship identification on-air. It is therefore important that stations adopt strict payola and plugola policies and then enforce them.

The penalties for payola and plugola violations can be high—a \$10,000 fine and up to one year's imprisonment for each offense. Violations of the payola rules and plugola policies can also call into question whether managers are exercising sufficient control over the station, thereby affecting the licensee's qualifications to remain a Commission licensee. Failure to observe the sponsorship identification requirements can even result in the initiation of license revocation proceedings. The FCC underscored the importance of understanding and complying with these rules in 2007, when it released Orders adopting Consent Decrees pursuant to which CBS Radio, Citadel Broadcasting Corporation, Clear Channel Communications, Inc., and Entercom Communications Corporation agreed to pay a combined \$12.5 million to close investigations into possible payola violations. In addition to agreeing to pay between \$3 million and \$4 million to the United States Treasury, each broadcaster also agreed to implement certain Business Reforms and a Compliance Plan within 60 days and to keep the reforms and compliance measures in effect for at least three years. The FCC has since entered into additional consent decrees regarding payola allegations, with the amount of the consent decree payment varying based upon the particular circumstances.

In order to remain in compliance with the payola rules and the plugola policies, we recommend, at a minimum, that: (1) employees with outside business interests be insulated from the process of program selection; (2) all station employees be regularly required to review payola/plugola guidelines; (3) employees regularly be required to execute affidavits disclaiming knowledge or involvement in payola or plugola; (4) logs be maintained to record visits by record promoters to the station; and (5) any other necessary procedures be adopted to prevent illegal payola/plugola practices at the station. The firm can provide

detailed guidelines, forms, and procedures to assist in creating a payola/plugola prevention program. The firm publishes a separate Advisory on the FCC's sponsorship identification requirements, including their impact on payola/plugola, and we strongly recommend that broadcasters utilize that Advisory to ensure compliance in this complex area of the law.

Promoting Lotteries, Casinos, and Station Contests

Lotteries

For many years, federal law flatly prohibited the broadcast of information deemed to promote a "lottery," although, as discussed below, that prohibition has now been loosened somewhat. It is important to note, however, that a broadcaster can face fines and license renewal difficulties for the broadcast of such information even though the broadcaster is not the sponsor of the lottery. Thus, stations must review all advertising with an eye towards complying with this prohibition.

The traditional elements of a lottery are (1) prize, (2) chance, and (3) consideration. All three elements must be present to constitute a lottery. These three elements can appear in infinite permutations, but if any of these elements is missing, there is no lottery. The first element, a prize, is anything of value offered to a contestant. The second element, chance, is present when, for example, the winner is selected by random draw or when the value of the prize is not predetermined. The third element, consideration, is usually the most problematic. Under FCC guidelines, the element of consideration is present in any contest or promotion which requires a contestant to (1) "furnish any money or other thing of value;" (2) "have in [his or her] possession any product sold, manufactured, furnished or distributed by a sponsor of a program broadcast" by a station; or (3) meet any other requirement which involves a substantial expenditure of time and effort by the contestant.

If consideration does not flow to the promoter or co-promoter (participating sponsors are considered "co-promoters"), then there is no FCC prohibition against broadcasting the material. However, there may well be state law restrictions on airing such material. Each state has its own lottery laws and interprets the three elements in its own way, so the result in one state may not be the same as in another state.

Examples of requirements that may be viewed as consideration include:

- payment of an entry fee
- requirement to purchase a sponsor's product
- requirement that an entrant submit a box top, label, or wrapper
- admission ticket serving as an entry blank
- cash register receipt serving as an entry blank
- requirement of a test drive to enter
- award of a prize, discount, or refund after purchase
- award of a prize to every 10th purchaser.

Examples of requirements that **generally** do not constitute consideration include:

- requirement that an entrant be present to win (provided that the drawing time is announced in advance)
- need for an entrant to listen for his/her name to be called over the air

- need to visit sponsor's store to obtain a free entry blank
- need to expend the cost of a postage stamp or postcard to mail an entry blank
- eligibility requirements: having a valid driver's license, Social Security card, or being of a particular age to enter.

Because the definition of consideration varies from state to state, legal counsel should be consulted to ascertain a specific state's interpretation before any contest is finalized and promoted.

A 1990 change in federal law relaxed the restrictions on the broadcast of some information that would otherwise be considered lottery information. Under the changed law, the broadcast of lottery information is permitted under federal law where it (a) concerns a legal state-run lottery as long as the state in which the broadcast occurs also has a legal state-run lottery; (b) concerns a lottery-type activity conducted by a not-for-profit organization which is authorized or not otherwise prohibited by the state in which it is conducted; or (c) concerns a promotional activity that is clearly "occasional" and "ancillary" to the primary business of the commercial entity conducting it and which is authorized or not otherwise prohibited by the state in which it is conducted. Effectively, this means that it is legal, under federal law, for a station to advertise or promote sweepstakes and similar contests which contain all the elements of a lottery, whether the contest is conducted by the station itself, conducted by a commercial sponsor, or conducted by a non-profit entity, as long as the party holding the lottery is not in the "business" of conducting lotteries and the state authorizes the activity or does not prohibit it.

Importantly, however, the federal law does not preempt state prohibitions on lottery advertising. Broadcast of lottery information is permitted only if the lottery is legal in the state where it is conducted, and if broadcasting information about the lottery is legal in the state where the information is broadcast. When Congress adopted the 1990 changes, it delayed the effective date in order to provide states with an opportunity to fill the sudden void in the law with their own lottery advertising laws. Many states subsequently adopted such laws, and also adopted trade regulation laws, which can restrict or prohibit "contests" that technically may not be lotteries. We therefore recommend that stations consult counsel with regard to state regulations on lotteries and contests before undertaking or promoting contests that have one or more elements of a lottery.

Casino Advertising

Casino advertising is also covered by the prohibition on the broadcast of lottery information. With respect to privately owned casinos, the FCC has held that a commercial spot or other announcement providing information about a casino may use the word "casino" only in stating the name of the establishment if the word is indeed part of the name (e.g., "New Orleans Riverboat Hotel and Casino"). The spot may not in any other way describe the establishment's gambling activities. Promotion of the establishment's non-gambling features (e.g., food, luxurious hotel rooms, non-gambling entertainment such as music/dance shows) is permitted.

However, the U.S. Supreme Court has held that the ban on casino gambling advertising is unconstitutional, at least when applied to states where gambling in some form is legal (e.g., Louisiana). Following the Supreme Court's decision, the United States Department of Justice stated that it would no longer attempt to enforce the ban in any state. Some lower court cases had also held the ban invalid in states under their jurisdiction. After these events, the FCC said that it would revisit the issue of whether and where it would enforce the ban, but has not done so to date. Accordingly, at this time, the permissibility of advertising the casino gambling aspects of a casino establishment is unclear outside of Alaska, Arizona, California, Hawaii, Idaho, Louisiana, Montana, Nevada, New Jersey, Oregon, Washington, Guam, and the Mariana Islands.

Gaming operations conducted by Indian tribes on tribal land are regulated under a specific federal statute that permits advertising of any gaming so long as the gaming itself is lawful under the statute. Casino-type games on tribal land may be conducted, and therefore advertised, if the tribe and the state where the casino is located have entered into a tribal-state compact permitting the gaming and the Secretary of the Interior has approved that compact. Bingo and similar non-banking games may be conducted on tribal land, and therefore advertised, if the games are legal in the state where they are played.

Contests and Promotions

The FCC maintains a strong interest in the manner in which non-lottery contests and promotions are conducted by stations. A broadcaster's failure to conform to the FCC's licensee-conducted contest rule can lead to significant fines. Generally, the Commission requires broadcasters to fully and accurately disclose the material terms of their contests and to conduct the contest as announced. It is very important that the contest description not be false, misleading, or deceptive with respect to any material term.

Under the FCC's contest rule, a "material term" is one that has a significant impact upon how the contest is conducted. Material terms in a contest description include the following:

- how to enter or participate;
- eligibility restrictions;
- entry deadline dates;
- nature and value of prizes;
- when prizes are awarded;
- means of selecting winners; and
- tie-breaking procedures.

These material terms should be stated whenever a live or recorded promo purports to set out the complete terms of the contest. However, short promos merely "teasing" the contest do not require a complete listing of all material contest terms. Spots disclosing the full terms of the contest should be scheduled with "reasonable" frequency. While the FCC has not stated a minimum frequency that it will deem reasonable, stations should certainly air all of the material contest terms at least once a day during the duration of the contest. It is also helpful if all contest terms are posted on the station's website.

Any failure of a station to conduct its contest in accordance with its announced rules can draw the wrath of the FCC, but there are three particular contest-related problems that are often the subject of FCC enforcement actions: misleading contests, rigged contests, and public nuisance contests. A misleading contest is one in which the broadcaster misrepresents the contest terms, overstates the prizes that can be won, or fails to award the prize. In the past, the FCC has imposed fines for failing to accurately state the full nature of the prize. For example, merely promoting as a prize a four-day vacation to a resort without mentioning that the prize does not include round-trip transportation is considered misleading since the average listener would expect such transportation to be an integral part of the prize.

In cases where a station contest is being co-promoted (e.g., with a local retailer), the station should carefully monitor its co-promoter to ensure the co-promoter is carrying out its duties with regard to the contest as represented. The FCC has generally rejected station efforts to shift blame to another party, and will hold the broadcaster ultimately responsible for ensuring the contest is conducted in accord with the announced

rules, and that the prize awarded was the prize described. In creating and executing contests, avoid the following:

- falsely stating the amount or nature of prizes;
- failing to control the contest to assure a fair opportunity for contestants to win the prize;
- urging persons to stay tuned to the station in order to win at times when it is not possible to win prizes;
- changing the contest rules without promptly advising the public;
- using arbitrary standards in judging entries;
- providing secret assistance to contestants or predetermining winners;
- claiming that winning is by chance when in fact chance plays little or no part; and
- broadcasting false clues.

Rigged contests are those contests where the outcome has been predetermined. It is unlawful to: (1) supply assistance to a contestant; (2) induce any contestant to refrain from using his or her knowledge in a contest involving skill or knowledge; or (3) engage in any scheme to predetermine or prearrange all or part of the outcome of a contest. To minimize contest problems, station announcements should include:

- a location where the public may obtain written copies of the complete contest rules;
- the beginning and ending dates of the contest;
- how to enter;
- an express statement of the amount or nature of the prize;
- a statement that if the original prize becomes unavailable, the station will substitute an equivalent prize or one of comparable value; and
- if a contest involves the elements of prize and chance, a statement that no purchase is necessary.

The third type of contest that draws particular FCC attention is a contest or promotion that adversely affects public safety. In 1985, the FCC eliminated formal restrictions that had been contained in a 1966 policy statement concerning public hazards, but warned stations that certain types of broadcasts would still be considered at license renewal time as contrary to the public interest. Among these are:

- a contest that results in hazardous accumulations of scrap metal in a certain location;
- a contest which leads listeners to call randomly chosen names from the telephone book at all hours of the day and night;
- a contest which requires the participants to travel to a specified place in a very short time, resulting in unsafe traffic conditions;
- the broadcast of "scare" announcements which could frighten or mislead the public; and
- a contest that puts contestants at risk, such as eating bugs or drinking large quantities of liquid.

Broadcasters should therefore exercise care to avoid any contest (whether their own or one sponsored by a third-party) that may threaten public safety, even if the contest does so indirectly. For example, if it is likely that a contest will create an unusually heavy demand upon the studio telephone lines, it is wise

to contact the station's telephone provider prior to the contest to ensure that the area telephone network does not become overloaded, preventing emergency communications.

If during the execution of a contest, problems begin to appear that could threaten public safety or welfare, stations should consider stopping the contest and contacting local authorities. Carefully executed and well-planned coordination with civil authorities, police officials, and telephone providers will minimize risks and hazards to the public.

On-Air Hoaxes

The FCC has adopted a hoax rule that expressly prohibits the broadcast of hoaxes considered "harmful to the public." The rule prohibits a station from knowingly broadcasting false information concerning a crime or catastrophe if it is foreseeable that broadcast of the information will directly cause substantial public harm. A "crime" is defined as any act or omission that makes the offender subject to criminal punishment by law. A "catastrophe" means a disaster or imminent disaster involving a violent or sudden change affecting the public. FCC decisions under this rule will employ a two-step analysis: (1) whether the programming's harm was foreseeable; and (2) whether the programming in fact directly caused substantial public harm.

For purposes of the hoax rule, public harm is foreseeable if the licensee could expect with reasonable certainty that substantial harm would occur. The greatest determinant of foreseeability is the nature of the broadcast. In this respect, the more inherently unbelievable the broadcast, the less likely that any resulting public harm will be foreseeable. The FCC has stated that the timing of the broadcast will not necessarily determine foreseeability, although it is one factor to be considered. Thus, if substantial harm results from a very realistic hoax, the FCC will not conclude that the harm was unforeseeable simply because the broadcast aired on April Fool's Day. The FCC's assessment of foreseeability will also be affected by other factors, such as the number of public complaints received about the broadcast.

To avoid chilling broadcast speech, the FCC has incorporated a disclaimer exception into the hoax rule. As a result, public harm from fictional programming that might otherwise violate the rule will be permitted if the program is accompanied by a disclaimer. To qualify for this presumption, disclaimers must clearly label the broadcast as fictional at the beginning and end of the program. For programs over 15 minutes in length, a disclaimer must also occur within each 15-minute interval.

Once the FCC concludes that harm from fictional programming was foreseeable, it must be shown that the programming in fact directly caused substantial public harm. "Public harm" will include damage to the health or safety of the general public, diversion of law enforcement or other public health or safety authorities from their duties, and damage to property. In all cases, the harm must be substantial, and must begin immediately after the broadcast. The FCC has not adopted a particular definition of what constitutes "substantial" public harm, but instead makes this determination on a case-by-case basis. In general, the FCC will find substantial public harm where a broadcast depicts imaginary danger that diverts local police and emergency resources from their duties, causes widespread public disorder, or harms the health or safety of the general public. By contrast, a broadcast hoax that results in no more than a few questions to police or complaints to the station would probably not be considered as causing substantial public harm. Nevertheless, in light of the hoax rule, licensees should exercise caution when creating fictional events depicting imagined crimes or public dangers.

One hoax that drew particularly intense FCC attention was the broadcast of faked emergency broadcast alerts. Federal law prohibits the transmission of any false or fraudulent signals of distress. In 1991, a St. Louis station received a \$25,000 fine when the morning announcer broadcast a prerecorded skit

designed to simulate an Emergency Broadcast System warning, complete with warning tone. In announcing the fine, the Commission noted that despite the substitution of a common "bleep" tone, most listeners mistook the tone for an authentic EBS signal. Judging by the FCC's swift and severe reaction, this type of parody is not recommended. Avoid using any "warning tone"-type sound effects in a skit or parody, even if the effect is dissimilar to the actual emergency signal.

Proceed with Caution

A commonly expressed maxim states that "ignorance of the law is no excuse." This statement is particularly relevant for on-air performers whose daily broadcasts are subject to these and other specific FCC rules and policies. Awareness of these rules and their boundaries will allow performers to create exciting and engaging programming while minimizing the risks of potentially substantial FCC fines, or worse, threatening a station's broadcast license. In all cases, stations should contact their counsel before airtime to evaluate the risks in any given set of circumstances.

For further information, please contact:

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

This publication is issued periodically to keep Pillsbury Winthrop Shaw Pittman LLP clients and other interested parties informed of current legal developments that may affect or otherwise be of interest to them. The comments contained herein do not constitute legal opinion and should not be regarded as a substitute for legal advice.

© 2009 Pillsbury Winthrop Shaw Pittman LLP. All Rights Reserved.