SCBA
SOUTH CAROLINA BROADCASTERS ASSOCIATION
Memorandum to Members

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News and Analysis of Recent Developments in Communications Law

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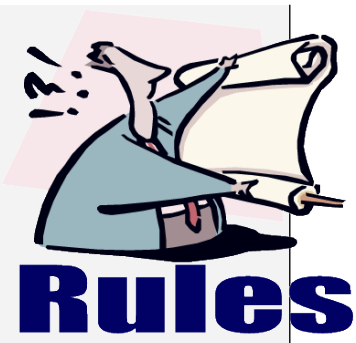
FCC Proposes Rules for Distributing Repack Funds to LPTV, TV Translator, and FM Stations



by Daniel Kirkpatrick
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Back in March 2018, Congress passed the Reimbursement Expansion Act (REA), which allocated additional funds to be used to reimburse broadcasters involuntarily affected by the post-incentive auction repacking of television stations. In addition to providing additional money for full-power and Class A stations, the REA for the first time expanded the universe of stations eligible to receive reimbursements to include LPTV and TV translator stations, as well as FM radio stations, and directed the Commission to adopt rules governing the details of how the reimbursement program would work for these stations. The Commission has now adopted a Notice of Proposed Rulemaking detailing how it intends to parcel out those funds. While the Commission notes that its proposed procedures to request reimbursement are "substantially similar" to those that have applied to full-power stations, there are some important differences, especially in the types of stations and expenses that will be eligible for reimbursement.

In the REA, Congress allocated a total of an additional $1 billion, with $600 million for fiscal year 2018 and an additional $400 million in 2019. While the majority of these funds are reserved for full-power and Class A stations subject to repacking, the REA did authorize the Commission to award, in fiscal year 2018, up to $150 million to LPTV and TV translators, and up to $50 million for FM stations, along with $50 million for the Commission's own consumer education efforts. For fiscal year 2019, the REA did not provide any specific allocations of the $400 million total, and in the NPRM, the Commission requests comment on whether it has the authority to award any of these funds to LPTV, TV translator, and FM stations, and, if so, how it should allocate those funds.

In the NPRM, the Commission proposed rules governing which stations are eligible for reimbursement, and what kinds of expenses can be reimbursed, as well as the procedures eligible stations must use to receive funds. Because the proposed rules on eligibility for LPTV and TV translators differ from those for FM stations, we've split this article into two separate sections – one addressing the LPTV and TV Translator rules and one on the FM rules.

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LPTV and TV Translators:

I. Eligible Stations

The NPRM proposes to limit the universe of LPTV and TV translator stations eligible to receive reimbursements to those that receive a construction permit resulting from an application during the recently-closed Special Displacement Window. Because their applications were treated as if they had been filed during the window, the NPRM proposes including those stations who were subject to displacement before that window opened and filed early displacement applications (with appropriate waivers). The NPRM further proposes that eligibility be limited not just to those stations that filed during the window, but to those whose displacement applications have been granted, although it seeks comment on whether this should include stations whose initial displacement applications are dismissed, but who are later able to re-file for displacement relief and obtain a grant, as long as they had originally been eligible to file in the initial the Special Displacement Window.

Eligible stations also must have been operating pursuant to a license (or a pending covering license application) for at least nine of the 12 months prior to April 13, 2017. For purposes of this determination, the Commission proposes to consider a station to have been "operating" as long as it was broadcasting at least two hours per day and 28 hours per week; a standard it incorporates from the minimum operating schedule requirements applicable to full-power television stations and one that has already generated concern among many LPTV operators.

The NPRM further proposes that digital replacement translators, assuming they meet other eligibility criteria, will be able to apply for reimbursements. The Commission takes pains to note, however, that Class A stations, which are already eligible for reimbursement under the existing program, will not be able to apply for funds allocated to LPTV and TV translator stations.

II. Eligible Costs

Under the REA, the Commission was authorized to reimburse costs "reasonably incurred" as a result of the repack. In the NPRM, the Commission proposes to reimburse costs incurred as a result of the displacement of LPTV and translator stations by full power and Class A station's initial post-auction applications, but re-

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quests comment on whether displacements caused by post-auction facilities improvement ("maximization") applications should also be reimbursed. Because maximizations were not required in the repack, the NPRM asks whether those costs can be reasonably attributed to the repack, and hence qualify for reimbursement.

For displaced LPTV and translator stations, the NPRM proposes to reimburse eligible stations' costs actually incurred in building out approved displacement facilities. Both hard (*e.g.*, equipment) and soft (*e.g.*, legal and engineering fees) costs would be reimbursable, but in the event that the reimbursement fund is not sufficient to cover all costs, hard costs would be prioritized. No reimbursements would be provided to cover lost revenues or upgrades to equipment, a restriction also applied to full power and Class A station reimbursements and one that will likely come into play because most, if not all, new transmitters will have ATSC 3.0 capability and other upgraded features that were not present in the equipment that they replace. (Note that this does not prohibit stations from purchasing upgraded equipment – it only limits their reimbursement to the cost of replacement equipment. Any additional costs must be borne by the licensee).

Also like full power and Class A stations, LPTV and TV translator stations would be encouraged to reuse existing equipment and would need to justify any new equipment purchases. Unlike full power and Class A stations, LPTV and translator stations would not be able to receive reimbursement for interim facilities, based on the Commission's conclusions that such facilities would largely not be necessary for LPTV and translator stations (a conclusion that appears to ignore stations displaced by 600 MHz auction winners that must abandon their licensed channel before they can move to a new channel that will not become available until full power and Class A stations in their market implement their own transition to new channels).

Under the NPRM, only costs incurred after Jan. 1, 2017 would be reimbursable. Costs incurred in reaching an agreement in the upcoming settlement window for mutually exclusive applications would not be reimbursable (although costs to build out amended proposals approved pursuant to a settlement would be), nor would any costs arising from an auction, if required to resolve any mutual exclusivity.

Finally, recognizing that some LPTV and translator stations have received, or will receive, funds from T-Mobile and other wireless licensees causing displacements, or through other sources such as state grants, the NPRM requests comment on whether such stations still should be eligible to receive reimbursement from the FCC. The Commission also requests comment on whether stations eligible to receive funds from such sources should be required to pursue those funds before being eligible for reimbursement from the Commission, both to avoid the possibility of duplicative payments for the same expenses and to force licensees to obtain money from other sources before dipping into federal funds.

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III. Reimbursement Procedures

In the NPRM, the Commission also proposes to adopt reimbursement procedures for LPTV and TV translator stations similar to those applied to full power and Class A television stations. These procedures would require that all stations believing they are, or will be, eligible to receive funds file an Eligibility Certification using the FCC's online LMS system. These Eligibility Certifications will document that the applicable station is, in fact, eligible for reimbursement. LPTV and TV translator stations would be required to prove that they were on-air during the required time frame by documenting its programming aired, providing power bills, or other means.

Licensees seeking reimbursement will also be required to file an initial Reimbursement Form identifying their existing broadcasting equipment, along with the types of costs they expect to incur and for which they will seek reimbursement. The Commission proposes creating a new catalogue of approved cost amounts to apply to LPTV and TV translator stations, as was done for full power and Class A stations, and incorporating that catalogue into the revised Reimbursement Form. Because many licensees will have incurred significant actual costs by the time the FCC adopts and releases these reimbursement forms, the NPRM suggests that licensees may submit actual costs where applicable instead of estimated costs.

Once all Eligibility Certifications and initial Reimbursement Forms have been submitted and reviewed by the Media Bureau, the Commission plans to issue an initial allocation to each eligible licensee. In the NPRM, the Commission requests comment on whether this allocation should be based on a percentage of anticipated and approved costs (as it was for television stations), or on some other calculation, such as a fixed allocation amount for licensees facing similar circumstances. In the event the total amount of reimbursement funds is not sufficient to fulfill all requests, the Commission proposes delegating to the Media Bureau the task of determining what costs should be prioritized.

The NPRM suggests that hard costs will be prioritized over soft costs such as project management fees, but requests comment on the priority guidelines the Commission should direct the Media Bureau to apply, if any. Once allocations are made, licensees will be entitled to draw down on those allocations by submitting documentation of actual incurred costs. As with full power and Class A stations, this will be done by updating a licensee's Reimbursement Request form. Prior to receiving any reimbursements, eligible licensees will also need to file confidential information about their destination bank account for payments, using the FCC Form 1876 and the CORES Incentive Auction Financial Module.

Once a licensee's final payment is made, which is supposed to occur by November 13, 2020, but may be extended until no later than July 3, 2023, the NPRM proposes re-

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quiring that licensees to retain relevant documentation for a period of 10 years. To attempt to prevent fraud, waste, and abuse, the Commission also, as it has done with television licensees, reserves the right to audit licensees who have requested and received reimbursement funds.

FM Radio Stations:
In proposing rules to govern reimbursement to FM radio stations, the Commission takes as a baseline the direction in the REA to reimburse those costs that are "reasonably incurred" by the station as necessary to "reasonably minimize disruption" of service to the station's listeners. This somewhat more restrictive standard results in different eligibility rules than those applied to television stations, with the Commission concluding that some disruption to FM operations is "reasonable" and therefore not subject to reimbursement.

I. Eligible Stations

The NPRM tentatively proposes to provide reimbursement to both full-power FM stations and FM translators, finding that both were anticipated by the REA. Although the Commission does not believe reimbursement to LPFM stations is required by the REA, the NPRM requests comment on whether such stations should be eligible nonetheless. Eligibility will be limited to stations that were licensed and operating as of April 13, 2017 with facilities that are being impacted by a repacked television station or one that is relinquishing its spectrum rights as part of the auction. The NPRM proposes reimbursement only for costs associated with the location of a facility that is collocated with, adjacent to, or in close proximity to a repacked (or relinquishing) television station. As with the television reimbursement programs, FM stations will not be reimbursed for expenses related to relocating or modifying studio-transmitter links or other broadcast auxiliary facilities. Also as with LPTV/TV translator stations, the NPRM requests comment on whether FM stations impacted by television station maximizations should be eligible for reimbursement under the program.

For purposes of allocating reimbursement funds, the FCC divides these eligible stations into three categories:

Category 1: Stations that are being permanently relocated as a result of a television station that is being repacked or relinquishing its spectrum. For example, an FM station that was co-located with a television station relinquishing its license and disassembling a shared tower could be a Category 1 station.

Category 2: Stations that are required to temporarily dismantle their facility or make changes that do not require prior FCC approval. Examples of Category 2 stations would be those that needed to temporarily remove their antenna from a tower, or were required to replace a transmitter.

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Category 3: Stations that are required to temporarily suspend operations or reduce power to allow workers to safely complete work on a repacked full-power or Class A television station. This is predicated to be by far the largest category of impacted FM stations, with the time each station will be off-air or at reduced power to vary greatly among stations.

For Category 1 and 2 stations, the FCC proposes reimbursing licensees for up to 100 percent of their eligible costs (as detailed below), provided sufficient funds are available. For Category 3 stations, however, the Commission proposes a more complicated priority system for reimbursements based on how long a station is forced to operate from a temporary facility. Under the procedure proposed in the NPRM, reimbursements would be allocated as follows:

- Stations off-air (or at reduced power) for under 24 hours, only between 10 p.m. and 6 a.m., or for less than five non-peak broadcast hours per day would not be reimbursed, with the Commission considering such disruption of service to be *de minimis*.

- Stations forced to operate from temporary facilities to avoid being off-air or at reduced power for between 24 hours and 10 days would be reimbursed up to 50 percent of eligible costs.

- Stations forced to operate from temporary facilities to avoid being off-air or at reduced power for between 11 and 30 days would be reimbursed up to 75 percent of eligible costs.

- Stations forced to operate from temporary facilities to avoid being off-air or at reduced power for more than 30 days would be reimbursed up to 100 percent of eligible costs.

For each class of station eligible to receive reimbursements, the Commission would reimburse the licensee for the costs of constructing new or upgraded temporary auxiliary facilities covering at least 80 percent of the station's licensed service area (measured by area or by population). As an alternative to constructing new auxiliary facilities, a station that operates FM translators could receive reimbursement for the operation of those facilities from new sites constructed pursuant to special temporary authority (STA). Any station eligible for reimbursement will be reimbursed only for costs incurred in constructing facilities comparable to the station's licensed facilities. To the extent possible, licensees will be expected to re-use existing equipment, and they will need to provide justification for any replacement or upgraded equipment. Finally, the Commission, as it believes is required by the REA, would not reimburse any licensees for lost revenues during any time off-air or operating with reduced facilities.

II. Reimbursement Procedures

In the NPRM, the Commission also proposes to adopt reimbursement procedures for LPTV, TV translator, and FM stations similar to those applied to full power and Class A television stations. These procedures would require that all stations believing they are, or will be, eligible to receive funds file an Eligibility Certification using the FCC's online LMS system. These

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Eligibility Certifications will document that the applicable station is, in fact, eligible for reimbursement. FM stations would need to identify the full power or Class A station(s) that would force it off-air, and provide some documentation (e.g. a letter from the applicable full-power station) to support its certifications.

Licensees seeking reimbursement will also be required to file an initial Reimbursement Form identifying their existing broadcasting equipment, along with the types of costs they expect to incur and for which they will seek reimbursement. The Commission proposes creating a new catalog of approved cost amounts to apply to FM stations, as was done for full power and Class A stations, and incorporating that catalog into the revised Reimbursement Form. Because many licensees will have incurred significant actual costs by the time the FCC adopts and releases these reimbursement forms, the NPRM suggests that licensees may submit actual costs where applicable instead of estimated costs.

Once all Eligibility Certifications and initial Reimbursement Forms have been submitted and reviewed by the Media Bureau, the Commission plans to issue an initial allocation to each eligible licensee. In the NPRM, the Commission requests comment on whether this allocation should be based on a percentage of anticipated and approved costs (as it was for television stations), or on some other calculation, such as a fixed allocation amount for licensees facing similar circumstances (*e.g.* a similar amount for each radio station forced off-air for 11-30 days). In the event the total amount of reimbursement funds is not sufficient to fulfill all requests, the Commission proposes delegating to the Media Bureau the task of determining what costs should be prioritized. The NPRM suggests that hard costs will be prioritized over soft costs such as project management fees, but requests comment on the priority guidelines the Commission should direct the Media Bureau to apply, if any.

Once allocations are made, licensees will be entitled to draw down on those allocations by submitting documentation of actual incurred costs. As with full power and Class A stations, this will be done by updating a licensee's Reimbursement Request form. Prior to receiving any reimbursements, eligible licensees will also need to file confidential information about their destination bank account for payments, using the FCC Form 1876 and the CORES Incentive Auction Financial Module.

Once a licensee's final payment is made, which is supposed to occur by November 13, 2020, but may be extended until no later than July 3, 2023, the NPRM proposes requiring that licensees to retain relevant documentation for a period of ten years. To attempt to prevent fraud, waste, and abuse, the Commission also, as it has done with television licensees, reserves the right to audit licensees who have requested and received reimbursement funds.

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III. Comments

The LPTV, TV Translator, and FM station reimbursement program will clearly be very important to affected licensees, and anyone impacted by these rules may want to consider submitting comments on the NPRM. Comments **can be filed until Wednesday, Sept. 26** with **reply comments due Friday, Oct. 26**. The REA directs the Commission to complete the rulemaking by March 23, 2019. Keep an eye on CommLawBlog.com for those specific deadlines once they are announced.

Although the Commission is attempting to move expeditiously in implementing the reimbursement program, it will likely still be some time before funds are available. Even after receiving Comments and Reply Comments, and adopting final rules, the Commission will need to finalize, and receive approval from the Office of Management and Budget for the Eligibility Certifications and Reimbursement Forms before they can be filed. Those submissions will then need to be reviewed, along with required financial information, before licensees can receive reimbursements. Nonetheless, any licensee expecting to claim reimbursement money should begin confirming their eligibility and should retain documentation of any expenses it incurs in the meantime.

FCC Announces the Next Step in Licensing Next Generation TV

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When the FCC released its *Next Gen TV Report and Order* in November 2017, we wrote about how this authorized television broadcasters to use the "Next Generation" broadcast television transmission standard (also known as ATSC 3.0) on a voluntary, market-driven basis. The rules from that *Order* became effective on Feb. 2, 2018, except for the rule sections 73.3801, 73.6029, and 74.782 which required approval by the Office of Management and Budget (OMB) because they contain information collection requirements. These rules covered core issues such as coverage and simulcasting requirements, and the FCC application process. However, the FCC recently announced that OMB has signed off on the rules, effective as of July 17. For broadcasters eager to jump into Next Generation TV (not the *Star Trek* franchise), the FCC also announced that the Media Bureau is in the process of making changes to its Licensing and Management System (LMS) to accommodate ATSC 3.0 license applications, and that completion of such changes is expected to begin in early 2019. The Bureau is not yet accepting applications for ATSC 3.0 licenses, but it will issue a public notice announcing when it will start accepting applications for such licenses. In the meantime, the Media Bureau will continue to consider applications filed using the experimental licensing rules for ATSC 3.0 market trials and product development.

EAS and WEA National Tests Scheduled for Thursday, Sept. 20

by FHH Law

The Federal Emergency Management Agency (FEMA) and the FCC has announced Thursday, Sept. 20, 2018 at 2:20 p.m. EDT as the scheduled date and time for this year's annual nationwide test of the Emergency Alert System (EAS). (Note that unlike the past two years, the scheduling date is on a Thursday, not a Wednesday as some may be accustomed.)

Immediately preceding the EAS national test, FEMA this year will also conduct a test of the Wireless Emergency Alert (WEA) system, which delivers emergency alerts to cell phones and other wireless devices. All wireless providers who have opted to participate in the WEA will be required to participate in this first national test of that system.

As with previous nationwide testing of the EAS, participants should have filed their **ETRS Form 1 providing information about their EAS equipment, this year by Aug. 27**, in advance of the national test**.** While the Aug. 27 deadline has passed, please be aware that the FCC will expect participants to monitor their equipment and file a "day-of-test" **ETRS Form 2 by the end of the day on Sept. 20.** As in past years, Form 2 will simply require the EAS participant to certify whether it received and retransmitted the national test message.

Based on our previous experiences with EAS testing, we would expect that there will be some congestion in the ETRS system after the test, so you should probably be prepared to spend some time completing your filings.

Finally, all EAS participants will also be required to file a post-test ETRS **Form 3 on or before Nov. 5.** Form 3 will require participants to identify the specific times at which they received and retransmitted the test message, the source(s) from which they received the test message (including which source it was received from first), the language in which the message was received and retransmitted, and any complications they experienced.

Copyright Enters the Twilight Zone (A Series of Controversial Decisions May Not Be All That They Seem)

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Picture for a moment a man. Not an ordinary man by any stretch. This man is Tom Brady. Quarterback. Five-time Super Bowl winner. Future Hall of Famer. Husband to a Supermodel. And from all appearances, a good father, and overall a decent person.

Yet this man has a way of courting controversy at all turns. Not drafted until the sixth round, he quickly supplants Drew Bledsoe, a man who many thought would be the future of the New England Patriots, as the team's quarterback. He succeeds; perhaps too well, as the Patriots become the Evil Empire of the NFL over the past two decades. Yes, Bill Belichick is the lightning rod for most of opposing fans' ire, but Brady has his haters too. Let's not forget a little thing called "Deflategate." Or his statement that his rigid workout regimens and strict (and somewhat quirky) dietary restrictions would allow him to play well into his forties – and keep him eternally young and handsome.

For all these reasons – the fact that he's apparently found the Fountain of Youth, the on and off field success, the polarizing figure he's become – it is really easy to picture Tom Brady. The world is filled with pictures of Tom Brady. And one of those pictures has now become extremely controversial in a legal sense.

Which brings us to the heart of the matter – a Feb. 15 decision by Judge Katherine Forrest in *Goldman v. Breitbart, News Network LLC.* The scene is the Hamptons, July 2, 2016. Tom Brady is seen with Danny Ainge, the general manager and President of the Boston Celtics. They are assumed to be there as part of the Celtics' pitch to Kevin Durant, the most sought after free agent in the NBA that summer. Another man – this one an ordinary man who goes by the name of Justin Goldman – takes a photo of Brady and uploads it to his Snapchat Story. In 24 hours, that would generally be the end of the story, as the photo would disappear from that platform. But, as a photo of Tom Brady in the Hamptons just as the Celtics are believed to be wooing Kevin Durant will do, this photo goes viral and eventually ends up being uploaded to Twitter by several different people.

Several prominent news outlets, including, among others, Time, Inc. (owner of Sports Illustrated), Yahoo, Vox, Gannett, the Boston Globe, NESN, and Breitbart News "embed" the Tweets into their online stories about a possible Celtics-Durant connection.

In this case, none of the defendants – according to Judge Forrest – actually copied and pasted the photo onto their own servers for display on their websites; instead, they follow the now-common practice of embedding content under a process allowed by the platform

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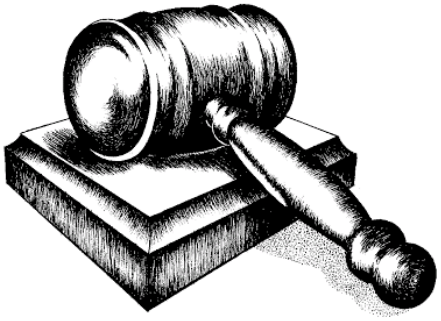
on which that content is found. Embedding is prevalent today because it is so easy to do and, until now, widely believed to be legal. The user simply needs to add a specific "embed code" to the HTML instructions when seeking to include a certain piece of content in a story. The underlying content – in this case the Tweet containing a picture of Tom Brady and Danny Ainge – remains on the original server – in this case, Twitter – even as it appears on the user's website.



It's that last part that has made embedding seem relatively safe from a copyright infringement perspective. Until now, some courts – with the Ninth Circuit taking the lead – have analyzed embedding under the so-called "Server Test," which provides that where the underlying photo at issue resides on the original server, the embedding party isn't violating any of the exclusive rights held by the copyright owner – most notably the reproduction and display rights. The "Server Test" was the theory advanced by the media defendants in *Goldman* when Goldman sued them (although, notably, not any of the individuals who actually copied Mr. Goldman's original photo from Snapchat Story and uploaded it to Twitter). Judge Forrester summarized the Server Test by referencing *Perfect 10, Inc. v. Google, Inc.*, the case that adopted that test, which was decided by the United States District Court for the Central District of California in 2006 and affirmed by the Ninth Circuit in 2007. Judge Forrester described that case as holding that images "which were stored on third-party servers and accessed by 'in-line linking' – which works, like embedding, based upon the HTML code instructions – were not infringements."

The Server Test stands in stark contrast to the "Incorporation Test," a test that had been proposed by the plaintiffs in *Perfect 10* and that would define display as "the act of incorporating content into a webpage that is then pulled up by the browser." The Incorporation Test generally favors copyright owners, as under that test, incorporating content into your website would mean that your website is actually displaying the content in question. The Server Test, by contrast, takes the view that the material is still being displayed solely from the server on which it resides.

The Server Test is believed to have carried the day since 2006. But Judge Forrester's decision may be changing that, as she ruled in favor of Justin Goldman, the plaintiff. Judge Forrester reviewed several similar (though not identical) cases from around the country and concluded that the Server Test has really never caught hold outside of the Ninth Circuit (which covers the far western states of Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington). In fact, she noted, four courts in the Southern District of New York have actually discussed the Server Test, with none of them holding that it applies to the display right in a case involving a claim of direct infringement. Rather, she noted, those other in-district cases either involved application of the distribution right or disputed factual issues that precluded summary judgment were applying the display right in the context of contributory infringement. She concluded her review of decisions from both the Southern District of New York and other jurisdictions as follows:

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In sum, this Court is aware of only three decisions outside of the Ninth Circuit considering the display right in light of *Perfect 10*; one from the Seventh Circuit which adopted the Server Test for contributory liability, one from the Southern District which stated as a factual matter only that *Perfect 10* existed, and one from the Northern District of Texas rejecting *Perfect 10*. This effectively allowed Judge Forrester to start with a clean slate from which to decide whether the defendant news sites had directly infringed on Goldman's exclusive right to display his photo. Looking to the plain language of Section 101 of the Copyright Act, she concluded that:

> Nowhere does the Copyright Act suggest that possession of an image is necessary in order to display it. Indeed, the purpose and language of the Act support the opposite view. The definitions in § 101 are illuminating. First, to display a work publicly means "to transmit…a…display of the work…by means of any device or process."17 USC § 101. To transmit a display is to "communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent." (*i.e.* Devices and processes are further defined to mean ones "now known or later developed.")

Thus, it doesn't matter whether the photo technically resides on Twitter's servers; what really matters is that the defendants "took active steps to 'display' the image on their own sites." This rocked the journalism world in particular because embedding has become so commonplace. In fact, when this decision was first issued in February, I shared the defendants' and amici's view that "not adopting the Server Test would 'radically change linking practices, and thereby transform the Internet as we know it.'" After all, I'm firmly on team journalism and know this *will* have a distinct impact on the ability to easily incorporate important content into publications.

That's why it's a good thing I've waited until now to write about this case. Though I could claim it was due to just being too busy at the time, the delay was really due to: 1) the fact that I thought the case would quickly be overturned on appeal and 2) my gnawing feeling that this may be the right result.

I'm writing now because on July 17, the United States Court of Appeals for the Second Circuit declined to overturn Judge Forrester's decision via "interlocutory appeal" (in which an overarching issue is appealed before the case is fully decided), calling an immediate appeal "unwarranted." The effect of that ruling is that, at least for the time being, it will be riskier in the Southern District of New York for online publishers to embed copyrighted content into their web pages.

I'm also writing now because I've come full circle as to my view of this result. That's part of the reason for my Twilight Zone-themed introduction: after a bizarre decision from a federal court that turns a seemingly accepted practice with regard to using photos inside out, I think I'm beginning to understand and agree with this decision. I'm not even sure I know what's real anymore.

I think it may be right, and I further agree with Judge Forrester's assessment that, "The Court does not view the results of its decision as having such dire consequences. Certainly given a

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number of as yet unresolved strong defenses to liability separate from this issue, numerous viable claims should not follow."

Among those defenses are: 1) whether the photo was effectively released into the public domain; 2) potential claims of licensing and authorization; 3) a defense under the Digital Millennium Copyright Act; 4) limitations on damages due to innocent infringement; and 5) fair use.

It's this last claim that is the most intriguing, relevant, and heartening, as the breadth of the fair use doctrine seems to have increased over the past several years. This is particularly true for the Second Circuit, which seems to have taken the lead on the concept of "Transformative Fair Use" (largely traced back to the opinion of former Supreme Court Justice David Souter in *Campbell v. Acuff-Rose Music, Inc.* in which Judge Souter looked at "whether the new work merely supersedes the objects of the original creation, or whether and to what extent it is 'transformative,' altering the original with new expression, meaning, or message"). But it's also true elsewhere, as evidenced by two recent decisions – albeit from a different jurisdiction – that were similarly noteworthy to those who pay attention to such things. Both cases, decided this year within the United States District Court for the Eastern District of Virginia, adopt an expansive view of fair use to the point where they could offset the effect of *Goldman v. Breitbart*. These cases are *Philpot v. Media Research Center Inc.* and *Brammer v. Violent Hues Productions, LLC*.

The first case is *Philpot v. Media Research Center*. Decided on Jan. 8 by Judge T.S. Ellis III, it involved photos taken by professional photographer Larry Philpot. Both were concert photos of famous musicians engaged in performance: Kenny Chesney and Kid Rock. They were each uploaded to the Wikimedia website where they were made available via a Creative Commons attribution license, version 3.0. That license allows free use of the photos but requires attribution to the original photographer. The photos were published by the Media Research Center, a 501(c)(3) non-profit that "publishes news and commentary regarding issues of public debate in order to expose media bias against American Judeo-Christian religious beliefs." The Chesney photo was published as part of an article titled "8 A-List Celebrities That Are Pro-Life" while the Kid Rock photo was published in an article titled "Kid Rock Announces 2018 U.S. Senate Bid."

Neither photo contained the required attribution to photographer Larry Philpot; as a result, they fell outside the scope of the terms and conditions of the Creative Commons 3.0 license (although this post focuses on fair use, I'd be remiss if I didn't stress the fact that it is of the utmost importance to read all the terms and conditions of a Creative Commons or other license and follow them to the last detail). Because it didn't have permission to use the photos, the Media Research Center raised several defenses, including fair use.

For those who aren't already familiar, fair use is a doctrine under the Copyright Act that provides certain uses of copyrighted works are "not an infringement." While this language suggests that the plaintiff bears the burden of proof in demonstrating that a particular use is not "fair use," most courts have treated fair use as an affirmative defense and placed the burden of proof on the defendant to show that a use was fair.

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Fair use claims are resolved by analyzing four non-exclusive factors:

- "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes";
- "the nature of the copyrighted work";
- "the amount and substantiality of the portion used in relation to the copyrighted work as a whole"; and
- "the effect of the use on the potential market for or the value of the copyrighted work."

Judge Ellis focused – as most do – on the first and fourth factors, concluding that the Media Research Center's use of these photos in this way was "fair." Among the high points of his decision are:

- The use of both the Chesney and Kid Rock photos was noncommercial and transformative because "[t]he undisputed factual record discloses that the 'expression,' 'meaning,' and 'message' of defendants use of the photographs here is plainly different from plaintiff's intended use of the photographs." Philpot, a professional photographer of musicians, took these photos to depict Chesney and Kid Rock in concert. By contrast, the Media Research Center used the photos for purposes of news and commentary; in fact, these photos were surrounded by content and commentary unrelated to the musicians performing in concert. Judge Ellis found that "because defendant used the Chesney and Kid Rock photographs in a new context, to tell new stories about the musicians as pro-life advocates or candidates for office, defendant's use of the photographs was transformative." Further, there was only nominal commercial gain because the Media Research Center only received a small amount of revenue in connection with these stories (about $26 from advertising on those pages and maybe $50 in donations through related links).
- Regarding "the nature of the work factor," the original Philpot photos were both factual and creative, so this factor did not favor either party.
- Because the Media Research Center used all of one photo and almost all of the other, the "amount and substantiality" factor pointed against fair use.
- There was no detrimental effect on the economic market for these photos because Philpot never intended to sell the photos (as evidenced by his posting them to Wikimedia) and, in fact, had not received any revenue from them. Further, "[a]ny speculative economic effects on the future economic market for plaintiff's Chesney and Kid Rock Photographs owing to a lack of attribution do not outweigh the lack of direct economic effects and defendant's general non-commercial use of the Photographs."

Judge Claude Hilton applied a similar analysis in his June 11 decision in *Brammer v. Violent Hues Productions, LLC.* In that case, photographer Russell Brammer posted his time-lapse photo of the Adams Morgan neighborhood in Washington, D.C. at night on several sharing

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sites and his own personal website. He applied for copyright registration in September 2016 and was granted that registration in July 2017, after the photo was used by Violent Hues on a website promoting the Northern Virginia Film Festival in 2016. Brammer sued, and Violent Hues raised fair use as a defense.

Like Judge Ellis, Judge Hilton ruled in favor of the defendant. Key aspects of his ruling include:

- Though Brammer's purpose in taking the photo was expressive, Violent Hues' use of the photo was informational (to provide festival attendees with information about the local area) and non-commercial (because it was not used to raise revenue or advertise a product or service). Further, Violent Hues acted in good faith because its owner found the photo online and had no indication that it was copyrighted before using it.

- While the original photo included both factual and fictional elements, it was used in a more factual than fictional way in nature, which lessens the creative nature of the work. Although the photo contained creative elements, it basically was a representation of the Adams Morgan neighborhood and was presented by Violent Hues as such.

- The third factor – the amount of the work used in relation to the whole – also favors Violent Hues because the defendant cropped the original photo to about half its original size. Violent Hues "used no more of the photo than was necessary to convey the photo's factual content and effectuate Violent Hues' informational purpose.

- Finally, use of the photo had no real effect on the market for the photograph. Brammer testified to only six sales or paid licenses of the photo, two of which occurred after Violent Hues posted the photo. In addition, Violent Hues itself didn't sell copies of or otherwise generate revenue from the photo. These cases – *Brammer v. Violent Hues* in particular – also fit the "Twilight Zone" theme because I believe they apply fair use more broadly than in many other cases. For instance: The idea that simply using a photo for a purpose other than the photographer's original intent goes beyond what I would previously have considered "transformative" and unilaterally grants the right to a user to determine when payment should and should not be made. Further, the simple fact that revenue has not been raised can also be determinative even though, in many news instances, there is little ability to directly tie revenue to use of a photo.

- Finally, the classification of the use of the Brammer photo of Adams Morgan as "factual" in nature and therefore not distinctly commercial, is a bit incredible. By that definition, any photo of a real place or person is factual in nature. However, this photo in particular, however, demonstrates that's just not true. It's a creative representation of Adams Morgan which required significant planning and execution, making it distinct from a simple "point and shoot" photo of the same neighborhood.

News organizations and other content users will welcome these two decisions, especially in light of the *Goldman v. Breitbart* embedding decision we wrote about last week. After all, applying *Philpot v. Media Research Center* and *Brammer v. Violent Hues* to the Tom Brady

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photo seems to indicate that the Breitbart defendants might have a strong claim of fair use. That photo was used in a new context without any direct revenue attached; it was not originally taken for a commercial purpose (as evidenced by its posting to a Snapchat story); and there seemed to be no actual or intended economic market for the photo (given that it was never offered for sale or license and, in fact, was intended to disappear after 24 hours).
It is important to remember that these decisions are all limited to their respective jurisdictions – the Southern District of New York and the Eastern District of Virginia – and don't formally create precedent elsewhere. I suspect, however, that we may see the Server Test v. Incorporation Test issue from *Goldman v. Breitbart* again in higher courts – perhaps even the Highest Court in the Land – at some point. Thus, it is still possible that these seemingly alternative interpretations of the legal impact of embedding and the scope of fair use stay in The Twilight Zone and never become reality.

D.C. Circuit Upholds FCC Reinstatement of UHF Discount

by Daniel Kirkpatrick
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The United States Court of Appeals for the D.C. Circuit on July 25 dismissed challenges to the FCC's April 2017 decision to reinstate the UHF Discount. That discount allows broadcast television station owners to count only 50 percent of households served by UHF stations when calculating a station's compliance with the FCC's national ownership cap, which limits the number of households that any one station owner may reach. The discount is critical to certain large ownership groups' compliance with the national cap and their opportunities for further expansion.

In 2016, under former Chairman Tom Wheeler, the Commission eliminated the cap based largely on the fact that the original technical reasons for the discount (*i.e.,* the technical disadvantages of analog UHF stations compared to VHF stations) had disappeared with the transition to digital television broadcasting, where most operators find UHF frequencies to be superior. When current Chairman Ajit Pai took over leadership of the Commission, he acted to reinstate the discount pending a more comprehensive review of all aspects of the national ownership cap. Appeals were quickly filed, including requests for a stay of the effectiveness of the reinstatement.

Last June, the D.C. Circuit Court refused to stay the effectiveness of the decision to reinstate the UHF discount, although the appeal continued up to today's decision. This past April, the Court seemed to question the FCC's decision by asking pointed questions to the Commission's attorneys at oral argument about whether the reinstatement was justified. Today's decision does not actually answer those substantive questions. Rather, the Court declined to address the rule change on its merits, finding instead that the public interest groups who had raised the challenge did not have standing to bring the appeal, as they had failed to demonstrate that they or their members would be directly harmed by the decision.

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The appeal was dismissed in a short order that the Court determined was not important enough to be published as an official opinion. Since the Court did not reach the merits of the case, we can all continue to question whether the FCC was justified in reinstating the discount, although that speculation is now moot (at least temporarily). The Commission back in December released a Notice of Proposed Rulemaking looking toward reviewing the UHF discount as part of a broader review of the national ownership cap. Comments and reply comments on that NPRM have been filed, and a decision is expected in the coming months. In the meantime, the UHF discount will remain in place, and TV operators interested in mergers will likely be quick to undertake transitions that depend on the discount.

FCC Postpones DIRS Exercise for the Second Time

by FHH Law

The FCC was set to conduct a voluntary Disaster Information Reporting System (DIRS) exercise Aug. 23 – Aug. 24. However, last month Hawaii was set to get hit by Hurricane Lane, prompting the FCC to postpone the exercise due to a possible **real** activation of the DIRS. The FCC postponed this test to Sept. 13. However, due again to the possibility of a real activation of the DIRS as Hurricane Florence is set to make landfall in Virginia and the Carolinas, the FCC has again decided to postpone the voluntary DIRS exercise until further notice. Please note, however, that the postponement of the DIRS exercise means that broadcasters still need to be cognizant of potential activations of DIRS in cases of emergencies such as hurricanes. Additional information can be found at https://www.fcc.gov/florence. Reach out to us if you have any questions on submitting reports to the DIRS, or other disaster-related issues.

FCC 2018 Application Fee in Effect as of Sept. 4

by FHH Law

Effective as of Sept. 4, the FCC has increased the application fees that it collects form applicants. On July 10, the FCC released an Order on adjustments to the application fees which it is required to adjust every two years to keep pace with the changes in the Consumer Price Index (CPI). This year's application fees published on Aug. 3, are going up by 3.7 percent in response to increases in the CPI from October 2015 to October 2017. The Order also reiterated the Commission's goal of moving to electronic payments as opposed to payments by mail, and notes that it will continue to require electronic payment for additional categories of applications.

FCC Releases Annual Regulatory Fee Order – Payments Due Sept. 25

by FHH Law

While we countdown the sad departure of the lazy summer days, the FCC released the final listing of regulatory fees for 2018 and their due dates.

Fees must be paid by Tuesday, Sept. 25

As is normally the case, the fees adopted by the Commission all track reasonably closely with the fees as proposed in May (the only fees that have changed are those for Interstate Telecommunications Service Providers and for International Bearer Circuits). For the most part, the specific fees for 2018 (with a few exceptions) represent decreases from the amounts due in 2017.

As has always been the case, failure to pay regulatory fees on time can have serious consequences, including: a late payment penalty of 25 percent of the unpaid amount assessed immediately after the deadline; additional processing charges for collection of late fees; and administrative penalties, such as withholding of action on any applications from delinquent parties, eventual dismissal of such applications, and even possible revocation proceedings. Consistent with recent procedure, don't bother reaching for your checkbook when you're ready to pay. Under the electronic filing regime, regulatory fee payments must be made electronically (*i.e.*, by online ACH payment, online credit card, or wire transfer). That means, no checks, money orders, bags of pennies, monopoly money, or anything else physical. Also, no Bitcoin or other virtual currencies.

The maximum payment that can be charged to a single credit card on a single day remains at $24,999.99, which applies to both single and bundled payments. If you owe more than $24,999.99 for a single license, you will ***not*** be permitted to split up the payment into multiple payment transactions, nor will you be permitted to pay over several days by using one or more credit cards. The FCC recommends that anyone expecting a fee obligation of $25,000 or more consider using debit cards, ACH debits from a bank account, or wire transfers.

If you aren't familiar with the FCC's online Fee Filer system, we recommend that you **not** wait until the last minute to try to figure it out. It's not especially user-friendly or intuitively obvious. (Of course, if you don't feel like doing it yourself, you can always ask your communications counsel to help out.)

You can log into the fee filer system online using your FCC Registration Number (FRN) and password or your CORES username and password, generate a Form 159-E (which you'll need to tender as part of the payment process), and then get on with the payment process. (If you're paying by wire transfer, you'll have to fax in your 159-E.)

When it comes around to figuring out exactly what you owe, just a heads up: While Fee Filer

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will ordinarily list fees associated with the FRN used to access the system, the list of fees shown in Fee Filer may not be complete. (The same is true for the broadcast regulatory fee "lookup" page the Commission usually provides.) As a general rule, it's the payer's responsibility to confirm the fullest extent of the payer's regulatory fee obligation so double- and triple-checking other FCC databases, as well as your own records, is prudent. In one continuing bit of good news for broadcast filers, there are once again no fees due for broadcast auxiliary licenses. It is also worth noting, as the FCC made a point to, that all television licensees who held a license on September 30, 2017 must pay regulatory fees, even if they have since relinquished that license as part of the Incentive Auction.

FCC Proceeding on C Band Use and Receive Only Earth Stations Moves Forward; Comments Due Oct. 29

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The Commission issued an Order and Notice of Proposed Rulemaking in the proceeding relating to the use of the 3.7 to 4.2 GHz band. As we've previously written, the Commission has been considering allowing the use of the 3.7 to 4.2 GHz band (known as the C band) by mobile broadband. The C band is currently used to deliver cable and broadcast network programming and the Commission has opened a filing window for C Band receive only earth stations until Oct. 17.

The Order provides for the Commission to collect information on satellite usage of the C band to allow it to make an informed decision about the future use of the band. The Order provides that earth station operators provide additional information with the Commission. The Order directs the Wireless Telecommunications Bureau, International Bureau, and the Office of Engineering and Technology to issue a Public Notice that will 1) provide detailed instructions for earth station licensees to provide additional information about their facilities; and 2) establish a window for initial filings of information. The information the Commission is requesting would be similar to that information requested in an application or registration. The Commission is also requesting information from the space station licensees. The Commission has not yet issued its Public Notice with specific instructions but one should be forthcoming.

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In the Notice of Proposed Rulemaking (NPRM) portion in the proceeding, the Commission seeks comments on the future usage of the C band and how to deal with protection for the incumbents. The Commission proposes to define the incumbents as those earth stations that were operational as of April 19, 2018, were licensed or registered (or had a pending application for license or registration) as of Oct. 17, 2018, and have timely filed information in response to the Commission's Public Notice collection information or certified the accuracy of information on file with the Commission. The Commission proposes to exclude those earth station not licensed or registered or those facilities for which the licensees do not timely file the information required in the Order. The Commission is also requesting specific comments on defining the protection to which an incumbent would be entitled.

In the NPRM the Commission proposes to permanently limit the filing of applications for earth station licenses in the C band to those incumbent earth stations. This would mean that the earth stations that are registered or licensed by Oct. 17, 2018, would be able to modify these stations at the registered location but not add new stations in new locations, and applications for new earth station registrations would not be allowed.

The Commission also seeks comment on how to maintain the accuracy of IBFS going forward. It also requests input on whether C band receive only earth stations should be entitled to protection only for those frequencies, azimuths, and elevations angles and other information on file with the Commission until the incumbent files an application to modify its license.

The Commission's Order and NPRM demonstrates that it is very important for operators of C Band receive only earth stations that were constructed and operational as of April 19, 2018 register or license their earth station by the Oct. 17, 2018 deadline to receive protection from the future allocation of the band.

Comment deadlines were announced on the NPRM and comments are requested by Oct. 29, and reply comments by Nov. 27, 2018.

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Upcoming FCC Deadlines

Do you know what FCC telecom and broadcast deadlines are approaching? We do.

Sept. 20 – *EAS National Test – Participants' ETRS Form Two Due* – All EAS participants must be prepared for the national EAS test on Sept. 20 at 2:20 p.m. EDT. Additionally, all participants must prepare and file in the EAS Test Reporting System (ETRS) a Form Two for each station by 11:59 p.m. EDT on Sept. 20. This form is scheduled to become available at 2:20 p.m. EDT, immediately following the EAS test, and will provide information as to the results of the test.

Sept. 25 –*Annual Regulatory Fees* –Annual regulatory fees will be due on Sept. 25, 2018. These will be due and payable for Fiscal Year 2018, and will be based upon a licensee's/permittee's holdings on Oct. 1, 2017, plus anything that might have been purchased since then and less anything that might have been sold since then. The fees must be paid through the FCC's online Fee Filer, and once again this year, the FCC will not accept checks as payment of the fees, but will require some form of electronic payment (credit card, ACH transfer, wire transfer, and the like). Please keep in mind that timely payment is critical, as late payment results in a 25 percent penalty, plus potential additional interest charges.

Oct. 1 – *EEO Public File Reports* – All radio and television stations with five (5) or more full-time employees located in Alaska, American Samoa, Florida, Guam, Hawaii, Iowa, Mariana Islands, Missouri, Oregon, Puerto Rico, the Virgin Islands, and Washington must place EEO Public File Reports in their public inspection files. TV stations must upload the reports to the online public file. For all stations with websites, the report must be posted there as well. Per announced FCC policy, the reporting period may end ten days before the report is due, and the reporting period for the next year will begin on the following day.

Oct. 1 – *EEO Mid-Term Reports* – All television stations with five or more full-time employees in Alaska, American Samoa, Guam, Hawaii, the Mariana Islands, Oregon, or Washington must electronically file a mid-term EEO report on FCC Form 397, with the last two EEO public file reports attached.

Oct. 10 – *Children's Television Programming Reports* – For all commercial television and Class A television stations, the third quarter 2018 children's television programming reports must be filed electronically with the Commission. These reports then should be automatically included in the online public inspection file, but we would recommend checking, as the FCC bases its initial judgments of filing compliance on the contents and dates shown in the online public file. Please note that as has been the case for some time now, the required use of the Licensing and Management System for the children's reports means that the licensee FRN and password are necessary to log in; therefore, you should have that information at hand before you start the process.

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Oct. 10 – *Commercial Compliance Certifications* – For all commercial television and Class A television stations, a certification of compliance with the limits on commercials during programming for children ages 12 and under, or other evidence to substantiate compliance with those limits, must be uploaded to the online public inspection file.

Oct. 10 – *Website Compliance Information* – Television and Class A television station licensees must upload and retain in their online public inspection files records are sufficient to substantiate a certification of compliance with the restrictions on display of website addresses during programming directed to children ages 12 and under.

Oct. 10 – *Issues/Programs Lists* – For all commercial and noncommercial radio, television, and Class A television stations, a listing of each station's most significant treatment of community issues during the past quarter must be placed in the station's online public inspection file. The list should include a brief narrative describing the issues covered and the programs which provided the coverage, with information concerning the time, date, duration, and title of each program.

Oct. 10 – *Class A Television Continuing Eligibility Documentation* – The Commission requires that all Class A Television maintain in their online public inspection files documentation sufficient to demonstrate that the station is continuing to meet the eligibility requirements of broadcasting at least 18 hours per day and broadcasting an average of at least three hours per week of locally produced programming. While the Commission has given no guidance as to what this documentation must include or when it must be added to the public file, we believe that a quarterly certification which states that the station continues to broadcast at least 18 hours per day, that it broadcasts on average at least three hours per week of locally produced programming, and lists the titles of such locally produced programs should be sufficient.

FHH - On the Job, On the Go

On Sept. 14, **Peter Tannenwald** will be attending the Brown Broadcasting Service's Board of Director's Meeting at Brown University in Providence.

On Sept. 26-29, **Kevin Goldberg** will be attending the Media Law Resource Center's Biennial Conference in Reston, Va.

On Sept. 25-28, **Karyn Ablin, Frank Jazzo, Scott Johnson, Daniel Kirkpatrick, Mark Lipp, Steve Lovelady, Matt McCormick, Francisco Montero, Sekoia Rogers, and Davina Sashkin** will be attending the annual NAB Radio Show in Orlando, Fl.