

February 2009

Unauthorized Recording of Telephone Conversations

Recently, the FCC has issued numerous fines for what appears to be a recurring problem of the unauthorized broadcast of telephone conversations. A new decision serves as a reminder that the prohibition extends beyond broadcasting to the mere recording of telephone calls, including even temporary captures for a digital delay system.

The decision involved a call to a restaurant that had been serving a burger named after an athlete who had just been badly injured in a motorcycle accident. When an employee answered, he was told, “You are on the air,” the station’s slogan was given, and then he was asked, “Is that OK?” to which he said yes (actually, “Yep”). He then responded to several sick suggestions about how the burger should be prepared (“Does the burger come out bloody?”) before he hung up.

The licensee contended that it had obtained the employee’s consent before broadcasting the call, and that had consent been refused, then its ten-second time delay device would have enabled it to dump the call before broadcast, at which point no recording would have been preserved. The licensee further contended that a time delay system did not comprise a recording. The Commission disagreed, holding that a recording need not be permanent, and that the station had begun to record the call before it got permission to do so. The Commission emphasized that permission must be obtained before any recording or broadcast begins. Thus, it violates the rule to begin a call that is being recorded or broadcast by informing a caller that he or she is already on the air and then asking if that is OK (and presumably dumping the call prior to broadcast if permission is declined). In the Commission’s view, even a “recording” that consists only of a brief time delay is prohibited until after permission is granted.

The only exception to the rule is a situation in which the caller should clearly be aware of the broadcast or recording, although the Commission tends to apply that exclusion rather strictly. Thus, the Commission is willing to presume awareness only where the other party is associated with a station (as when a reporter calls in to the station) or where a listener originates a call to a program that customarily broadcasts telephone conversations.

In sum, with that narrow exception, no recording – no matter how brief or temporal – should be made of a telephone call unless and until the other party first consents. Unfortunately, that raises a difficult issue of how consent can be proven in the absence of a recording should a dispute later arise. It may be possible to create a presumption of compliance by adopting a formal policy to require consent before any recording or airing is to occur and to regularly remind all staff of that policy.

If you have any questions regarding the issues in this Client Alert, please contact [Peter Gutmann](#) at (202) 857-4532 or any one of the attorneys in our [Communications Law Practice Group](#).

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