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August 7, 2009

VIA EMAIL AND FEDERAL EXPRESS

David J. Kaufman, Esq.
Rini Coran, PC
1140 Nineteenth St., NW
Suite 600
Washington, D.C. 20036

Re: *Mobile Relay Associates' assertions of alleged violations of 47 U.S.C. § 605(a) by RadioReference.com and demand for removal of associated information from its database*

Dear Mr. Kaufman:

We are counsel to RadioReference.com LLC ("RadioReference"), and are writing in response to your recent letters to its president and owner, Mr. Lindsay Blanton, asserting alleged violations of 47 U.S.C. § 605(a) in connection with RadioReference's online publication of technical data on Mobile Relay Associates' logic trunked radio ("LTR") system.

We have thoroughly reviewed the allegations contained in your letters and have concluded and advised Mr. Blanton that your allegations under Section 605 are completely without merit. In addition, the online publication of this information by RadioReference, which is the leading online information service provider for radio communications enthusiasts and professionals, is protected speech under the First Amendment. We have explained the basis for our conclusions below.

RadioReference Publication of Information on MRA Does Not Violate § 605.

As you note in your letter of July 15, liability under 47 U.S.C. § 605 attaches only to a person who has both intercepted and divulged the contents of an intercepted communication. *See, e.g., Smith v. Cincinnati Post & Times-Star*, 475 F.2d 740, 741 (6th Cir. 1973). RadioReference.com does neither.

First, RadioReference did not intercept any communications. Rather, RadioReference relies on submissions by its online users for data, including the data

David J. Kaufman, Esq.
August 7, 2009
Page 2

regarding the trunked radio system used by your client. RadioReference did not gather your client's data by monitoring radio communications. Because RadioReference.com did not intercept any of your client's radio communications from which the LTR data may have been derived, its publication of that data is not actionable under § 605.

Second, RadioReference does not divulge or publish "the existence, contents, substance, purport, effect, or meaning" of any communications on your client's LTR system. The data published by RadioReference does not equate to any of these categories. Section 605 simply does not outlaw publication of data not pertaining to a particular communication, even if those data were derived from interception, which in this case was lawful in any event. *Cf.* 4B Op. Off. Legal Counsel 400, 403 (1980) (advising that no violation occurs by divulging "aggregate statistics about the use of radio frequencies").

Interception of your client's radio communications are authorized by 18 U.S.C. § 2511.

Moreover, because your client's radio communications are "readily accessible to the general public," their interception is explicitly authorized by § 2511(2)(g)(ii). In addition, to the extent it were relevant, publication of this data in no manner facilitates unlawful contact. To the contrary, RadioReference provides information and analysis to its online community of radio and enthusiasts and professionals that allow its users to pursue and enjoy lawful monitoring activities which Congress explicitly recognized they may freely do. We are sympathetic to your concern noted in your July 15 letter that MRA and its customers are "being harassed by unknown persons who are using codes to transmit to customers' own dispatchers and other units." The blame there, however, lies with the persons engaging in the unauthorized transmissions, who could and may have obtained these codes from their own monitoring activity. It makes no more sense to blame RadioReference for these activities than it would to blame a manufacturer of lawful radio scanners.

At bottom, no liability attaches under § 605(a) for divulging the contents of a communication that was lawfully intercepted. Contrary to your assertion that "no lawyer or judge" would construe the authorizations contained in § 2511(2)(g) to limit the reach of § 605, we found a number of district and circuit level opinions arriving at that or a similar conclusion. *See, e.g., United States v. Gass*, 936 F. Supp. 810 (N.D. Okla. 1996) (acquitting defendant charged under § 605 because interceptions of radio communications "readily accessible to the general public" are permitted by § 2511(2)(g)(ii)); *Edwards v. State Farm Ins. Co.*, 833 F.2d 535, 539-40 (5th Cir. 1987) (upholding dismissal of § 605 claim where interception did not violate § 2511); *United States v. Rose*, 669 F.2d 23, 26-27 (1st Cir. 1982) (declining to suppress evidence based on § 605 where interception of radio communication did not violate § 2511); *Smith v. Cincinnati Post & Times-Star*, 475 F.2d 740, 741 (6th Cir. 1973) (upholding dismissal of § 605 claim where recording was authorized by § 2511(2)(d)).

David J. Kaufman, Esq.
August 7, 2009
Page 3

Persons using your client's LTR services have no reasonable expectation of privacy.

In addition, your client's users do not have the reasonable expectation of privacy in your client's LTR system necessary for an action to lie under § 605(a). *See, e.g., Edwards*, 833 F.2d at 539-40 (“[S]ection 605 makes unlawful the interception and divulgement of an ‘oral’ radio communication only if the speaker held a subjective expectation of privacy that was justifiable under the circumstances.”). Users have no reasonable expectation of privacy in your client's LTR communications due to “[t]he ease of interception, the widespread availability of the technology required for interception, and the ease of access for the user to more private means of communication.” 3 Op. Off. Legal Counsel 240, 243-45 (1979). This lack of expected privacy would fatally undermine any claim against RadioReference or its subscribers brought under § 605. *See, e.g., Tyler v. Berodt*, 877 F.2d 705, 707 (8th Cir. 1989) (upholding dismissal of § 605 claim because users of cordless telephone did not have privacy expectation).

The First Amendment protects RadioReference's publication of your client's data.

Finally, RadioReference's online publication of information on MRA's LTR system is protected speech under the First Amendment. Thus, even if such publication were actionable under Section 605 (and as shown above, it is not), enforcement of that provision under the circumstances here would raise serious First Amendment concerns. “[S]tate action to punish the publication of truthful information seldom can satisfy constitutional standards.” *Bartnicki v. Vopper*, 532 U.S. 514, 527-28 (2001) (quoting *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 102 (1979)). Where a statute meant to protect privacy, such as § 605, interferes with a constitutionally protected right to speech, the statute must give way: “The right of privacy does not prohibit any publication of matter which is of public or general interest.” *Id.* at 534 (quoting Samuel Warren & Louis B. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 214 (1890)). Here, RadioReference's publication of data lawfully obtained related to your client's use of public spectrum is a matter of public interest to its online community of radio enthusiasts and industry professionals. Moreover, as discussed above, your client and its customers have no expectation of privacy whatsoever in the data at issue, and concomitantly there is no governmental interest in protecting such information from disclosure, let alone a sufficient governmental interest to satisfy First Amendment scrutiny. Even if RadioReference publication of that data violated § 605, suppressing that publication under the aegis of privacy, and indeed in a situation as here where no expectation of privacy exists, would be barred by the First Amendment.

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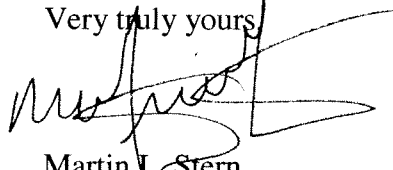
As a provider to a community of radio enthusiasts, RadioReference wishes your client no harm. However, it must reject your position that its publication of MRA's trunked radio data violates § 605(a). RadioReference does not obtain the data by intercepting your client's

David J. Kaufman, Esq.
August 7, 2009
Page 4

radio communications and, in any event, the data it publishes are not the type of content that § 605 protects. Users of your client's trunked radio service have no reasonable expectation of privacy in their radio communications; the law explicitly recognizes this fact and limits its protection of those communications accordingly. If your client wishes to provide a communication service that provides user privacy and excludes the possibility of unknown listeners, it should avail itself of encryption technology such that its communications would not be readily accessible to the public.

After receiving your letters, RadioReference, out of an abundance of caution, removed access to the MRA data on its website. This, of course, has denied its online community the benefit of that information, as it turns out, completely without basis. At this point, RadioReference is reviewing its options and before proceeding further, has asked us to discuss with you whether there is an alternative way to address your client's concerns, such as by identifying specific data or locations that might be tied to particular harassing transmissions, and then addressing how to handle that information. We look forward to discussing this matter with you further, in order to arrive at an accommodation that addresses your client's concerns, as well as the interests of RadioReference and its online community.

Very truly yours,



Martin L. Stern

MLS:JL

cc: Lindsay C. Blanton III, RadioReference.com LLC