

Cannabis Business Blog

Advertising of Marijuana Products: A Broadcaster's Dilemma

By Brad Deutsch on 1.5.15 | Posted in Federal

One of Winston Churchill's most famous quotes comes from an October 1934 radio speech: "I cannot forecast to you the action of Russia. It is a riddle, wrapped in a mystery inside an enigma; but perhaps there is a key. That key is Russian national interest."

Broadcasters face a similar dilemma in trying to forecast whether the Federal Communications Commission will prohibit stations from carrying ads for medical and recreational marijuana products. To date, the FCC has issued no rulings or policy statements on ads or underwriting announcements for marijuana. Nor has the Commission ruled on any complaints that raise the issue.

Here is the dilemma: Broadcasters are federal government licensees. While some states have legalized the sale of marijuana products, there still is a concern that advertising for an activity that remains a felony under federal law might present problems if a license renewal application is challenged or a complaint is filed with the FCC.

As a form of "commercial speech," ads are protected by the First Amendment if the speech is related to a "lawful activity." However, it is not clear whether the FCC will apply federal or state law and the answer to the question may depend on where the broadcast is heard. The argument that the advertising of marijuana is permissible is strongest if the ad is broadcast only in a state where marijuana is legal. But what if the broadcast is received in a state which has not legalized marijuana? Or what if the broadcast program is streamed so that it can be received in all 50 states, many of which have not legalized marijuana?

The key to the FCC's decision in determining whether to renew the license of a broadcast station is whether, in light of the station's past performance, renewal will serve the public interest, convenience and necessity - - an extremely elusive standard. To date, there is no FCC rule or policy prohibiting the broadcast of advertising by state-licensed marijuana businesses in an area where state and local laws permit such advertising. Broadcasters, however, remain concerned that the Commission will not countenance the airing of broadcast ads for the use of a substance prohibited by federal law. For example, the Colorado Broadcasters Association advises its members not to take any marijuana advertising. In the words of Justin Sasso, CBA's President: "We boil it down to a very simple point. Broadcasters are federally licensed. Under federal law, marijuana is treated like every other controlled

substance.”

On the other hand, DOJ has advised its own federal prosecutors to focus their limited enforcement investigative and prosecutorial resources on certain priorities such as preventing the distribution of marijuana to minors and cracking down on organized crime. Moreover, in the most-recent federal budget bill, Congress has explicitly prohibited DOJ from using funds to interfere with any state’s implementation of *medical* marijuana laws.

Also, there is FCC precedent for the proposition that a federal prohibition on an activity should not apply to the licensee of a broadcast station who is acting consistent with state law. A case in point is Section 1304 of the U.S. Criminal Code which prohibits the broadcast of the “advertisement of any lottery or any information concerning a lottery”; violations are punished by imprisonment of up to one year or a \$1,000.00 fine, or both. Despite this federal prohibition, the FCC has allowed the advertising of lotteries by broadcasters licensed to serve communities in states where the lottery is permissible pursuant to state laws, so long as the lottery is conducted by the state itself, or by a non-profit or governmental organization.

Another case that sheds some light in this area is *Greater New Orleans Broadcasting, Assn., Inc. v. United States*, 527 U.S. 173 (1979), where the Supreme Court held that the FCC could not enforce its ban on advertisements for private casino gambling that are broadcast in states where such gambling is legal, even if the signal of the station reaches into a state where casino gambling is illegal.

Similar to Winston Churchill’s assessment of Russia’s foreign policy, we are unable to forecast the action of the FCC. It remains a mystery. The key is how the FCC will interpret the public interest standard set forth in the Communications Act of 1934. The dilemma for broadcasters is that the FCC has provided no guidance on whether the airing of ads for marijuana products serves or disservices the public interest.

Warning Regarding Federal Law: The possession, distribution, and manufacturing of marijuana is illegal under federal law, regardless of state law which may, in some jurisdictions, decriminalize such activity under certain circumstances. Penalties for violating federal drug laws are very serious. For example, a conviction on a charge of conspiracy to sell drugs carries a mandatory minimum prison term of five years for a first offense and, depending on the quantity of marijuana involved, the fine for such a conviction could be as high as \$10 million. In addition, the federal government may seize, and seek the civil forfeiture of, the real or personal property used to facilitate the sale of marijuana as well as the money or other proceeds from the sale. Although the U.S. Department of Justice (DOJ) recently rescinded its guidance regarding prioritization of criminal prosecutions of individuals and entities operating in compliance with effective state regulatory systems, DOJ left in place long standing guidance to federal prosecutors regarding how to exercise this discretion. Individuals and companies are cautioned to consult with experienced attorneys regarding their exposure to potential criminal prosecution before establishing business operations in reliance upon the passage of state laws which may decriminalize such activity. Federal authority to prosecute violations of federal law as crimes or through seizures and forfeiture actions is not diminished by state law. Indeed, due to the federal government’s jurisdiction over interstate commerce, when businesses provide services to marijuana producers, processors or distributors located in multiple states, they potentially face a higher level of scrutiny from federal authorities than do their customers with local operations.