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Memorandum to Clients
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Heading for a showdown in the Supremes?

Judge Puts the Cuffs on AereoKiller

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Remember Aereo, the Barry Diller-backed startup seeking to revolutionize the way we watch television? (Hint: It's the video delivery service that uses rooms full of dime-sized antennas, each assigned to a different subscriber, enabling said subscriber to watch broadcast television via any mobile, Internet-based device.) As we reported last summer, Aereo won a key legal battle in New York in July, when a federal judge OK'd the continued provision of Aereo's service at least temporarily. (Technically, the judge refused to issue a preliminary injunction requiring Aereo to shutter its service while it's being sued by a number of broadcasters claiming that the Aereo service infringes their copyrights.)

You may also recall Alki David, the owner of several services providing online distribution of over-the-air television (and other) programming. The most relevant for our purposes are FilmOn.com and Aereokiller.

David's Aereokiller service seems to have drawn inspiration (not to mention its name) from Aereo's service. While not absolutely identical to Aereo, Aereokiller rests on the same general technology and the same basic legal principles as Aereo. (In its court filings, Aereokiller argues that it is not only technologically analogous to Aereo but, in fact, "better and more legally defensible"). And further highlighting the influence of Diller's Aereo service on David's Aereokiller service, the latter was originally launched via a website found at www.barrydriller.com (though it has now migrated to David's FilmOn.com site and is available via an Aereokiller app); it appears to be operated by the David-owned "Barry Driller Content Systems, PLC". At least I think I've got that corporate structure right (there's clearly a lot going on here).

In any event, it's easy to suppose that David may have Aereo and Barry Diller in his sights, at least competitively. But a recent decision by a federal judge in Los Angeles could deep-six both Aereokiller and Aereo: Judge George Wu from the United States District Court for the Central District of California has issued a preliminary injunction against at least some aspects of Aereokiller's operation.

We could be on a direct path to the Supreme Court. (Quick, someone get the Swami! Oh, wait, that's me!).

Like Aereo, Aereokiller was sued by virtually every major broadcast network soon after it began streaming signals of the network affiliate stations in Los Angeles. Using the same approach they had tried, unsuccessfully, in the NYC litigation against Aereo, the networks sought a preliminary injunction, asking Judge Wu to stop Aereokiller from retransmitting the networks' over-the-air broadcasts until the litigation had been concluded.

As we learned in the Aereo preliminary injunction post, the networks could win their motion for preliminary injunction only if they could show:

- A likelihood of succeeding on the merits of the case itself;
- That they would suffer irreparable harm in the absence of preliminary relief;
- That the balance of equities tips in their favor;
- That an injunction is in the public interest.

In both the Aereo and Aereokiller cases, the broadcasters were able to satisfy three of those four criteria. But you need all four, and in the Aereo case in New York, the judge was not convinced that the broadcasters were likely to prevail on their central infringement claim – because the Second Circuit's *Cablevision* decision posed an insurmountable obstacle to that claim. So Aereo was allowed to continue to operate.

Aereokiller was not so lucky. Judge Wu in Los Angeles con-

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A plan to blow up FM's

Explosive Proposal: C4 for FM's?

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Just as the Commission appears to be on the verge of resolving the long-running feud between FM translator proponents and LPFM proponents, in walks a petition for rulemaking proposing a new class of full-power FM channel in Zone II. The proposed class – ominous suggested name: C4 – would feature maximum ERP of 12 kW and maximum antenna height of 100 meters.

The idea is to shoe-horn the new class in between Class A and Class C3. The petitioner, SSR Communications, Incorporated observes, quite correctly, that the incremental power differences between Classes C and C0, C0 and C1, C1 and C2, and C2 and C3 are all three decibels, while the difference between Class A and Class C3 (the next class up from Class A) is more than twice that (6.2 dB). Like nature, SSR seems to abhor a vacuum – hence, the proposal to fill the space with the new C4.

Under SSR's proposal, Class C4 would get its own class contour distance (33 km) and separate mileage spacings vis-à-vis other classes. Moreover, stations seeking to reclassify themselves as C4's would be able to trigger orders to show cause directed to certain underfacilitied co-channel and adjacent channel stations, not subject to Section 73.215, that would otherwise preclude the reclassification. Such underfacilitied target stations would be forced either to upgrade themselves (in which case the C4 application would be dead meat) or immediately accept Section 73.215 status. (SSR copped that approach from the FCC's Class C0 upgrade process that's been in effect for the last dozen or so years. Anyone familiar with that process should grasp the concept quickly.)

SSR touts the spectrum efficiency benefits of its proposal but, in making its pitch to the Commission, it seems to hammer even harder on an additional claim. According to SSR, its proposal will be of particular use to minority-owned stations. How many such stations are we talking about? In initially summarizing its proposal, SSR refers only to "several minority-owned Class A" stations that might benefit, but once it gets its rhetorical juices flowing, SSR manages to crank that estimate up to "dozens, if not hundreds of upgrade opportunities for existing minority-owned facilities". SSR's estimate is based on a preliminary analysis of seven Southeastern states (Alabama, Florida, Georgia, Louisiana, Mississippi, North Carolina, and South Carolina).

The Commission has, of course, long expressed heartfelt concern about the plight of minority broadcasting, so SSR's emphasis on that particular supposed upside of its proposal is understandable. But, historically, the Commission has been reluctant to modify its technical rules based on non-permanent factors such as the racial identity of the licensees of particular stations. So it's not clear that that will be an effective selling point in the long run.

Moreover, SSR's petition makes no reference to the effect its proposal might have on the potential availability of spectrum for LPFM stations. As we have repeatedly seen, the proponents of LPFM have garnered substantial support both at the Commission and in Congress, so anything that might upset that particular applecart is not likely to be greeted with open arms. To be sure, SSR's proposal might have no effect at all on LPFM opportunities – but if that were the case, you'd think that SSR would have at least mentioned that in passing.

In any event, at this very early stage we don't even know whether the Commission will do anything with SSR's petition. It's likely that we'll see a public notice, possibly in the next month or so, noting the filing of the petition and asking for preliminary comments on it. (Check back with us for updates on that.) But even such a notice will not signal any real progress. Before SSR gets any traction here, the FCC will have to issue a "notice of proposed rulemaking" formally proposing adoption of SSR's plan (or something like it). And there's absolutely no guarantee that we'll ever see such an NPRM. Nevertheless, SSR has tried to get the ball rolling.

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A lesson to be learned, again

Harbowl, Super Bowl® and Mr. Roy Fox

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With four minutes to go in the AFC Championship game and the Ravens looking good for a trip to Super Bowl XLVII®, I noticed that the hashtag #Harbowl was already blowing up on my Twitter feed. That's because a Ravens victory would mean that, for the first time in NFL history, two brothers – those would be John and Jim Harbaugh, of the Ravens and Forty-Niners, respectively – would be facing each other as head coaches in the Super Bowl®. Look for "Harbowl" to become the unofficial moniker for the game.

Being a trademark lawyer geek, I immediately flashed on two thoughts: (1) how quickly could I get an application on file with the U.S. Patent and Trademark Office (USPTO) to register "Harbowl" as a trademark (for hats, shirts, bumper stickers, temporary tattoos and all the other impulse items that NFL fans will be craving for the next two weeks); and (2) what are the chances that I could get that application granted?

Answer to Question One: I might be able to have an "intent to use" application on file before the game is done – *it's just that easy to file for trademark protection.* (Tip to readers: The ease of filing for such protection is a reason all of you should consider protecting your call signs, program names, slogans and other important brands by filing applications for federal trademark registrations.)

Answer to Question Two: "slim" and "none", since – thanks to federal trademark law – I'd probably need the permission of the Harbaugh brothers to trademark something referencing their names.

And that's *before* the NFL has its say.

As we all know (at least those of you who have read my Super Bowl®-related articles for the last several years), the NFL has a reputation for ruthlessly enforcing its trademarks relative to the Big Game, even when it doesn't happen to have any trademarks to enforce. As it turns out, "Harbowl" graphically illustrates this.

Geek that I am, I searched the USPTO database for "Harbowl". Turns out I wasn't alone in this thought, but I was about a year too late. Back in February, 2012, Roy Fox of Pendleton, Indiana filed an "intent to use" application for "Harbowl" in conjunction with "hats; t-shirts". Mr. Fox's application made it through the initial processing steps. (I'm guessing that the USPTO examining attorney wasn't a football fan and thus may not have recognized "Harbowl" as a reference to a Harbaugh v. Harbaugh Super Bowl®.)

But then the NFL stepped in.

The NFL and NFL Properties, LLC each filed multiple requests for more time in which to oppose Mr. Fox's application. Those requests were granted, giving the NFL and NFL Properties, LLC until early November, 2012 to file their objections. (The original due date for objections was in July, 2012). For whatever reason, Mr. Fox abandoned his application for "Harbowl" on October 26, 2012.

I personally don't really believe that the NFL has a legitimate beef about "Harbowl" because that neologism doesn't create a likelihood of confusion – the legal test for trademark infringement – with any of the "Super Bowl" trademarks that the NFL owns. (I addressed some of those in last year's post.) "Harbowl" doesn't incorporate other NFL trademarks like the Ravens' or Forty-Niners' names, logos (or, to be safe, colors), much less make any reference to "Super Bowl".

This underscores how aggressive the NFL is when it comes to asserting control over Super Bowl-related trademarks.

Even so, this underscores how aggressive the NFL is when it comes to asserting control over anything that could conceivably be related to the Super Bowl®. (Shades of the "Who Dat" kerfuffle that arose in 2010! Trouble recalling that? Check out our January, 2010 posts on www.CommLawBlog.com.) Because of that, all broadcasters should exercise extreme care when it comes to using NFL-trademarked words or logos – including, most obviously, the many uses of Super Bowl® – in any way that makes it appear that you have a connection with, or the endorsement of, the NFL.

That means that you should not promote your contests with the words "Super Bowl" or anything resembling those words. Don't promote events like game-watching parties. Familiarize yourself with the list of NFL-owned trademarks, which include all team names and logos. You may use those terms on-air, but ***only*** for news and information, not commercial or entertainment, purposes. Don't even accept advertisements from others using the term "Super Bowl" unless you have absolute certainty that the advertiser has a license to use the trademarked term.

(And as long as we're on the subject, we're giving you a couple months' notice that the same applies to "March Madness" when the NCAA basketball tournament starts up in that month. Ditto for most other recurring, high-profile events (*e.g.*, the Oscars®, the Olympics®, etc., etc.))

As you can see from the way that they got right up in Mr. Fox's grill at the USPTO, the NFL doesn't mess around. And while his encounter with the NFL probably cost Mr. Fox a mere $275 (that is, the extremely modest filing fee for

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After the Worst Congress Ever, where do we go from here?

113th Congress: Cooperation and Convergence?

By Catherine McCullough
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(Editor's Note: The Memo to Clients welcomes back guest commentator Catherine McCullough. This month she provides her perspective on trends that will impact communications clients in the 113th Congress. Catherine is a Vice President at DCI Group, where she counsels clients in federal policy matters.

As I write this, the gavel on the 112th Congress' last votes fell just a couple of weeks ago. The ignominious 112th Congress is doing its walk of shame back home from Washington and all around town its performance is being summed up: "Worst. Congress. Ever."

Writing about the specific telecom issues facing Congress at the beginning of the last session, I speculated that the 112th would be heavily influenced by love and money. In other words, Congress needed to confer incentive auction authority on the FCC and pass a few pro-consumer measures (involving, *e.g.*, protection of online privacy). And sure enough, Congress did take care of the auction issue – bringing money into the Treasury seemed to be a priority. Some progress was made on the privacy front, but not all of it through the legislative process.

"Multi-stakeholdering" processes may, if properly crafted, prove beneficial.

But at the beginning of the new 113th Congress, rather than talk about specific issues I want to focus more on how two other trends will shape communications policy: cooperation and convergence.

When I talk about "cooperation," I mean the ability to get work done in the absence of a well-functioning legislature.

The 112th Congress seemed unable to create the trust relationships necessary to get big bills passed. In the Senate, the absence of "get-it-done" negotiators like Ted Kennedy, Ted Stevens and Fritz Hollings and the loss of dealmakers like Richard Lugar were felt keenly when it came time for Congress to work as a team. (The passing of Daniel Inouye, another long-time dealmaker, at the end of 2012 will only make matters worse in the coming term.) On the House side, "cooperation" was in short supply, as leadership was pressured by a tea party minority unwilling to cut deals.

But even if Congress couldn't seem to function particularly effectively through its regular procedures, there were a few bright spots elsewhere in the federal government, as some policy progress was made through cooperative efforts between regulators and the private sector. International Internet governance and privacy-related issues, for example, benefited from processes that brought multiple stakeholders together to address and resolve matters of common interest. In these cases, strong communication between regulators and industry led to progress on solutions that were created by, and that worked for, many at the table.

Such stakeholder-based processes – now being called "multi-stakeholdering" processes by agencies engaging in them, such as the Department of Commerce and the Federal Trade Commission – reflect a collaborative approach led by government agencies, but dependent on mutual engagement rather than classic "top-down" regulation.

This collaborative approach has been used in the past to regulate industries that rely on rapidly evolving technologies. Such technologies present constantly moving targets not easily subject to effective regulation even by the more nimble administrative procedures available to agencies, much less the cumbersome and glacial legislative processes of Congress. Indeed, in many instances formal governmental regulation (or legislative) can have the undesirable effect of discouraging or frustrating innovation. In these cases, cooperation between regulators and industry often yields the best outcome for consumers.

The Federal Trade Commission, for example, used the method to push the nascent online behavioral advertising industry to conform to standards that both protect consumers and allow reasonable use of consumer data by businesses.

It may be hard for those of us used to the FCC's "top-down" regulatory approach to see a time when the agency leans more toward multi-stakeholdering processes, they may, if properly crafted, prove beneficial.

From a practical perspective, the FCC may have to seek multi-stakeholdering solutions if it wants to be a part of the next big trend in our industry: convergence.

When most pundits talk about convergence, they focus on the merging of one or more technologies historically utilized in one industry to other, seemingly disparate, industries. For example, the increasing use of mobile wireless technologies by the automobile industry has spawned the field of "telematics" – also called "connected cars" – something you'll hear more about at the next Consumer Electronics Show. But those of us in Washington might want to consider how convergence may affect the process of policymaking now.

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The deadline is nearly here – are you ready?

Online TV Public Inspection Files: Tick, Tick, Tick . . .

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TV licensees (that is, full-power and Class A licensees) – this is your final warning from us here at the *Memo to Clients*. ***You've got until February 4 to get your public inspection file uploaded to the FCC's online system.*** That's only days from when you should be receiving this issue, so if you haven't gotten started on this yet, now would be a good time.

We have previously provided a number of tips on this topic: how to access the system; once you're in, how to upload the required materials; what documents have to be uploaded. If you missed those posts, check the *Memo to Clients* from last September and December, or read them at www.CommLawBlog.com, to get started.

We're not going to re-visit the myriad details of the new rules, their genesis, their implementation, etc., etc. Been there, done that.

We do, though, want to offer a cautionary reminder.

We haven't canvassed the status of everybody's public files. It's possible – maybe not likely, but possible – that everyone has already done everything that they need to do, and our warning here is a churlish and unnecessary bit of hectoring. If you, dear reader, have uploaded your public file already, congratulations, and please accept our apologies for suggesting otherwise. But for everybody else, we do want to underscore one consideration that should motivate any folks who have been dragging their feet.

The FCC's online public file system is, ahem, an ONLINE public file system. Because of that, anybody anywhere anytime is in a position, unbeknownst to you, to check the status of your file. Once the deadline for completing the upload process arrives – that would be on February 4 – any shortcomings will be rule violations for which the Commission could issue fines. And anybody, anywhere, anytime will be in a position to identify such violations and bring them to the FCC's attention. Even if the Commission opts not to start handing out fines immediately (and while the Commission may indeed restrain itself, particularly in the initial phase, such self-restraint is not mandatory), it's hard to imagine a greater incentive to get your file in order by February 4.

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For instance, convergence could mean major shifts in the policymaking power structure. Take the example of the connected car. The National Highway Traffic Safety Administration (NHTSA, part of the Department of Transportation) has the power to dictate product safety standards for automobiles. It also has jurisdiction over distracted driving. But who has jurisdiction when a distraction is caused by a mobile device brought in to a car?

Right now, NHTSA is creating "voluntary guidelines" that can result in the imposition of liability on the mobile industry in civil lawsuits, even though the agency doesn't directly regulate the mobile device and wireless industries. But the Secretary of Transportation has signaled that he may go farther by adopting other measures to stop distracted driving. This could include seeking direct jurisdiction over at least some aspects of the industry.

The jurisdictional impact of convergence will be felt beyond the agencies. For instance, if NHTSA seeks more regulatory control, the Congressional subcommittee which oversees the NHTSA may as a result become involved in overseeing some aspects of technologies the FCC previously considered its turf.

Given the number of industries whose operations are becoming increasingly dependent on, and thus converging with, mobile wireless systems – transportation, healthcare, commerce, to name the most obvious ones – you can see that we might be facing a new regulatory world where jurisdictional issues must be confronted and thrashed out.

I'm most interested to see how the changing technological landscape will affect the FCC. How will the Commission seek to involve – or not involve – itself in these new fields? Will it try to add more arrows to its regulatory quiver? Will it ask Congress for major structural changes to the Communications Act, or can it use its authority under the existing Act to quietly adopt new strategies?

Though no one may be able to predict every issue that will confront the 113th Congress, there is one thing I do believe: those who work in the broad field of communications will live in a changed (and more converged) atmosphere. We will likely have to learn new methods of policymaking, new policymakers, and new policymaking cultures – ones that rely on more cooperative, multidimensional methods of finding solutions that work for all of us.

Two-year waiting period? What two-year waiting period?

Radio Multiple Ownership: Market Manipulation Minus the Wait?

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While the heyday of radio consolidation is fading in the rearview, some opportunities still exist. As Cumulus Licensing LLC recently demonstrated, with a quick change in a station's city of license, an otherwise impermissible ownership situation can become permissible – thanks to a helpful Audio Division interpretation of the contour overlap standard that has governed radio multiple ownership for nearly a decade.

Concentration of control in the radio world hasn't been on many people's radar for a while, so some background may be in order.

Since back in the 1990s, radio ownership in any particular market has been subject to caps depending on the number of other stations present in the particular market. In the '90s, the relevant "market" for any proposed acquisition depended on the particular contours of the particular stations owned and proposed to be owned by the buyer. That gave rise to considerable flexibility for buyers, who were able to some degree to manipulate the scope of the relevant market to their advantage.

Don't look for a boatload of applications trying to take advantage of what might be classified as a loophole.

That signal contour approach to market definition was largely tossed out in 2003, when the Commission adopted an Arbitron/ geography-based approach. Under the "new" approach, radio ownership caps are determined by the number of stations located in (or "home to") Arbitron-defined markets. By relying on the independent determination of Arbitron as to which (and, thus, how many) stations were in each market, the FCC theoretically reduced the flexibility the signal contour approach had afforded to inventive applicants.

But, as the Commission acknowledged, even the Arbitron approach was subject to manipulation.

Station licensees could persuade Arbitron to modify its market definitions to increase some markets to include particular stations, or decrease them to exclude particular stations. The result of such modifications: some deals that might not otherwise have met the FCC's ownership caps could suddenly be acceptable. To discourage rampant, licensee-induced changes in the Arbitron market definitions, the Commission imposed a two-year waiting period before any such changes could be relied on to demonstrate compliance with the ownership caps.

Of course, some stations aren't located in (or "home to") any Arbitron-defined markets. Such stations are still subject to the signal contour method of determining local ownership caps.

So what happened with Cumulus?

Cumulus was looking to improve its position in the adjacent Mobile, Alabama and Pensacola, Florida Arbitron markets. No problem there. It entered into agreements with a couple of other licensees to acquire a total of three stations, one in the Mobile market, the others in the Pensacola market. The proposed acquisitions would, once granted, still leave Cumulus safely within the permissible caps for those markets.

But wait. As a petitioner to deny the deal pointed out, of the stations that Cumulus already owned in the Mobile market, one had just been the subject of a recent change-of-community application that brought it from scenic Atmore, Alabama to slightly more scenic (from a 307(b) perspective, anyway) Saraland, Alabama. That change just happened to bring the station from outside the geographical boundaries of Arbitron's Mobile market to within those boundaries. According to the petitioner, if that change had not been made, Cumulus's proposed acquisitions would have had to be assessed under the signal contour approach and (again according to the petitioner) those acquisitions would have exceeded the relevant ownership caps and the assignment applications would have to be rejected.

As the petitioner saw it, the change-of-community application was essentially the same as an effort to modify the Arbitron market definition; since (as noted above), such market modifications are subject to a two-year waiting period, Cumulus could not take advantage of the change for two years.

The Audio Division didn't buy it.

According to the Division, the two-year waiting period applies only to market changes effected through Arbitron's processes, *i.e.*, changes in market boundaries (making a market bigger or smaller) or changing a particular station's "home" designation for Arbitron purposes. Change-of-community applications, by contrast, are handled through the FCC's own processes. The Commission can thus take into account the potential effect of such proposed changes on such regulatory considerations as multiple ownership and market size *before* deciding whether to grant the change. So the two-year holding period is irrelevant with respect to changes approved through the FCC's processes.

In this case, the change-of-community application had already been granted before Cumulus filed its applications to acquire other stations in the market. *Just* before, as it turns out – the change-of-community application was granted on

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The bigger they come . . .

Size Still Matters to M&A Regulators

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With the 2012 book now closed on several acquisitions and mergers in the communications field, the federal government has performed its annual ritual of announcing the thresholds it will use for automatic federal review of mergers and acquisitions. The FCC worked on several 2012 "Big Ticket" transactions including Liberty Media's acquisition of Sirius/XM, the Verizon spectrum shuffle with assets from Verizon Wireless, T-Mobile, Leap, several cable companies and others.

The FCC can review any transaction in detail before issuing an approval. On the other hand, Congress long ago deemed that the Department of Justice and the Federal Trade Commission ***must*** review transactions that cross certain dollar amount thresholds. The dollar amounts of those thresholds were announced recently in the Federal Register. They are set to take effect as of ***February 11, 2013***. Readers considering a merger or acquisition should bear in mind that the administration automatically will be sending at least two agencies to take a closer look at transactions where either:

- ✔ the total value of the transaction exceeds $283,600,000; or
- ✔ the total value of the transaction exceeds $70.9 million and one party to the deal has total assets of at least $14.2 million (or, if a manufacturer, has $14.2 million in annual net sales) and the other party has net sales or total assets of at least $141.8 million

The new thresholds also affect the filing fees that parties to a deal have to pay the government for the pleasure of going through the review process. (Fees are split between the FTC and the Department of Justice.) For most of 2013, any deal subject to review and valued at less than $141.8 million will pay a $45,000 fee. (Used to be that deals coming in at a mere $100 million got to pay that.) For deals valued at more than $141.8 million but less than $709.1 million, the review fee will be $125,000. And if you're proposing a deal valued at more than $709.1 million, get set to fork over a tidy $280,000.

When negotiating deals, all parties would be well-advised to bear these thresholds in mind. Once those lines are crossed, the prospect of additional (and considerable) time, expense and hassle to navigate the federal review process is a virtual certainty.

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May 7, 2012, while the first of Cumulus's assignment applications was filed two days later. That may, of course, have been purely coincidental; but – call us crazy – it seems to us that it's a good bet that the filing of the assignment applications was timed to occur after Cumulus was successful in moving its existing station within the geographical boundaries of the Mobile market.

In any event, since the petitioner's beef was really with the grant of the change-of-community application rather than with the follow-up assignment applications, the Division concluded that it was too late for the petitioner to raise the issue now.

Another point weighing against the petitioner: even before the change-of-community, that particular Cumulus station had already been counted by Arbitron as "home to" the Mobile market for more than eight years, so the move into Saraland did not affect the practical Arbitron status of the station. It seems to us that the Division could have avoided any discussion of the two-year waiting period by mentioning this, since the station's status as "home to" Mobile had clearly been in place for well more than two years before the change-in-community. (It's possible that the staff was concerned about the fact that formally moving the station from Atmore to Saraland meant that the Atmore market – *not* an Arbitron-defined market – would be losing a station, so Arbitron's historical treatment of the station didn't completely resolve all conceivable market-related questions. But that factor implicates Section 307(b) considerations more than multiple ownership concerns, at least as far as we can see.)

The Division opted instead to focus on the alternate rationale that FCC-granted changes potentially affecting a station's market status are not subject to the waiting period. By doing so, the Division appears to have endorsed a way of circumventing the contour-overlap approach to the radio multiple ownership rules.

But don't look for a boatload of applications trying to take advantage of what might be classified as a loophole. The limitations on "move-in" applications that take stations from outside a market to inside the market have been considerably tightened in recent years. As a result, it seems unlikely that very many folks will be able to take advantage of the Division's decision. Nevertheless, licensees looking to max out their local ownership interests may want to consider whether an otherwise impermissible acquisition might be made possible through the change in one or another station's community of license.

Form 323 - Kissing the SUFRN Good-bye?

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If you've got an "attributable interest" in a broadcast licensee, you might want to make sure that you've got your social security number (SSN) handy. The FCC is trying – again – to insist that ***all*** attributable interest holders provide SSN-based FCC registration numbers (FRNs) when the time comes to file biennial Ownership Reports on FCC Forms 323 (for commercial licensees) and 323-E (for noncommercial licensees).

In a Sixth Further Notice of Proposed Rulemaking (*6th FNPRM*) the Commission has proposed deep-sixing the "special use FRN" (SUFRN, as in "SUFRN succotash") alternative that has been available since the July, 2010 filing of the biennial Form 323. The Commission has also proposed expanding the SSN-based FRN requirement to Form 323-E for noncoms, which would meant that folks on the controlling boards of NCE stations would have to get SSN-based FRNs. And the Commission has also renewed a proposal first bandied about in the Fifth Further Notice of Proposed Rulemaking (*5th FNPRM*) back in 2009. (In the nearly four years since the *5th FNPRM*, that proposal – which would expand the FRN reporting requirement even more – apparently never made it to the Federal Register . . . until now!)

Broadcasters would have to obtain and report SSN-based FRNs not only for the licensees themselves, but also for all their attributable interest-holders.

So long, SUFRN?

The history of the FCC's efforts to require the reporting of SSN-based FRNs by all attributable interest holders in commercial licensees makes for fascinating reading. Unfortunately, the summary of those efforts as set out in the *6th FNPRM* is not entirely accurate; it misses a lot of important details concerning the provenance of SUFRNs, a device made available for those not interested in providing their SSNs to the FCC. If you need to brush up on things, let us refer you to the fine collection of posts on the topic that you can find on our blog at http://www.commlawblog.com/tags/form-323/. (Note: when you go to that link, the posts – about a couple dozen – will appear in reverse chronological order, so be sure to scroll down to the May, 2009 entries before you start reading.) For a quick synopsis, check out this post, and for a good chuckle, check out this one.

In a nutshell, back in 2009 the FCC tried to insist that *all* attributable interest holders in commercial broadcast licensees would have to provide SSN-based FRNs. The universe of "attributable interest holders" is vast; it includes all general and many limited partnership interests, all members of LLC licensees, holders of five percent or more of a corporate licensee's stock, and all officers and directors of a licensee. But wait, there's more. That universe also includes individuals and entities who hold indirect interests in broadcast licensees, *i.e.*, through intermediate holding companies. (Possibly helpful illustration: if Corporation A happens to own a 20 percent ownership interest in a corporate licensee, then *all* of Corporation A's officers, directors and 25 percent or greater shareholders would be deemed to hold attributable interests in the licensee.)

Prior to 2009, a licensee had generally been responsible for, at most, its own FRN. But with the revised Form 323 introduced in 2009, that changed dramatically. Suddenly – and we do mean suddenly, since the Commission sprang the revised form on the broadcast industry in mid-August, 2009, without having made it available for public review beforehand – commercial broadcasters would have to obtain and report SSN-based FRNs not only for the licensees themselves, but also for all their attributable interest-holders. That would impose a substantial burden on many, possibly most, licensees. It also gave rise to legitimate privacy concerns. In this day and age of identity theft, we are all taught not to hand out our SSNs unnecessarily.

Not surprisingly, considerable opposition to the mandatory reporting of SSN-based FRNs arose, despite the fact that the Commission seemed bent on minimizing the opportunity for any public comment. Faced with serious resistance, the Commission initially (in December, 2009) announced that SUFRNs could be used by licensees to report interest holders for whom the licensee could not obtain SSN-based FRNs as of the deadline for filing the Ownership Report. But the licensee would still be obligated to obtain and report SSN-based FRNs for all its attributable interest holders.

Fletcher Heald, joined by a number of state broadcast associations, took that requirement to court. The day our petition was filed, the FCC announced that it was postponing the then-imminent Ownership Report deadline indefinitely. Coincidence? You make the call.

By May, 2010, the requirement was still with us, and the new filing deadline was fast approaching. Back to court we went. This time the court ordered the Commission to respond to our petition. Two days after that order came down, the FCC revised Form 323. Coincidence? You make the call. In so doing, the Commission didn't bother to tell anybody other than the Office of Management and Budget, which rubber-stamped the change.

The Commission then paraded into court, pointing to its

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revised form without mentioning to the court that the ink was still wet on the revised version. The court eventually denied our petition, but only based on the revised version of the form, which the court interpreted to say that no individual attributable interest holder would be required to submit an SSN-based FRN if he/she preferred not to. So even though our petition was technically "denied", we had largely achieved the result we wanted.

The biennial Form 323 filings went in in 2010 and 2011 (yes, it really was "biennial", since the 2010 report related back to 2009) without apparent problems. But now, with the *6th FNPRM*, the Commission is proposing to eliminate the SUFRN option.

Why? It's not entirely clear. The Commission speaks generally about the need to "facilitate long-term comparative studies" of broadcast "ownership". It sees SSN-based FRNs as "essential to providing the kind of searchable and manipulable database needed to support accurate and reliable studies of ownership trends." And now we learn that, apparently, the "fundamental objective" of the biennial Ownership Report is to "track trends in media ownership".

As far as we know, the FCC's interest in studying "ownership trends" is of extremely recent vintage, as is the notion that that activity is the "fundamental objective" of Ownership Reports. But even if we indulge the Commission on this point for the moment, serious questions remain about the proposal to toss the SUFRN option.

The Commission apparently plans to use its enforcement authority to impose a forfeiture against "recalcitrant attributable interest holder[s]."

For example, the Commission seems to think that reliance on an SSN-based system will assure greater accuracy than any alternative. But that assumes that everyone obtaining an SSN-based FRN provides accurate input. That's not necessarily a given: the potential for inadvertent slip-ups always exists, as does the possibility that folks who prefer not to provide their SSN might intentionally mis-enter it in the CORES system. How can the FCC police against that? Also, if you're familiar with CORES, you know that it's possible to get an FRN without entering an SSN at all. For example, you can simply indicate that you have applied for an SSN (the assumption being that you haven't yet received it), and bingo, you can get yourself an official FRN without an underlying SSN. (In a footnote to the *6th FNPRM*, the FCC itself acknowledges that the CORES FRN system can be circumvented and requires accurate input from users.)

So the FCC's insistence on the virtues of an SSN-based approach to FRNs seems a bit over-stated.

So, too, does the Commission's insistence on getting data from ***all*** attributable interest-holders. While rounding up that universe of respondents will for sure provide an incredibly comprehensive snapshot of essentially all participants in the broadcast industry, is that really necessary? What difference does it make if Joe and Loretta Six-Pack happen to own a five percent, or even ten percent, interest in their brother-in-law's station down the block? Who cares if, strictly for purposes of convenience (*e.g.*, for signing the occasional corporate document for regulatory purposes), a broadcast president/CEO has appointed one of her office staff to serve as "Assistant Secretary" of the licensee corporation? If the FCC's goal is to chart and monitor the major veins and arteries of the broadcast industry, why bother scanning down to the capillary level, especially when that imposes a substantial burden on the scannees?

And let's not forget the legitimate privacy concerns of everyone who would have to get an SSN-based FRN. One's SSN is normally viewed as among the crown jewels of one's array of personal identifying information. We are frequently encouraged not to provide our SSN unnecessarily.

The FCC initially began collecting SSNs only from those who "do business with" the Commission, as a mechanism to facilitate debt collection. While that might be a valid basis for SSN collection, does it have anything at all to do with Joe and Loretta Six-Pack or the Assistant Secretary who happens to hold a corporate officership simply for convenience purposes? The Commission can't claim with a straight face that it might try to go after such bit players for regulatory obligations incurred by the licensee.

BTW, if you're not sure how serious the FCC is about enforcing an SSN-based FRN requirement, check this out. According to the *6th FNPRM*, if an attributable interest holder is unwilling to provide an SSN-based FRN for inclusion in an Ownership Report, the Commission will apparently expect the licensee to "report the recalcitrant attributable interest holder" so that the FCC can "use its enforcement authority to impose a forfeiture against such individuals". Translation (cue sinister music, lower lights menacingly): "We have our ways to get the information we want. Bwahahahaha." Exactly how such individual forfeitures could be justified is unclear, since (as the FCC admits), its rules don't currently require attributable interest holders to have FRNs at all. We're guessing that that wouldn't stand in the FCC's way, though, at least until the matter got to court.

In summary, the FCC appears still to be wedded to the SSN-based FRN reporting requirement that it attempted to foist on the broadcast industry in 2009. That initial attempt was foiled, thanks primarily to the fact that the Commission ignored a number of obvious procedural niceties in its headlong rush to impose the requirement. But now, more than three years later, the Commission is taking a more deliberative approach presumably designed to avoid the

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Annual webcaster wake-up call!

Some Things DO Change on New Year's Day

By Kevin M Goldberg
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According to famed lyrical poet Paul Hewson ("Bono" to his millions of friends), "nothing changes on New Year's Day". He reportedly started writing the song as a love paean to his wife, although it eventually morphed into a political statement inspired by the Polish Solidarity Movement. Regardless of the song's broader political statement (or anybody's personal notions about the significance of New Year's Day), the plain statement isn't true: things ***do*** change on New Year's Day.

Compliance with the statutory license applicable to webcasting is one of those things.

When the ball drops in Times Square, webcasters are faced with updated forms to fill in and submit, a new cycle for reporting, and a clock ticking down the 31 days until the annual minimum fees of $500 per channel must be sent to SoundExchange.

In perhaps the most noteworthy change, there are actually fewer forms for some webcasters to file.

Thankfully, much like last year, the changes from 2012-2013 are pretty minor. The rates have increased slightly. The forms have changed a little (with a new look and feel), although that shouldn't be anything to worry about if you've done this before. And, in perhaps the most noteworthy change, there are actually fewer forms for some webcasters to file. Here's an overview of what will be expected of webcasters in 2013.

And when I refer to "webcasters", I'm referring not only to my primary target audience, *i.e.*, FCC- licensed radio stations who are webcasting. (See below for more details on the three different categories of broadcaster/ webcaster). Beyond that radio-based universe is a larger universe of operators engaging in "non-interactive webcasting", perhaps more commonly referred to as "streaming". (These are folks who, in overly simplified terms, don't allow the user to request and directly hear a song.) The information in this post is generally applicable to ***all*** webcasters, radio-based and non-radio-based alike.

Radio stations who are streaming online (most often consisting of a simulcast of the station's over-the-air signal, though perhaps offering one or more "side channels" as well) normally fall into one of three categories: commercial broadcaster, noncommercial webcaster, and noncommercial educational webcaster. Remember that the distinction between "commercial" and "noncommercial" is based ***not*** on the station's FCC license, but rather on whether the entity offering the webcasting service is exempt from federal income taxation under Section 501(c) of the Internal Revenue Code. There is a further distinction between "noncommercial webcaster" and "noncommercial educational webcaster", the latter being affiliated with an accredited educational institution whose students substantially staff the webcasting operations.

There are also sub-categories within each category. For instance, a noncommercial webcaster can self-classify under the "CRB" or "WSA" designations. "CRB" stations are subject to the rules put in place by the Copyright Royalty Board in its Webcasting III decision applicable to the years 2011-2015; "WSA" stations are subject to the relevant Webcaster Settlement Agreement.

The designations of "commercial broadcaster", "noncommercial webcaster (WSA)" and "noncommercial educational webcasters" include special categories for smaller entities which come with some benefits. By paying an extra $100 "proxy fee" with its annual minimum payment, a commercial broadcaster who had fewer than 27,777 "aggregate tuning hours" in the previous year and expects to do so again can receive an exemption from the rather onerous monthly "Playlist Report of Use" requirement. Ditto both for a noncommercial webcaster (WSA) who had fewer than 44,000 aggregate tuning hours in the previous year and expects to do so again, and for the noncommercial educational webcaster who had fewer than 55,000 aggregate tuning hours in every month (though you can go over in one month) and expects to do so again.

You choose your category – or, if applicable, your status as a small broadcaster or microcaster – when you file your Annual Minimum Fee Statement of Account form with SoundExchange. ***That form is due by January 31, 2013.*** Note: in prior years, small broadcasters or microcasters had to file a separate "Notice of Election" form; this year that election is incorporated into the Annual Minimum Fee Statement of

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Account form, which includes a line where the webcaster will indicate its election to pay the $100 "proxy fee".

But that's not all: your obligations continue throughout the year. With the exception of the noncommercial educational microcaster, everyone – whether payment is required or not – must file a Monthly Statement of Account form with SoundExchange within 45 days of the end of the month in question. Full-sized commercial broadcasters, noncommercial webcasters and noncommercial educational webcasters have to file Playlist Reports of Use on a regular basis – generally monthly – as well.

So consider yourself reminded: if you are engaged in "non-interactive webcasting", you will need to find the proper Annual Minimum Fee Statement of Account Form and send it to SoundExchange along with your payment of $500.00 per channel ***by January 31, 2013***. If you qualify either as a "small broadcaster" or under one of the "microcaster" categories, you may also pay an extra $100 per channel in exchange for an exemption from the requirement that you file Playlist Reports of Use on a monthly or quarterly basis (but you don't need to use a separate Notice of Election form this year). ***However – with one very minor exception for noncommercial microcasters – regardless of your classification or size, your obligations do NOT end on January 31, 2013. You will need to file Statement of Account forms and, possibly, Playlist Reports of Use throughout the year.***

You can get more detailed information about every category via the "How do I Pay" page on the SoundExchange website. Additionally, SoundExchange has produced a video (available on YouTube) in which they "break down what your service needs to submit to be compliant with the statutory license for 2013". You can find that video at http://www.youtube.com/watch?v=SS3s2YwwdP0. And webcasters can also get help from the SoundExchange Licensee Relations group at 202-559-0555.

We're here to help as well.

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problems it ran into the last time around.

While we may all agree that the Commission's proposal is flawed in a lot of ways, we must face the fact that, unless somebody comes up with an acceptable alternative, the FCC seems bound and determined to toss out the SUFRN option and to insist on SSN-based FRNs from ***all*** attributable interest-holders of each licensee. So now's the time to put your thinking caps on. It's hard to imagine that a suitable alternative can't be devised, even if the FCC seems resistant to that notion. Here's hoping that comments in response to the *6th FNPRM* will provide such alternatives.

Non-coms in the FRN cross-hairs?

Also out for comment in the *6th FNPRM* is a proposal that the SSN-based FRN reporting requirement be extended to attributable interest holders in noncommercial licensees. The NCE universe dodged this particular bullet back in 2009, although the issue was then teed up in a Fourth Further Notice of Proposed Rulemaking (*4th FNPRM*). The Commission is now soliciting more comments on it – even though, in response to the *4th FNPRM* members of the public broadcasting community severely criticized it.

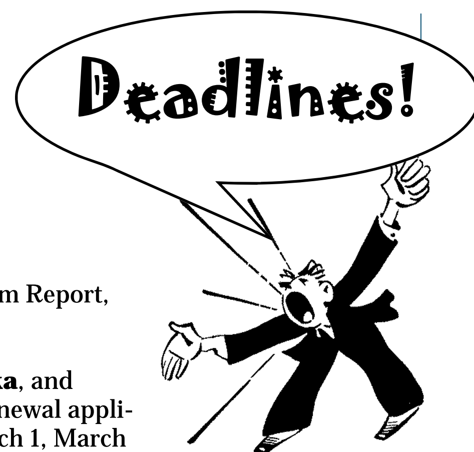
Other proposals

Additionally, in the *6th FNPRM* the Commission suggests that the biennial ownership reporting requirement be expanded to include entities and individuals whose interests are not otherwise attributable. If their non-attributability arises from either (a) the single majority shareholder exemption or (b) the exemption for interests held in "eligible entities" subject to a higher EDP threshold, then that non-attributabiltiy would go away under the FCC's proposal. (This proposal first saw the light of day back in 2009, but has not been actively pursued, until now.)

The Commission is also suggesting that the filing date for biennial Ownership Reports should be shifted back a month, to December 1 (although the "as of" date would remain October 1). The Commission probably thinks that giving broadcasters an extra 30 days to prepare their reports is doing them a favor, but hold on there. December 1 arrives immediately after the Thanksgiving holiday, and coincides with multiple other filing deadlines. Why not pick a date – July 1, for instance – that would not be similarly encumbered. Further, it's not uncommon for broadcast transactions to be timed to close as of the December 31 of any given year. That being the case, ownership data accurate as of October 1 would often be inaccurate a mere 90 days later. For that reason a mid-year reporting deadline (again, July 1 springs to mind) might be preferable all around.

In any event, the *6th FNPRM* has been [published in the Federal Register](), as a result of which the deadlines for comments have been established. Comments on the various proposals are due to be filed by ***February 14, 2013*** (Happy Valentine's Day!), and reply comments are due by ***March 1.***

February 1, 2013



Radio License Renewal Applications - *Radio* stations located in **Kansas**, **Nebraska**, and **Oklahoma** must file their license renewal applications. These applications must be accompanied by FCC Form 396, the Broadcast EEO Program Report, regardless of the number of full-time employees.

Television License Renewal Applications - *Television* stations located in **Arkansas**, **Louisiana**, and **Mississippi** must file their license renewal applications. These applications must be accompanied by FCC Form 396, the Broadcast EEO Program Report, regardless of the number of full-time employees.

Radio Post-Filing Announcements - *Radio* stations located in **Kansas**, **Nebraska**, and **Oklahoma** must begin their post-filing announcements with regard to their license renewal applications on February 1. These announcements then must continue on February 16, March 1, March 16, April 1, and April 16. Once complete, a certification of broadcast, with a copy of the announcement's text, must be placed in the public file within seven days.

Television Post-Filing Announcements - *Television* and *Class A televisio*n stations located in **Arkansas**, **Louisiana**, and **Mississippi** must begin their post-filing announcements with regard to their license renewal applications on February 1 . These announcements then must continue on February 16, March 1, March 16, April 1, and April 16. Please note that with the advent of the online public file, the prescribed text of the announcement has changed slightly. Also, once complete, a certification of broadcast, with a copy of the announcement's text, must be uploaded to the online public file within seven days.

Radio License Renewal Pre-Filing Announcements - *Radio* stations located in **Texas** must begin their pre-filing announcements with regard to their applications for renewal of licenses on February 1. These announcements then must be continued on February 16, March 1, and March 16.

Television License Renewal Pre-filing Announcements - *Television* and *Class A televisio*n stations located in **Indiana**, **Kentucky**, and **Tennessee** must begin their pre-filing announcements with regard to their applications for renewal of license on February 1. These announcements then must be continued on February 16, March 1, and March 16. Please note that, with the advent of the online public file, the prescribed text of the announcement has been changed slightly from that of previous renewal cycles.

EEO Public File Reports - All *radio* and *television* stations *with five (5) or more full-time employees* located in **Arkansas**, **Kansas**, **Louisiana**, **Mississippi**, **Oklahoma**, **Nebraska**, **New Jersey**, and **New York** 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.

Noncommercial Television Ownership Reports - All *noncommercial television* stations located in **Arkansas**, **Louisiana**, **Mississippi**, **New Jersey**, and **New York** must file a biennial Ownership Report (FCC Form 323-E). All reports must be filed electronically.

Noncommercial Radio Ownership Reports - All *noncommercial radio* stations located in **Kansas**, **Oklahoma**, and **Nebraska** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323-E.

February 4, 2013

Uploading of Public Files – All *television* stations will have to have completed the uploading of their local public inspection file materials to the FCC-maintained online public inspection file system by February 4.

March 12, 2013

Television Spectrum Incentive Auction- Reply Comments are due in the proceeding seeking to re-allot certain spectrum now in the television band for broadband use and to develop rules and procedures for auctioning certain portions of this spectrum to new users.

April 1, 2013

Radio License Renewal Applications - *Radio* stations located in **Texas** must file their license renewal applications.

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These applications must be accompanied by FCC Form 396, the Broadcast EEO Program Report, regardless of the number of full-time employees.

Television License Renewal Applications - *Television* stations located in **Indiana**, **Kentucky**, and **Tennessee** must file their license renewal applications. These applications must be accompanied by FCC Form 396, the Broadcast EEO Program Report, regardless of the number of full-time employees.

Radio Post-Filing Announcements - *Radio* stations located in **Texas** must begin their post-filing announcements with regard to their license renewal applications on April 1. These announcements then must continue on April 16, May 1, May 16, June 1, and June 16. Once complete, a certification of broadcast, with a copy of the announcement's text, must be placed in the public file within seven days.

Television Post-Filing Announcements - *Television* and *Class A television* stations located in **Indiana**, **Kentucky**, and **Tennessee** must begin their post-filing announcements with regard to their license renewal applications on April 1 . These announcements then must continue on April 16, May 1, May 16, June 1, and June 16. Please note that with the advent of the online public file, the prescribed text of the announcement has changed slightly. Also, once complete, a certification of broadcast, with a copy of the announcement's text, must be uploaded to the online public file within seven days.

Radio License Renewal Pre-Filing Announcements - *Radio* stations located in **Arizona**, **Idaho**, **New Mexico**, **Nevada**, and **Wyoming** must begin their pre-filing announcements with regard to their applications for renewal of licenses on April 1. These announcements then must be continued on April 16, May 1, and May 16.

Television License Renewal Pre-filing Announcements - *Television* and *Class A television* stations located in **Ohio** and **Michigan** must begin their pre-filing announcements with regard to their applications for renewal of license on April 1. These announcements then must be continued on April 16, May 1, and May 16. Please note that, with the advent of the online public file, the prescribed text of the announcement has been changed slightly from that of previous renewal cycles.

EEO Public File Reports - All *radio* and *television* stations *with five (5) or more full-time employees* located in **Delaware**, **Indiana**, **Kentucky**, **Pennsylvania**, **Tennessee**, and **Texas** 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.

Noncommercial Television Ownership Reports - All *noncommercial television* stations located in **Delaware**, **Indiana**, **Kentucky**, **Pennsylvania**, and Tennessee must file a biennial Ownership Report (FCC Form 323-E). All reports must be filed electronically.

Noncommercial Radio Ownership Reports - All *noncommercial radio* stations located in **Texas** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323-E.

April 10, 2013

Children's Television Programming Reports - For all *commercial television* and *Class A televisio*n stations, the first quarter 2013 reports on FCC Form 398 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. Please note that the FCC requires the use of FRN's and passwords in either the preparation or filing of the reports. We suggest that you have that information at hand before you start the process.

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 public inspection file.

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

Issues/Programs Lists - For all *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 public inspection file. Radio stations will continue to place hard copies in the file, while television and Class A television stations must upload them to the online 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.

(Continued from page 1)
cluded that the broadcasters ***are*** likely to prevail.

First, and foremost, he reminded everyone of basic geography: California is in the Ninth Circuit, not the Second Circuit. Therefore, he is not bound by either the Aereo decision or the Second Circuit's *Cablevision* decision.

More importantly, Judge Wu surmised that the Ninth Circuit – whose decisions *are* binding on Wu – would have come out differently in the *Cablevision* case. His disagreement with the Second Circuit is based on an alternate interpretation of the Copyright Act. In his densely reasoned opinion, Judge Wu parsed the meaning of terms such as "transmission", "copy", "work", "performance" and "performance of a performance". He concluded that, in *Cablevision*, the Second Circuit placed too much importance on whether the end user (*i.e.*, the Aereo subscriber/viewer) was ultimately receiving a public performance of a transmission; the key issue should have been whether the end user is receiving a public performance of a copyrighted work "irrespective of which copy of the work the transmission is made from".

As the Judge explained:

> Very few people gather around their oscilloscopes to admire the sinusoidal waves of a television broadcast *transmission*. People are interested in watching the *performance* of the *work*. And it is the public performance of the copyrighted work with which the Copyright Act, by its express language, is concerned. Thus, *Cablevision's* focus on the uniqueness of the individual copy from which a transmission is made is not commanded by the statute.

Judge Wu also cited a law review article by the esteemed (by some) Judge Richard Posner (from the U.S. Court of Appeals for the Seventh Circuit), who proposed this analysis of the considerations relevant to the assessment of copyright infringement claims:

> A rational resolution of the issue requires discerning the purpose of giving the owner of a copyrighted work the exclusive right to perform it. The purpose is to prevent the form of free riding that consists of waiting for someone to spend money creating a valuable expressive work and then preventing him from recouping his investment by copying the work and selling copies at a price below the price the creator of the work would have to charge to break even.

As Wu sees it, in Judge Posner's terminology, Alki David and (presumably) Barry Diller are in effect free riders.

All of which puts the Aereo decision (from a District Judge in the Second Circuit) and the Aereokiller decision (from a District Judge in the Ninth Circuit) on course for a collision in the Supreme Court.

If both the Second Circuit and the Ninth Circuit affirm their respective lower courts' views as to what constitutes a public performance, the result will be a classic "circuit split" that could be resolved only by the Supreme Court (unless Congress were to intercede with legislation addressing the problem). In my mind, it's dead-on certain that the Supreme Court would agree to resolve the split in Circuit law, should such a split develop. The Supremes would have to resolve that split because avoiding it would result in a nationwide service being treated differently according to region, with similar parties treated in vastly distinct manners under the law.

In that case the Supremes would likely consider not only how the statutory language itself must be read, but also what Congress intended and how much weight that perceived intention should be accorded. That, in turn could, lead to Congressional revision of the definition of "public performance", should Congress disagree with the Court's decision. In which case, there is still the possibility that David, Diller and innovators everywhere win in the end (and for that, from a strictly legal-nerd perspective, I love them . . . because this will be fascinating to watch).

The result could be a classic "circuit split" that could be resolved only by the Supreme Court.

But that's all a bit speculative – we probably won't get to that point for a year or two, if ever.

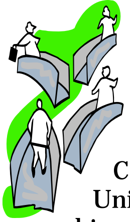
In the meantime, the situation will have to remain geographically muddled. In the Second Circuit, Aereo may still operate its service (although the legal momentum Aereo had been enjoying may be diminished some thanks to Judge Wu's contrary analysis). But in the Ninth Circuit, Aereokiller – although offering a service extremely similar to Aereo's – may ***not***

> retransmit[ ], stream[ ], or otherwise public perform[ ] or display[ ] within the geographic boundaries of the [Ninth Circuit], directly or indirectly, over the Internet (through websites such as filmonx.com or filmon.com), via web applications (available through platforms such as the Windows App Store, Apple's App Store, the Amazon Appstore, Facebook or Google Play), via portable devices (through applications on devices such as iPhones, iPads, Android devices, smart phones, or tablets), or by any means of any device or process, the Copyrighted Programming.

For purposes of the injunction, "Copyrighted Programming" refers to all broadcast TV programming in which any of the plaintiff broadcasters holds an exclusive right under the Copyright Act. The plaintiffs include NBCUniversal, Telemundo, ABC/Disney, CBS, Open 4 Business Productions and Big Ticket Television, Inc.

The Second Circuit encompasses New York, Connecticut and Vermont. The Ninth Circuit covers Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, the Northern Mariana Islands, Oregon and Washington – and Guam and the Northern Mariana Islands, too!

That leaves a huge chunk of America's heartland in which Aereo and/or Aereokiller may or may not be deemed legal. For now, the Swami will remain silent on where he sees this going. . . .



FHH - On the Job, On the Go

On January 17, **Frank Montero** – joined by representatives of the Obama Administration – moderated a panel entitled *The Obama Administration at the Mid-Point* at the MMTC Broadband Summit. Topics covered: broadband, telecom and Internet policy initiatives. The following week, **Frank** donned his robe and wig and served as a Chief Judge in the regional finals of the Price International Media Law Moot Court Competition administered by the University of Oxford and the Annenberg School of Communication of the University of Pennsylvania. The arguments were held at the Benjamin Cardozo School of Law in New York City. In his spare time, **Frank** also managed to offer some insights into the Bubba the Love Sponge slander suit for readers of *Radio Ink* magazine. (Our colleague **Kevin Goldberg** also copped good ink in the same article.) And he attended the swearing-in of the Latino members of the 113th Congress, as well as the Latino Inaugural Reception.

On February 9, **Kathleen Victory** will be teaching a session on "Negotiating the Deal" as part of the NAB's Broadcast Leadership Training program.

On February 7-9, **Matt McCormick** will attend the Annual Conference of the ABA Forum on Communications Law in Dana Point, California.

If you're heading to the Annual Convention and Exposition of the National Religious Broadcasters (March 2-5, Gaylord Opryland Hotel, Nashville), keep an eye out for **Peter Tannenwald** and **Harry Martin**. **Peter** will be participating in a presentation to television licensees about the status of the FCC's Incentive Auction preparations on March 3. **Harry** is scheduled to appear on an "FCC Super Session" panel on March 4.

Frank M, along with **Frank Jazzo, Matt M, Howard Weiss** and **Scott Johnson**, will also be attending the NAB's annual State Leadership Conference in Washington from March 4-6.

Kathy Kleiman is currently out in Los Angeles, at ICANN headquarters, conferring with the ICANN powers-that-be about top level domains, responsible Internet governance, and all that good stuff. **Kathy** also reports that she recently received a "nice award" from the folks in charge of the Women in Computing Conference that was held last October. Seems the "Tech Entrepreneurs Lab" program that **Kathy** helped plan and lead was one of the confab's highest ranked sessions.

With January comes the need to warn everybody that the term "Super Bowl" is a registered trademark and that the NFL – which owns that mark (who knew?) – tends to be brutally harsh in its efforts to prevent unauthorized use of "Super Bowl" and other NFL-owned trademarks. This annual chore has traditionally fallen to **Kevin Goldberg**, our resident trademark maven. You can find **Kevin**'s 2013 version on page 3 of this issue. As you will note, the Swami did some actual research for his piece, determining that one Roy Fox had applied for registration of the term "Harbowl" last year, only to face apparent opposition from the NFL. (Note: His "actual research" was probably done from his couch while he was watching the AFC Championship Game, but we don't need to get into that.) What's interesting here is that we posted **Kevin**'s piece on our blog on Monday, January 21. And two days *later*, ESPN, ABC, and a bunch of other MSM types were all over the "Harbowl" story like a hobo on a ham sandwich. None of them credited **Kevin** with breaking the story, but we're pretty confident he did . . . confident enough to recognize him as our *Media Darling of the Month.*

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his application –another reason you should consider applying for protection of your own marks), you might find yourself in a much more expensive predicament. When it comes to trademark infringement claims, the NFL doesn't just litigate at the USPTO; rather, they've shown an affinity for going to big boy court and seeking big time damage awards when it suits their needs.

So we salute you, Mr. Roy Fox. Not just for your creativity, foresight and entrepreneurial spirit, but also for the relatively inexpensive reminder you've given to broadcasters around the country. The take-home lesson here: do ***NOT*** promote yourselves, your stations, your events or any of your commercial interests using the words "Super Bowl" or other NFL trademarks unless you have permission from the NFL to do so. You CAN report on the game and/or events (including official NFL events) surrounding the game, but using NFL-registered trademarks for promotional purposes without permission can cause you a world of grief.

And a personal note to Mr. Fox: I hope you put your obvious foresight to profitable use. When you applied for the "Harbowl" mark in February, 2012, the Ravens were around 14-to-1 and the Niners were about 20-to-1 to win the Super Bowl back then. I'm sure the odds of *both* teams getting to the Big Game would have been astronomically higher, and any of those "prop bets" would have made you more money than selling t-shirts would in any event.

[And now for my annual prediction. This is tough. It's going to be a great game, and I'm personally torn between the two teams. On the Ravens side, I grew up in Maryland and know that a Ravens Super Bowl win will tick Redskins fans (and Redskins owner Dan Snyder, a megalomaniac in the eyes of many) off to no end, and I love that. On the Niners side, I love SF, having split time between that city and DC for about three years and knowing many people that will be very happy about a Niners win. But San Francisco already celebrated a World Series win in the past few months – their second in three years to boot – and I'm all for spreading the wealth. (Plus I'm not sure the Mission can stand another championship celebration). So you heard it here first: the Swami sees the Ravens over the Niners, 24-21.]