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Memorandum to Clients

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"Clips" to be captioned . . . but what's a "clip"?

Expanded Closed Captioning Requirement for IP-Delivered Programming?

By Harry F. Cole
cole@fhhlaw.com
703-812-0483

For the last year or so, the law has required a sizable chunk of U.S. video programming displayed on the Internet to be closed captioned. One type of programming has, however, been exempt from that requirement: video "clips" don't need to be captioned, as opposed to "full-length" programming which, for the most part, does.

But now the FCC is considering closing that loophole, and the Media Bureau is looking for input in making the decision. If you have any information or thoughts to share, you've got until ***January 27, 2014*** to let the Bureau know; reply comments can be filed until ***February 26***.

Before delving into the specifics of the Bureau's inquiry, let's take a quick look at the Internet captioning requirements as they now stand.

In January, 2012, the FCC adopted rules governing closed captioning of video programming delivered by Internet Protocol (IP); they have been in full effect (except with respect to certain archived programming) since March, 2013. The Commission's Report and Order may be found at this link, and the actual rules themselves (set out in various subsections of Section 79.4) may be found at this link.

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At first blush the rules seem relatively straightforward: they specify (at Section 79.4(b)) that "[a]ll nonexempt full-length video programming delivered using Internet protocol must be provided with closed captions if the programming is published or exhibited on television in the United States with captions on or after [certain dates]." The particular application of that requirement is, however, complicated, involving determinations of: (a) who is responsible for which elements of compliance; and (b) what programming is subject to the requirement.

Who do the rules apply to? The IP captioning requirements apply to two types of entities, Video Programming Owners (VPOs) and Video Programming Distributors (VPDs). (The latter may also be referred to as "Video Programming Providers").

A ***VPO*** is defined as:

> Any person or entity that either:
>
> (i) licenses the video programming to a video programming distributor or provider that makes the video programming available directly to the end user through a distribution method that uses Internet protocol; or
>
> (ii) acts as the video programming distributor or provider, and also possesses the right to license the video programming to a video programming distributor or provider that makes the video programming available directly to the end user through a distribution method that uses Internet protocol.

Essentially, a VPO is the party that authorizes the IP distribution of the programming. It is ***not*** necessarily the copyright holder. If a TV station is making some or all of its programming available through some IP delivery mechanism (including, but not limited to, posting the programming on the station's website), the station is a VPO.

A ***VPD*** is defined as:

> Any person or entity that makes available directly to the end user video programming through a distribution method that uses Internet protocol.

Note that a VPO can also be a VPD – for example, a television station that both (a) provides some or all of its pro-

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En banc Ninth Circuit reverses panel decision

Noncommercial Stations Out West: Back to Being Noncommercial . . . For Now

By Jon Markman
markman@fhhlaw.com
703-812-0493

We all know that noncommercial (NCE) broadcasting stations are just that – ***NON***commercial. Section 399b of the Communications Act forbids them from accepting advertising on behalf of for-profit activities; it also forbids advertising both for political candidates ***and*** for expressing the advertiser's views on any matter of public importance. (The difference between the latter two? Think "Vote for John Smith" vs. "America's farmers are its backbone".)

As we reported in the April, 2012 *Memo to Clients*, a three-judge panel of the U.S. Court of Appeals for the Ninth Circuit tossed those last two prohibitions (*i.e.*, the ones against political and issue advertising).

That wasn't the end of the matter. As we thought it might, the FCC asked the Ninth Circuit *en banc* to take another look at the case. And now the 11-judge court sitting *en banc* has restored (by an 8-3 vote) the prohibitions against political and issue advertising.

But there's reason to believe that the case may not be over yet.

This all started when Minority Television Project (MTP), the licensee of NCE Station KMTP-TV, was hit with a $10,000 fine by the FCC for broadcasting a number of conventional ads on behalf of Chevy, Ford and Korean Airlines. MTP took the Commission to court, lost the initial round, and appealed. Thanks to a quirk of First Amendment law, MTP was able to challenge ***all*** of the Section 399b prohibitions, not just the one involving normal "commercials" (that is, the one element of the law that MTP was accused of violating). And that opened the door for the 2012 decision tossing the political/issue advertising taboo. In the panel's view, the ban on political/issue ads (unlike the ban on regular advertising) had not been adequately justified under First Amendment jurisprudence.

Eight of the 11 judges on the *en banc* court disagreed. Applying an "intermediate scrutiny" standard of review, the majority has now concluded that all of Section 399b's prohibitions are consistent with the First Amendment.

That choice of standard of review was crucial. MTP argued unsuccessfully that "strict scrutiny" – a standard far less favorable to the government – should apply. MTP's rationale? The use of "intermediate scrutiny" for assessing First Amendment challenges by broadcasters dates back more than 40 years, to the *Red Lion* decision. In that case the Supreme Court concluded that, because of the supposed scarcity of spectrum and the importance of assuring diversity of information flowing to the public, broadcasters should not be accorded the same level of First Amendment protection enjoyed by their print media counterparts.

MTP urged that the Supreme Court's decision in *Citizens United* effectively overruled the *Red Lion* line of cases. In MTP's view, considerable intervening technological changes, including the "ubiquity of the Internet" – which did not even exist at the time of *Red Lion* – also warrant re-thinking of the use of "intermediate scrutiny" standard, a standard which relegates broadcasting to second class citizenship in the First Amendment world. Once the majority of the *en banc* court rejected those arguments, however, the result was pretty much a foregone conclusion.

But then there was the vigorous dissent of Chief Judge Alex Kozinski, who

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FLETCHER, HEALD & HILDRETH
P.L.C.

1300 N. 17th Street - 11th Floor
Arlington, Virginia 22209
Tel: (703) 812-0400
Fax: (703) 812-0486
E-Mail: Office@fhhlaw.com
Website: fhhlaw.com
Blog site: www.commlawblog.com

Co-Editors

Howard M. Weiss
Harry F. Cole

Contributing Writers

Anne Goodwin Crump,
Kevin M. Goldberg,
Dan Kirkpatrick and Jon Markman

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Kavanaugh concurrence confronts must carry constitutionality

D.C. Circuit Rejects Challenge to Sunsetting of Viewability Rule

By Harry F. Cole
cole@fhhlaw.com
703-812-0483

The D.C. Circuit has given the FCC and the cable industry a belated Christmas present. It has rejected a challenge mounted by a number of broadcasters (including the NAB) to the FCC's 2012 revision of its "viewability" rule. And one member of the three-judge panel went considerably further, suggesting that the entire cable must-carry regime is on extremely shaky constitutional footing.

The viewability rule, adopted in 2007, applied to "hybrid" cable companies. ("Hybrid" cable operators are those that opted, after the 2009 DTV transition, to provide an analog tier of programming – consisting of local TV signals and, in some cases some cable channels – so that subscribers with analog receivers would not require additional equipment.) The rule provided that such operators could either (1) provide the digital signal of all must-carry stations in analog format (in addition to any digital version carried) to all analog cable subscribers, or (2) transition to an all-digital system and carry the signal in digital format only, provided that all subscribers have the necessary equipment to view the broadcast content.

The rule was scheduled to sunset in June, 2012 and, after a rulemaking proceeding, the Commission decided to let that happen (although the Commission did tack on an additional six months). While hybrid cable operators remain subject to a general "viewability" requirement, since December, 2012 they have had significantly greater flexibility in meeting that requirement.

Concerned that the sunsetting of the original viewability rule could threaten their ability to reach a significant number of viewers, several broadcasters challenged the FCC's decision.

To no avail.

The D.C. Circuit was completely unpersuaded. The majority opinion (by Judge Edwards) easily rejected the petitioners' *Chevron* I claim since Congress did not expressly mandate the retention of the rule. He also had no great difficulty in concluding that the FCC's action was not arbitrary or capricious or inadequately telegraphed in its notice of proposed rulemaking.

The more interesting aspect of the court's decision is Judge Kavanaugh's concurring opinion. He's totally on board with all of Edwards's points, but he wrote separately to suggest that both the viewability rule – and, more broadly, the entire cable must-carry regime – raise serious First Amendment questions.

The Supreme Court has historically recognized those questions but has resolved them in favor of broadcasters. Now, however – at least according to Kavanaugh – the march of technology has shifted the balance in favor of cable operators. Essentially, Kavanaugh observes that, thanks to the incredible increase in competing media sources, "cable operators 'no longer have the bottleneck power over programming that concerned the Congress in 1992.'" His bottomline message: "cable regulations adopted in the era of Cheers and The Cosby Show are ill-suited to a marketplace populated by Homeland and House of Cards."

> *Kavanaugh's concurring opinion is a cable operator's dream and a broadcaster's nightmare.*

Kavanaugh's opinion is a cable operator's dream and a broadcaster's nightmare. It reflects at least one judge's very firm embrace of the First Amendment argument that the cable industry has repeatedly advanced against must-carry. And he squarely argues that the strength of that argument has increased with time and technological development.

Dating back to the 1994 *Turner Broadcasting case*, the Supremes, although not unsympathetic to cable operators' First Amendment claims, have concluded that the interests of preserving over-the-air broadcasting are sufficiently hefty to outweigh the incursion on cable operators' rights. But in Kavanaugh's view, application of the Supremes' *Turner* analysis leads to "an entirely different result" when applied "to today's highly competitive video programming distribution marketplace".

Kavanaugh's opinion appears to be a not-very-subtle invitation to the cable industry to make another First Amendment run against must-carry. Because of that, it's probably unlikely that the broadcast parties who took this case to the Circuit will be eager to seek Supreme Court review, since that could tee up the First Amendment issue sooner rather than later. Presumably, though, the cable industry will eventually be able to get the issue before the Supremes, which could lead to some fireworks in the video distribution industry.

Waterloo. Gettysburg. Normandy . . . First Street?

Aereo Armageddon Ahead?

By Kevin M. Goldberg
goldberg@fhhlaw.com
703-812-0462

The Aereo War rages on, fought (like most wars) on several fronts, but always with an eye toward that epic battle destined to change the face of the conflict entirely. Yorktown. Waterloo. Gettysburg. Normandy.

Possibly soon to be added to that list: Washington, likely site of the Aereo Armageddon. More specifically, One First Street, N.E. – where the U.S. Supreme Court sits.

And it could happen sooner than many expected. That's because the major broadcast networks, having lost their bids to shut Aereo down in New York and Boston, have sought Supreme Court review of the New York decision. And, in an interesting gambit, Aereo has taken the unusual step of agreeing with its adversaries. Aereo says that the Supreme Court ***should*** take the case. While that is no guarantee that the Court will agree that the issues are now ripe for resolution at the highest level, such unanimity among the parties certainly doesn't hurt.

Knocking on the Supreme Court's door, Aereo has taken the unusual step of agreeing with its adversaries.

Before we get ahead of ourselves, a bit of history.

Aereo, of course, is the innovative service that captures over-the-air broadcast signals with dime-sized antennas and then makes those signals available to subscribers via the Internet device(s) of their choice. Aereo does this without the consent of, or any royalty payments to, the broadcasters whose signals are re-transmitted. Broadcasters feel Aereo's service constitutes a "public performance" of content inconsistent with the broadcasters' exclusive rights under the Copyright Act. (You can find lots of reporting on Aereo's litigation here.)

Aereo began operating in March 2012 in New York. The major broadcast networks promptly filed a lawsuit in the U.S. District Court for the Southern District of New York alleging copyright infringement. They also asked the court to preliminarily enjoin Aereo from operating during the pendency of the trial. Judge Alison Nathan, the presiding judge, denied that request. Her ruling was upheld, 2-1, by a three-judge panel of the United States Court of Appeals for the Second Circuit; the full Second Circuit sitting *en banc* declined to review the matter. So Judge Alison's denial of the preliminary injunction remains in place and Aereo has continued operating in New York. Technically, the Second Circuit's affirmance of her order is what is now knocking on the Supreme Court's door.

But that's just one front in the Aereo War.

Aereo has since commenced service in Boston, Atlanta, Salt Lake City, Miami, Houston, Detroit, Denver, Dallas and Baltimore.

It has been sued by broadcasters in Boston (in July 2013) and Utah (twice, in October 2013). Aereo has tried – so far unsuccessfully – to narrow the battlefield by asking the judges in Boston and Utah to transfer their respective cases back to the seemingly Aereo-friendly courtroom of Judge Nathan in New York. The Boston judge denied that request; the Utah court has not yet acted on the request pending before it.

The denial of the Boston transfer motion was not really a loss for Aereo, though. The Boston judge, following the path blazed by Judge Nathan in New York, denied the broadcaster-plaintiff's request for a preliminary injunction, leaving Aereo up and running there. (A similar request filed in Utah has yet to be ruled on.) An appeal of the Boston ruling has recently been filed with the First Circuit.

So far, so good for Aereo. It's 2-0 in the district courts and 1-0 on appeal in the Second Circuit.

But Aereo has a doppelganger of sorts. Shortly after Aereo appeared on the scene, a company called FilmOn X (née "Aereokiller") began offering a service similar to Aereo's in Los Angeles. (Some might say that FilmOn X is a copycat of Aereo – dime-sized antennas and all – but FilmOn X claims that its technology is actually superior to Aereo's.)

FilmOn X was sued by broadcasters in Los Angeles in 2012 and again in Washington, D.C., where it began operating in 2013. In the former case, Judge George Wu of the U.S. District Court for the Central District of California agreed with the broadcaster-plaintiffs and granted their motion for preliminary injunction, thereby ordering FilmOn X to stop operating in L.A. Judge Wu's order is currently on appeal to the Ninth Circuit, which heard oral argument in late August, 2013, but has yet to issue a decision.

Meanwhile, in Washington, U.S. District Judge Rosemary M. Collyer also preliminarily enjoined FilmOn X from operating for the time being. But she went further than Judge Wu in L.A. and barred FilmOn X from operating *anywhere* in the country other than the states within the Second Circuit's jurisdiction (*i.e.*, New York, Connecticut and Vermont). She carved the Second Circuit out in deference to the Aereo decision. An appeal filed by FilmOn X with the D.C. Circuit is in its early stages.

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So unlike Aereo, FilmOn X isn't doing so well: 0-2 in the district courts.

Where does that leave us? Five distinct lawsuits in five different venues, producing (so far) four distinct District Court rulings: the defendant streaming service avoids preliminary injunctions in New York and Boston, but gets enjoined in L.A. and D.C., with the D.C. judge upping the ante by extending the injunction almost nationwide. On the appellate side, only one U.S. Court of Appeals – the Second – has yet weighed in, but a decision out of the Ninth Circuit could come out any time now, and appeals have been started in the First and D.C. Circuits as well.

Which brings us to Supreme Court.

Ordinarily, the Court is reluctant to agree to review a case unless it reflects a "circuit split", that is, a situation in which inconsistent decisions have been reached at the Court of Appeals stage. In such a circumstance, the Supremes can step in a resolve the inconsistency and restore uniformity to the law. Here, even though only one Court of Appeals – the Second – has technically taken a position, the divergent decisions reached thus far in the various venues do seem to reflect a pretty clear split. That's one of the primary reasons that the broadcasters in the Second Circuit case have petitioned the Supreme Court to review the Second Circuit's ruling in favor of Aereo.

Will the Court grant the broadcasters' petition? When I first sat down to write this article, I didn't think so.

In their petition (full legal name: "petition for writ of certiorari"), the broadcasters home in on the dangers presented by the Second Circuit's decision. They argue that the Court's intervention is "urgently needed" both because: (a) Aereo's business model is built on the unauthorized for-profit exploitation of others' copyrighted works, a practice for which the Supremes have historically shown little tolerance; and (b) the "viability of over-the-air broadcast television" is threatened.

The detailed substantive arguments largely track those advanced by the broadcasters in the lower courts, arguments that were accepted by Judge Denny Chin (a Second Circuit judge who strongly disagreed with his colleagues) and the District Courts in the L.A. and D.C. FilmOn X cases. To summarize briefly: The Copyright Act gives the copyright holder the exclusive right to make "public performances" of their copyrighted works. The Act's definition of "public performance", and Congress's intent underlying that language, are clear: "performance" refers to the copyrighted broadcast programming.

That definition was enacted by Congress in direct response to the Supreme Court's decision in the *Fortnightly* case in which the Court said that cable television systems were not engaged in separate performances when retransmitting broadcast programming. The key is not, as the Second Circuit believes, how many people can receive a particular transmission of a broadcast; rather, the crucial question is how many can receive the broadcast itself. In essence, the Second Circuit has confused "transmission" with "performance".

These are not clear-cut semantic distinctions. Clarifying the confusion will be the Supreme Court's main task.

The broadcasters also argue that the Second Circuit's misreading of the Copyright Act will cause the broadcast industry significant harm. It is a "direct assault" on a "well-established and statutorily protected" business model. As the broadcasters note, Aereo – emboldened by the Second Circuit decision – has already expanded to several other cities, with plans to enter 20 more in 2013 alone. And presumably in response, major cable and satellite companies appear to have altered their business practices with regard to retransmission consent. That poses a clear financial threat to broadcasters. And beyond retransmission consent, there is also a danger to the broadcasters' ratings which underpin advertising rates: the Nielsen ratings system will not reflect Aereo viewers.

So will the Court grant the broadcasters' petition?

When I first sat down to write this article, I didn't think so. The Supremes are notoriously reluctant to decide an issue – especially a difficult one – until they have to. (Recent example: The current Court reviewed the FCC's indecency rules not once, but twice, in a matter of three years but still declined to decide whether those rules violate of the First Amendment.)

Plus, there are a lot of potential "outs" regarding this case: the Ninth Circuit and the D.C. Circuit could side with their Second Circuit confrères and reverse the L.A. and D.C. district court rulings, effectively undermining any notion of a circuit split. Perhaps more importantly, all these cases – even the Second Circuit case – are still in their infancy. They involve only motions for preliminary injunction at this point. That means that no trial has yet occurred in any of the cases, so no court has yet compiled a full evidentiary record on which the Supreme Court may confidently rely.

So I was figuring the broadcasters' petition would be denied.

But then Aereo, in response to the broadcasters' petition, urged the Justices to take the case.

Ordinarily, parties in Aereo's position, having won in the lower court, are not inclined to risk taking points off the board like that. When you think about it, though, Aereo's move makes perfect sense because Aereo has at least a couple of reasons for wanting to accelerate this case to

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The juggernaut presses on

Audio Division Issues LPFM Progress Report, Road Map

By Harry F. Cole
cole@fhhlaw.com
703-812-0483

The LPFM juggernaut that has already been moving forward with impressive speed all year seems, incredibly enough, to be gaining momentum. Less than three weeks after the filing window slammed shut on new LPFM applications, the Audio Division released a public notice providing a progress report and a road map for handling the 2,800 or so applications that were filed. That map seemed to point to potential resolution of most applications in reasonably short order, some even as soon as next month – and sure enough, nine days before Christmas the Division's staff had identified all 406 separate groups of mutually exclusive (MX) applications and had opened the window for various conflict-resolving steps.

All LPFM applicants, as well as anyone who might be affected by any of the applications, would do well to review the Division's public notice carefully.

The good news for many: nearly one-third of the LPFM applications – approximately 900 – appear to be singletons. The Division has made identification of all singletons its highest priority, and has already started to mark the ones it has so identified as "accepted for filing", a status that starts the 30-day petition to deny period. That means that, at least for some (if not most) of the singletons, the petition to deny period will expire in January, leaving applications that don't attract any petitions potentially eligible for grant next month.

The public notice listing all MX LPFM groups is a major milestone.

Meanwhile, the public notice listing all MX groups itself is a major milestone. The release of that notice opened up an initial settlement period, during which applicants may amend their applications to eliminate mutual exclusivities. ***Only minor amendments*** are permitted during this period – "minor" amendments in this context include: (1) site relocations of 5.6 kilometers or less; (2) channel changes of no more than +/- three channels or to an intermediate frequency (+/- 53 or 54) channel; (3) partial and universal voluntary time-sharing agreements; (4) changes in general or legal information; and (5) changes in ownership where the original parties retain more than 50 percent ownership in the application as originally filed. (Site relocation amendments of more than 5.6 kilometers ***are*** permitted for the limited purposes of (1) curing potential third-adjacent channel interference and (2) allowing time-share proponents to relocate to a common transmitter site.)

In addition to technical amendment, MX applicants may also resolve mutual exclusivities by entering into settlement agreements with one another. The basic rule of thumb: a settlement must be designed to lead to the grant of at least one application in an MX group without creating any new mutual exclusivities. Settlements may provide for coordinated amendments of applications, dismissal of applications and/or partial or universal share-time proposals.

If an applicant opts to dismiss its application pursuant to a settlement, all parties to the deal will have to file a copy of the settlement agreement, a joint request for approval of the agreement, and separate affidavits from each of the parties concerning the terms of the deal. (The specifics of the affidavits are set out in the public notice, and also may be found in Section 73.3525(a) of the rules.) An applicant opting unilaterally to dismiss its application will have to file a similar affidavit confirming that it has not been paid or promised any consideration in return for the dismissal.

Once any technical amendments and/or settlements have rolled in and been processed by the staff, one or more "tentative selectees" will be announced for each of the remaining, unresolved MX groups. Any petitions to deny any of the tentative selectees will then be considered and, eventually, the tentative selectees' applications will either be granted or dismissed. (In some cases "successor" tentative selectees may also be identified; they, too, will be subject to petitions to deny.)

A couple of things to remember when it comes to amending an LPFM application. As noted above, only minor amendments may be filed during the initial amendment period immediately following release of the public notice announcing MX groups. Once tentative selectees have been announced, applicants will be permitted to file major amendments (think non-adjacent channel changes, relocations of more than 5.6 km, etc.) for a period of 90 days following the public notice identifying them as selectees. Each tentative selectee announcement will identify, in addition to the selectee, all the other applications in that Selectee's MX group. These public notices are likely to roll out gradually, on an MX group-by-MX group basis, as the various groups are processed. Upon release of each such public notice, **ALL** applicants listed in that public notice – whether or not the tentative selectee – will be permitted to file major amendments.

And ***in no event*** may an applicant use an amendment to increase its comparative point total or bring itself into compliance with the minimum separation requirements of Section 73.807.

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closure ***now***.

First, the broadcasters are obviously willing to litigate their arguments anywhere and everywhere possible, which gives rise to the prospect of extended litigation in courts across the country. That imposes a direct financial burden on Aereo, and also creates uncertainty that "undermines Aereo's efforts to expand its footprint and further develop its business".

Second, the factual record now in front of the Supremes is the factual record that led the Second Circuit to come down on Aereo's side. The record in the L.A. and D.C. cases didn't work so well for Aereo's counterpart there, FilmOn X. Why wait around and risk having other facts crop up that might not be helpful to Aereo?

Each of the three players is convinced that the other two are wrong.

Third, technology changes fast. While the Supreme Court might traditionally be inclined to sit back and wait to see how things shake out over the long haul, that approach doesn't work as well in an age of rapid technological development. Parties in high tech industries often cannot as a practical matter wait three years to determine whether every new technology is legal or not.

And while Aereo's decision to support Supreme Court review now rather than later may be motivated more by Aereo's own strategic self interest than by altruism, it caused me to do a 180 – I think it's very likely the Court could take this case, possibly as early as mid-January (which might get us a decision on the merits by July, if everything falls into place just right).

Cablevision apparently thinks so too. I'm deducing that from a "white paper" it released entitled "Aereo and the Public Performance Right".

Cablevision essentially channels Marshall McLuhan in *Annie Hall*, slamming people who think, wrongly, that they fully grasp another's theories. Here, Aereo's legal theory derives largely, if not entirely, from the Second Circuit's 2008 decision in *Cablevision* (which involved the copyright implications of Cablevision's Remote DVR service), so Cablevision may rightly claim some parental rights to the theory underlying that decision. Cablevision's White Paper reads something like a paraphrase of McLuhan (reading Woody Allen's script): "We've read what you were arguing! You know nothing of our work! How you were able to transmit anything is totally amazing!"

The White Paper tries to put distance between the *Cablevision* case and Aereo's. That's not surprising. Cablevision stands to lose a lot no matter which side ultimately wins before the Supreme Court. If Aereo wins, Cablevision, the cable company, will have a new competitor. If the broadcasters win, Cablevision's ability to innovate could greatly be curtailed; its current Remote DVR service, blessed at this point only by the Second Circuit, could be shut down.

Cablevision argues the broadcasters' interpretation of the Copyright Act is wrong. The broadcasters try to differentiate between a "performance" and a "transmission" but those are actually the same thing, in Cablevision's view, so the broadcasters are wrong and should lose.

But, Cablevision says, Aereo is wrong, too. Aereo's service is completely unlike Cablevision's Remote DVR service (and most cloud services available today) because Aereo's hard drive copies are not even lawful in the first place: "Subscribers have no fair use right to make copies merely so they can receive programming over an unlicensed television delivery service". This is something many have wondered as well: yes, Aereo is simply taking over-the-air signals with an antenna like anyone else could and yes, Aereo is simply helping its subscribers play that content back via an Internet device, but is it legal to combine the two?

We can expect to see the arguments set out in the White Paper show up in an amicus brief from Cablevision when the Aereo case ultimately gets to the Supreme Court. In which case we will have three key players, each weighing in with its view of the law, with just one thing in common: each of the three players – Aereo, broadcasters, Cablevision – is convinced that the other two are wrong, so it's time for the Supreme Court to decide who is right.

I agree.

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According to the FCC's public notice, MX applicants may "communicate with each other at any time before or after" the formal announcement of MX groups if they want to "explore options for resolving application conflicts". In other words, the mere fact that MX groups have been formally identified does ***not*** prevent MX applicants from exploring possible settlement approaches. And there's an incentive for doing so sooner rather than later: Any proposal filed by February 14 that invokes any of the three available mechanisms for MX resolution (MX-resolving amendment, settlement or time-share) will get moved up to the head of the processing line for expedited consideration ***as long as*** the proposal would "eliminate all technical conflicts between at least one application and all other applications in the MX group".

It is clear that the Audio Division is committed to wrapping up as many LPFM applications as soon as possible. While considerable work still lies ahead, the road map the Division has laid out should encourage all applicants to take whatever steps they can, as soon as they can, to avail themselves of the various options to help the Division along in the process.

EA or CMA or MSA/RSA or CMA or . . . how about PEA?

Incentive Auction Update

Add PEA to the alphabet soup options for the 600 MHz band

By Dan Kirkpatrick
kirkpatrick@fhhlaw.com
703-812-0432

One of the crucial questions that the FCC must answer before it can get its Incentive Spectrum Auction off the ground is how it plans to sell 600 MHz licenses in the "forward" part of the auction. In the Incentive Auction Notice of Proposed Rulemaking, the Commission indicated that it was initially leaning toward selling them based on Economic Areas (EAs), rather than larger pieces of real estate (*e.g.*, nationwide licenses) or smaller alternatives (*e.g.*, CEAs or MSA/RSAs). (Fuzzy on the distinctions? Check out the *Memo to Clients* Sidebar at the end of this article for further information.)

But now the Wireless Telecommunications Bureau, at the prodding of the Competitive Carriers Association (CCA), is thinking that Partial Economic Areas (PEAs) might be the way to go, and it's asking for input on the question.

This is a big deal. Here's why.

Think of it in terms of haves vs. have-nots.

As most readers presumably know, the Incentive Auction will consist of two independent but interrelated elements: (1) the reverse auction, through which the FCC will "free up" spectrum by giving TV licensees cash to vacate their current channels; and (2) the forward auction, in which the FCC will sell off the spectrum freed up in the reverse auction. (The cash generated by the latter will be used in part to pay broadcasters in the former.) The ultimate success or failure of the Incentive Auction will be measured in part by how much money the forward auction brings in.

That being the case, the FCC has to be concerned about how to market the spectrum for the forward auction. Selling nationwide licenses, for example, might seem a simple way to attract the highest bids from the get-go, but there are problems with that approach. For example, the amount of spectrum that might be available for easy nationwide use could be limited, since the "freeing-up" process of the reverse auction and consequent spectrum repacking may not yield uniform amounts of spectrum in all markets.

Offering spectrum on a more granular, less-than-nationwide, basis necessarily raises the question of what geographic or other units to use for bundling the spectrum for auction. Using units that are too small would risk complications in auction design and implementation, as well as in the service roll-out.

After grappling with these difficult questions, the Commission (as noted above) initially liked EAs. But along with other commenters, CCA (representing more than 100 competitive wireless carriers, including rural, regional and national carriers) preferred CMAs. CMAs are smaller than EAs, better suited to the coverage of small and rural operators. And as a practical matter, such operators might not be able to afford to successfully bid on EAs, much less fully deploy an EA-wide system. So they would have an easier time if the spectrum increments were put up for auction on a CMA basis.

But CMAs don't "nest" into EAs, which may or may not be a problem. As an alternative, CCA has proposed that spectrum be auctioned in PEA blocks, which neatly subdivide EAs. In CCA's view, the smaller size of PEAs would "enable smaller and rural carriers to bid on portions of EAs to obtain more efficiently sized spectrum licenses".

The question of what spectrum increment(s) to use in the auction is by no means trivial. Think of it in terms of haves vs. have-nots. The existing nationwide operators – primarily AT&T and Verizon – presumably have their eyes on acquiring as much spectrum as possible, and they have deep enough pockets to bid on large increments. Smaller carriers – such as the rural and regional folks represented by CCA – have far less interest in snagging spectrum outside their respective bailiwicks, and their more limited financial resources probably wouldn't let them compete against AT&T and Verizon in a bidding war for larger spectrum increments.

This dichotomy is tugging the Commission in two directions: on the one hand, the deep pockets of AT&T and Verizon make it tempting to maximize revenues by selling the spectrum in big chunks; on the other, the "big chunk" approach would substantially reduce the ability of smaller rural operators to compete in the auction. One theory suggests that the more bidders participating, the greater the chances of maximizing bid amounts across the board. Congress is interested because it is relying on auction revenues to help with the federal budgeting.

So the PEA proposal could be just what the doctor ordered to bridge the gap by providing a "Goldilocks" alternative right between EAs and CMAs. As it turns out, there are 176 EAs nationwide; there would be more than 700 CMAs; and right in the middle are PEAs, numbering 350, according to the FCC's public notice.

The Wireless Bureau is also soliciting comments on whether – and if so, how – PEAs might be "packaged" into increments consisting of several PEAs. That would permit the larger operators to avoid having to fight a maximum number of separate auction battles. Not surprisingly, CCA and smaller carriers aren't keen on the whole packaging

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concept. CCA has suggested that, if PEA package bidding is to be permitted, a per-package cap ("no more than the ten largest PEAs by population") per bidder should be imposed. AT&T, by contrast, has advocated for nationwide packages, or at least packages consisting of the top 100 markets.

As arcane as all this may seem, resolution of these questions could have a major impact on the outcome of the Incentive Auction. The deadline for comments is ***January 9, 2014***; reply comments may be filed by ***January 23***.

The longer these questions remain open, the harder it's going to be for the Commission to schedule the commencement of the actual auction process. That date, of course, is a matter of prime concern to a large universe of interested folks. And recently, despite the FCC's repeated insistence that it's been on track to complete all the necessary prep work to conduct the Incentive Auction sometime in 2014, Chairman Wheeler took the opportunity – in a blog posted on the FCC's website – to throttle back that ambitious schedule. While Wheeler's post is less than specific about the likely timing of the auction, he is now expressing the belief that it can be held "in the middle of 2015".

Of course, in order to do that, the Commission will have to hit a number of milestones in terms of nitty-gritty preparation details along the way, as the Chairman acknowledges. We should get a better idea of precisely what those milestones are and when they might be met at the January, 2014 Commission meeting. That's when the Incentive Auction Task Force is slated to make a presentation on its anticipated timeline for rolling out the auction.

The very rough roadmap sketched out by Wheeler in his blog post mentions an initial Report and Order establishing "policies" that should be ready for a Commission vote "in the spring" of next year. That would be followed "in the second half" of 2014 by release of two public notices – an "Auction Comment Public Notice" and a "Procedures Public Notice" – designed to "provide additional details and seek comment on how the specific parts of the auction will actually function". Presumably the question of how to package the 600 MHz spectrum for sale will have to be resolved before those notices can be released.

Wheeler's blog provides no other specifics (if you can call those vague references "specifics"). He also makes no mention of possible procedural slow-downs along the way. Each of the various decisions the Commission will have to make between now and the auction – and there are bound to be a boatload of very complex decisions to be made – will theoretically be subject to reconsideration, possibly appeal, maybe even a stay. Also, the longer that any of the various components of this sprawling proceeding are out for comment, the greater the likelihood that one or another of the zillions of interested parties may come up with new or different proposals, consideration of which may engender further delay. In other words, the new target of the "middle of 2015" may still prove to be ambitious, even if the Commission meets all the milestones it currently envisions.

Perhaps sobered by the fiasco of the massively flawed rollout of the federal government's Obamacare website in October, the Chairman's blog post repeatedly acknowledged the absolute necessity of having all processes up and running ***before*** the auction commences. To that end, he assured that the Commission will "check and recheck the auction software and system components against the auction requirements, and under a variety of scenarios replicating real life conditions". And it will conduct "several software demonstrations" in addition to its routine "mock auction". His bottom-line promise: "Only when our software and systems are technically ready, user friendly, and thoroughly tested, will we start the auction."

Chairman Wheeler's commitment to getting things right is reassuring, and his willingness to move the date back into 2015 seems to be a practical manifestation of that commitment. That's good (although it's hard to imagine that anyone realistically thought a 2014 auction was ever in the cards). But we all have a very long way to go before the Incentive Auction can happen. Let's hope that he sticks with that commitment for the duration.

Another Memo to Clients sidebar !

Alphabet Soup, Spelled Out

For those readers unfamiliar with the FCC's alphabet soup, here is some background on EAs, CMAs and PEAs.

EA: Economic Area. As defined by the Bureau of Economic Analysis, EAs are "one or more economic nodes – metropolitan areas or similar areas that serve as centers of economic activity – and the surrounding counties that are economically related to the nodes". EAs can be aggregated to form larger areas, such as Major Economic Areas (MEAs) and Regional Economic Area Groupings (REAGs). There are 176 EAs nationwide.

CMA: Cellular Market Area. CMAs are standard geographic areas used for licensing cellular systems; they consist of Metropolitan Statistical Areas (MSAs) (defined by OMB) and Rural Service Areas (RSAs) (defined by the FCC). There would be more than 700 CMAs nationwide.

PEA: Partial Economic Area. PEAs are subdivisions of EAs based on the CMA boundaries; they are smaller than EAs and they separate rural from urban markets to a greater degree than EAs. CCA contemplates 350 PEAs nationwide.

(Continued from page 1)
gramming to others for IP distribution and (b) posts its own programming on its own website for viewing would fall into both categories.

What is required of VPOs and VPDs?

VPOs. VPOs must "[s]end program files to [VPDs] with captions . . . with at least the same quality as the television captions provided for the same programming". Basically, VPOs are responsible for ensuring that the programming as provided to the VPD contains the necessary captioning. The rule does not require use of any particular captioning technology or standards for this – to the contrary, the rule allows VPDs and VPOs to make that determination by mutual agreement. However, the rule does provide a "safe harbor" for VPOs: their captioning will be deemed to have satisfied the rule if they provide captions to the VPD using the Society of Motion Picture and Television Engineers Timed Text format (SMPTE ST 2052-1:2010: "Timed Text Format (SMPTE-TT)" 2010). (Specs for that SMPTE standard may be found at this link.)

VPOs are responsible for ensuring that the programming as provided to the VPD contains the necessary captioning.

VPDs. VPDs must in turn "[e]nable the rendering or pass through of all required captions to the end user, maintaining the quality of the captions provided by the video programming owner and transmitting captions in a format reasonably designed to reach the end user in that quality". So upon receipt of the captioned programming files from the VPO, the VPD must transmit all of that content to its viewers, and the VPD must ensure that the captioning is properly displayed on the end user's device. If the VPD's delivery of programming to end users depends on particular applications, plug-ins or devices, all such apparatus must comply with relevant FCC rules. Each VPD must also make available to its end users contact information for the VPD's representative to whom captioning-related complaints may be directed. That person must be in a position to ensure compliance with the rules. The contact information must include (in addition to the individual's name), her/his title, telephone number, fax number, postal mailing address and e-mail address. (That information must be kept current and updated within 10 days of any change.)

Joint Obligations. Additionally, VPOs and VPDs share a common obligation to agree on a mechanism by which the VPO will alert the VPD, on an ongoing basis, as to whether any particular programming is subject to the IP captioning requirements. One such mechanism described in the rules is a "certification" process by which the VPO certifies to the VPD that the programming is not required to be captioned and explains why that is the case. If the VPD can produce such a certification to the Commission in the event of a complaint, then the VPD will be off the hook should a complaint about lack of captioning be filed. (The VPD will still have to make good faith efforts, using whatever the agreed-to mechanism is, to identify programming that must be captioned.)

The VPO and VPD can come up with some alternative notification mechanism. The VPD in such cases may ask the FCC to review the mechanism to determine whether the VPD may rely on it.

Additionally, if a VPO eschews the SMPTE-TT standard and agrees with a VPD to utilize some different standard, both VPOs and VPDs may be found responsible if the quality of the captions is not the same as the equivalent television captioning for the same programming. For these purposes, the "quality" of captioning will be determined by reference to such factors as completeness, placement, accuracy, and timing.

What programming must be captioned for IP distribution? The question of what programming must be captioned is a bit complicated. The main rule provides that ***all*** "nonexempt full-length video programming delivered using Internet protocol" must be captioned ***as long as*** the programming is "published or exhibited on television in the United States with captions" as of certain dates. The term "video programming" is in turn defined as "[p]rogramming provided by, or generally considered comparable to programming provided by, a television broadcast station, but not including consumer-generated media". To simplify (and possibly over-simplify) all that, it's probably safe to start with the assumption that any programming (other than "consumer-generated media") that has been broadcast, with captioning, on a U.S. TV station on or after September 12, 2012 (the effective date of the IP captioning rules) is likely subject to the IP captioning requirement.

Still, application of the general rule entails multiple additional inquiries.

What is "consumer-generated media"? This is any content – audio, video, multimedia – created by consumers and made available by them to online websites and services. Videos posted on YouTube are a common example. Note, however, that if a full-length program that includes consumer-generated media is shown on TV with captions, then the IP version of the same program must also be captioned.

What is "nonexempt" programming. VPOs

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and VPDs may petition the FCC for full or partials exemptions from the captioning requirements based on the economic burden captioning would impose. The rules set out in detail the process through which such an exemption may be requested, including the provision of public notice and comment on the petition. The rules also set out the necessary contents of the petition. Note: As long as a petition for an exemption based on economic burden is pending, the Commission will treat the subject programming as exempt from captioning.

What is "foreign programming"? The IP captioning requirements apply only to programming that has been "published or exhibited on television in the United States". Accordingly, if programming has appeared on TV ***only*** in some foreign country and ***not*** in the U.S., it is not subject to the IP captioning rules.

What is "full-length" programming. The term "full-length video programming" is defined in the rules as "[v]ideo programming that appears on television and is distributed to end users, substantially in its entirety, via Internet protocol, excluding video clips or outtakes." "***Outtakes***" in this context is any content not used in an edited version of the programming as shown on television.

The term "video clips" is defined, unhelpfully, as "[e]xcerpts of full-length video programming".

The term "***video clips***" isn't so easily dealt with. It is defined, unhelpfully, as "[e]xcerpts of full-length video programming". Precisely how brief an "excerpt" must be in order to qualify as a "video clip" is not specified. Similarly, content is not necessarily determinative: for example, promotional materials may or may not constitute "full-length" programming. The Commission has indicated that, where "substantially all" of a full-length program as shown on television is made available by IP, that is ***not*** a mere "video clip". Similarly, the Commission has warned that "shav[ing] off a few minutes (or brief segments)" from a 30-minute program does not relieve the parties of IP captioning requirements. Ditto where a full-length program is broken into segments, each of which is separately distributed by IP.

But telling the difference between "clips" and "full-length" programming may not make much difference in the foreseeable future because, as noted, the Commission is leaning toward requiring IP-delivered clips to be captioned, too. Before it imposes that new obligation, though, the FCC wants to hear from programmers about the burdens – financial and practical – that clip-captioning would likely impose. The Bureau asks about the amount and quality of clip-captioning already available and the extent to which such captioning is increasing. It also wants to know what exactly is involved in the captioning process of clips for IP distribution, that is, what technical challenges does that process present. If some, but not all, clips should be captioned, which subsets should be in and which should be out, and why?

As television stations increasingly use the Internet to make their product available 24/7 on that medium, increasing attention should be paid to such chores as captioning. Any TV licensees who have not fully focused on this aspect of their use of the Internet may want to take this commenting opportunity to get themselves fully up to speed on it.

A note about "archived" programming. When it adopted the IP captioning rules nearly two years ago, the Commission recognized that a significant amount of uncaptioned programming had already been provided to VPDs and placed in VPD libraries before the programming had been shown on television with captions. No IP captioning of such archival programming by VPDs is required ***as long as*** the programming is not shown on television with captions. Identifying such programming – and then taking it off-line to add captions to it – poses serious technical difficulties. Accordingly, the Commission determined that the IP captioning requirements relative to such archival programming would be deferred until March 30, 2014, and would thereafter be subject to a somewhat relaxed captioning schedule. In particular:

For uncaptioned IP-delivered programming already in a VPD's library, no IP captioning is required even if the programming is shown on TV with captions ***as long as*** it is not shown on TV on March 30, 2014 or thereafter.

If such archival programming is shown on television with captions ***on or after March 30, 2014 but before March 30, 2015***, the VPD must provide captions ***within 45 days*** of the date on which the programming is shown on television. The time for adding captions shrinks to ***30 days*** for programming shown with captions between ***March 30, 2015 and March 29, 2016***, and then shrinks again to ***15 days*** for programming shown with captions ***on or after March 30, 2016.***

A VPO is required to update all VPDs with respect to any change in the status of any archived programming changes. The FCC has not prescribed any particular mechanism for such updates – the parties may develop a notification system that is mutually agreeable.

Complaints. Finally, be advised that the FCC has developed a complaint system which is featured prominently on its website. That system requires VPOs and VPDs that receive complaints to respond to them within 30 days.

Shades of HAL!

Ghost in the Machine?

By Harry F. Cole
cole@fhhlaw.com
703-812-0483

We all remember HAL, the creepy monotone computer from *2001: A Space Odyssey* that developed an unpleasant independent streak. (Click here for a clip of HAL's big scene.) Science fiction, right? Maybe not. It seems that, like HAL, the FCC's Consolidated Database System (CDBS) may be developing a mind of its own.

CDBS, of course, is one of the Commission's crucial electronic interfaces with the Real World. Broadcasters file applications and reports of all sorts through CDBS, which in turn regularly spits out public notices reflecting (among other things) application filings. Those public notices are issued daily and can run anywhere from a few pages to a few hundred pages, depending on the level of filing activity. Since inclusion of an application listing in such a Broadcast Applications public notice usually establishes deadlines for related filings, the notices are an important, if prosaic, component of the FCC's regulatory system.

So it struck a number of observers as odd when, in recent weeks, public notices about renewal applications for a couple of FM translators and an LPTV station included the following comment:

> NOTE: BASED ON OUR INITIAL ANALYSIS OF THIS APPLICATION AND OTHER PUBLICLY AVAILABLE INFORMATION, INCLUDING ADVERTISING REVENUE SHARE DATA FROM THE BIA DATABASE, THE COMMISSION INTENDS TO CONDUCT ADDITIONAL ANALYSIS OF THE OWNERSHIP CONCENTRATION IN THE RELEVANT MARKET. THIS ANALYSIS IS UNDERTAKEN PURSUANT TO THE COMMISSION'S OBLIGATION UNDER SECTION 310 (D) OF THE COMMUNICATIONS ACT, 47 U.S.C. SECTION 310 (D), TO GRANT AN APPLICATION TO TRANSFER OR ASSIGN A BROADCAST LICENSE OR PERMIT ONLY IF SO DOING SERVES THE PUBLIC INTEREST, CONVENIENCE AND NECESSITY. WE REQUEST THAT ANYONE INTERESTED IN FILING A RESPONSE TO THIS NOTICE SPECIFICALLY ADDRESS THE ISSUE OF CONCENTRATION AND ITS EFFECT ON COMPETITION AND DIVERSITY IN THE BROADCAST MARKETS AT ISSUE AND SERVE THE RESPONSE ON THE PARTIES.

(You can see that notation here (at page 25), and here (at page 181), and again here (at page 37).)

Old hands will recognize that particular verbiage as reminiscent of notations that the Commission used to include with respect to certain assignment or transfer applications that were thought to raise possible concentration of control questions. Those notations were part of an effort, in place from 1998-2003, to "flag" potential problem applications.

But the flagging process generally involved neither renewal applications nor secondary services (like FM translators and LPTVs), and in any event it hasn't been around for about a decade.

So why have the "flag" notations suddenly reappeared?

Beats us.

The FCC may want to sic a team of IT specialists on the problem.

We posed that question to some folks at the FCC and were surprised to learn that the Commission's staff appeared to be equally at a loss to explain the phenomenon. From the guarded responses we got, it looks like CDBS has, on its own, taken to adding the notation to random applications without much rhyme or reason. The notations were apparently not intended to be inserted into any of the public notices – we have no reason to believe that anybody at the Commission is looking to re-institute the long-gone "flagging" process – but they showed up nonetheless. We understand that the staff, now alerted to the problem, has taken to searching for such notations and manually deleting them from the public notices before they go out the door.

We applaud the staff for making extra efforts to prevent the inclusion of obviously extraneous (and potentially confusing) notations in the FCC's public notices. But shouldn't the Commission go further and get to the bottom of why CDBS is acting up like this?

Again, the public notices issued daily based on CDBS have considerable legal significance, so the Commission – and everybody who relies on those notices – should be troubled by the notion that the notices may contain inaccurate information. Rather than rely on manual troubleshooting by Media Bureau staff who have lots of other things to do, the Commission – in the interest of ensuring the reliability of CDBS and, by extension, its other electronic systems – may want to sic a team of IT specialists on the problem.

For a demonstration of how the problem might be resolved, click here.

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agreed with MTP that most of the longstanding bases for treating broadcasters differently under the Constitution had been swept away by technological advancement and subsequent Supreme Court decisions. As Kozinski sees it, the scarcity rationale matters only when the supposedly scarce spectrum is the primary means of getting information to the public. But in a world of Internet and cable/satellite TV, broadcasting is certainly not the only, and possibly not even the primary, means of doing so anymore, so even if intermediate scrutiny analysis may have been justified in the past, that is no longer the case today.

Personally, this writer finds the dissent far more persuasive than the majority opinion (and that's not just because I admire Kozinski's writing style). The government's argument about the supposed risks presented by political/issue advertising on NCE stations is weak at best. Skepticism should be required any time the government restricts speech, and in my view even a modicum of skepticism dooms the government's argument here: while commercial advertisers might seek to shape the content of NCE broadcasters to reach more desirable audiences, that is far less likely with political advertisers, and there is certainly no evidence to justify the restriction. Ordinarily, *some* evidence is required to support an abridgment of First Amendment rights.

Whether rampant NCE commercialization would actually happen is far from clear.

Interestingly, in his dissent Kozinski seems to encourage MTP to take its case to the Supreme Court. Brushing aside the majority's reliance on well-established Supreme Court precedents, he counters that those earlier decisions have been "decimated" by intervening developments. His none-too-subtle message appears to be that the Supremes might now be open to re-thinking their historical reliance on "intermediate scrutiny" for broadcasters in First Amendment cases.

If Kozinski is right, the results could be far-reaching.

The last decade has, for good or for ill, seen some groundbreaking campaign finance cases. The Supreme Court's *Citizens United* opened the doors for corporate spending on behalf of (though supposedly not in coordination with) candidates. *SpeechNow.Org v. FEC* (out of the D.C. Circuit *en banc*) led to the creation of so-called "Super-PACS". Sometime in 2014 we are likely to see whether another restriction – cumulative limits on donations to campaigns – will fall with *McCutchen v. FEC*. This Court is obviously not shying away from full engagement on the campaign law front. Section 399b's prohibition against political and issue-oriented advertising could attract the Court's attention.

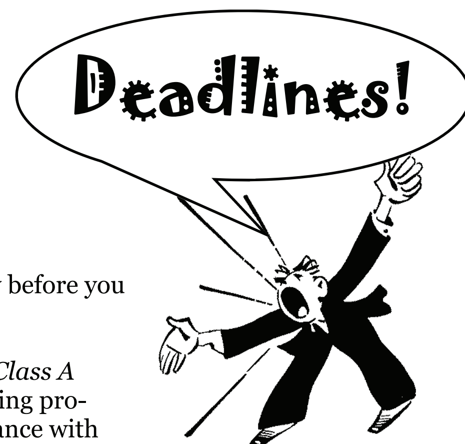
And if the Supremes were to toss out Section 399b? The specter of widespread commercialization on NCE stations may send a chill down the spine of many NCE audience members, but the prospect of public unhappiness has not stopped the Supreme Court in the past. (Some reports suggest that the public is already strongly opposed to the Court's recent campaign financing decisions, even if the public may not particularly understand them.)

Whether rampant NCE commercialization would actually happen is far from clear. NCE stations might be tempted by the deep well of political money – somewhere between $1 billion and $6 billion in campaign spending in the 2012 elections alone –into which they might finally be able to dip their fund-raising buckets. Still, many NCE folks, fearing unhappy viewers/listeners and a consequent reduction in contributions, might be reluctant to succumb to that temptation.

But if Kozinski is guessing right and the Supremes were to see this case as an opportunity to re-think *Red Lion* and its progeny, the ultimate impact on the broadcasters as a whole could be tremendously significant: the industry might enjoy full First Amendment protections for the first time in decades. Sure, the Court has passed on similar opportunities in recent years but, as Kozinski observes, the Court has veered away from longstanding precedent in the past. This writer wouldn't be opposed at all to a similar change of path here.

As always, check on CommLawBlog.com for updates.

We wish you the happiest of holidays and peace in the new year.



January 10, 2014

Children's Television Programming Reports – For all *commercial television* and *Class A television* stations, the third quarter 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 order to file the reports. We suggest that you have that information handy 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.

January 21, 2014

AM Revitalization – Comments are due in response to the Commission's broad Notice of Proposed Rule Making aimed at revitalizing the AM radio service.

February 1, 2014

Radio Post-Filing Announcements – *Radio* stations located in **New Jersey** and **New York** 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 television* 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. 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 **Delaware** and **Pennsylvania** 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 television* stations located in **Texas** 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.

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February 3, 2014

Radio License Renewal Applications – *Radio* stations located in **New Jersey** and **New York** 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 **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.

EEO Public File Reports – All *radio* and *television* stations *with five (5) or more full-time employees* located in **Arkansas**, **Louisiana**, **Kansas**, **Mississippi**, **Nebraska**, **New Jersey**, **New York** and **Oklahoma** 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 **Kansas**, **Nebraska** and **Oklahoma** 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 **Arkansas**, **Louisiana**, **Mississippi**, **New Jersey** or **New York** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323-E.

February 18, 2014

AM Revitalization – Reply Comments are due with regard to the Commission's Notice of Proposed Rule Making aimed at revitalizing the AM radio service.

FHH - On the Job, On the Go

On January 14, **Frank Jazzo**, **Scott Johnson**, **Harry Cole** and **Dan Kirkpatrick** – along with **Bobby Baker**, the head of the FCC's Political Programming Staff – will present a webinar on political broadcasting for members of a number of state broadcast associations. Registrations are limited. Check with your state association to determine if they're participating.

And about a week later (January 22, to be precise), **Scott** will take the show on the road, presenting a Political Broadcast Law Seminar for the Alabama Broadcasters Association in Birmingham. Also on the bill **– Bobby Baker**. Scott advises that they're planning to direct some of their presentation to advertising agency reps as well as broadcast owners, managers and sales folk.

Wrapping up the month, **Scott** will be in Columbia, South Carolina on January 30 for the South Carolina Broadcasters Association's Winter Conference. Joined by the FCC's Doug Miller, he'll be presenting a Congressional and FCC regulatory update.

Frank Montero authored an Op Ed piece on the FCC's relaxation of its foreign ownership policy for Bloomberg BNA's *Telecommunications Law Resource Center*. **Frank** has also been invited to serve on the New Jersey Broadcasters Convention Committee. And, for the second year in a row, he's been asked by the Cardozo School of Law Moot Court Honor Society (in association with the University of Oxford's Programme in Comparative Media Law and Policy and the University of Pennsylvania's Annenberg Center for Global Communication Studies) to serve as a judge at the Americas Round of the Price Media Law Moot Court Competition at the Cardozo Law School in New York. The Price Media Law Moot Court Programme originated at Oxford University to foster an interest in international law governing freedom of expression issues. This year the Americas Round will be argued on January 22-26; it will feature teams from North America, Latin America and the Caribbean. In his spare time, **Frank** also plans to attend the Minority Media and Telecommunications Council's Fifth Annual Broadband and Social Justice Summit in Washington on January 15-16.

But what about copyright and localism?

Sports Blackout Rules on the Ropes?

By Dan Kirkpatrick
kirkpatrick@fhhlaw.com
703-812-0432

Looks like the clock is running out for the sports blackout rules.

In a Notice of Proposed Rulemaking (*NPRM*) the FCC has proposed their elimination, although the NFL, MLB, NAB and a number of network TV affiliates appear poised to mount a late-game defensive surge to try to save them. The outlook for the rules, however, isn't brilliant.

The sports blackout rules as they currently stand generally prohibit certain multichannel video program distributors (MVPDs – think cable systems, broadcast satellite services, open video systems) from carrying, within a protected geographical area, a live sporting event not available live on a local over-the-air (OTA) TV station in that area. You can find the rules themselves in Sections 76.111 (cable operators), 76.127 (satellite providers), 76.128 (application of sports blackout rules), 76.1506(m) (open video systems) of the FCC's rules. Importantly, the rules themselves are not the source of sports blackouts; rather, the respective professional leagues determine the availability of OTA game broadcasts. The FCC's rules effectively enforce league-initiated blackouts across the various MVPD services.

The FCC's rules effectively enforce league-initiated blackouts across the various MVPD services.

The blackout rules developed in a piecemeal fashion over the course of more than 50 years. Initially applicable to broadcast stations only (since the other video services didn't exist in the early 1960s), they were gradually expanded and tweaked as necessary to apply to the various MVPD services as those services came online and were embraced by the viewing public.

In the 1960s, the NFL, whose activities were limited thanks to antitrust litigation dating back to the 1950s, pressed Congress for permission to pool and sell as a package the TV rights of the league's teams. Congress agreed, passing the Sports Broadcasting Act of 1961 that exempted from antitrust laws the packaging of video rights by professional football, baseball, hockey and basketball leagues. The law also permitted leagues to blackout OTA broadcasts of home games within the home territory of a league member.

In those halcyon times it was believed that gate receipts were a team's primary revenue source; the ability to blackout coverage of local games was thought necessary to maximize attendance and, thus, receipts. From the leagues' perspective, the goal of the Sports Broadcasting Act was to allow the league to equalize revenues among its members. By contrast, the FCC emphasized that its concern was "not in ensuring the profitability of organized sports, but rather in ensuring the overall availability of sports telecasts to the general public". According to the FCC, the overall availability of sports telecasts was "of vital importance to the larger and more effective use of the airwaves" – a sentiment that most sports lovers would wholeheartedly endorse.

By the early 1970s, though, football fans were unhappy that they couldn't watch home games on local TV even when the games were sold out. Baseball, basketball and hockey fans were not similarly unhappy because, unlike NFL games, TV coverage of MLB, NBA and NHL games was not all pooled at the league level; rather, TV coverage of the majority of non-football games was subject to contracts negotiated between the individual teams and local TV stations.

At the urging of football fans, Congress added language to the Communications Act prohibiting blackout of local TV broadcast in a team's home territory if the game was being televised elsewhere (thanks to the league's TV deal) ***and*** the game was sold out 72 hours before game time. Although enacted only as a two-year experiment set to end as of December 31, 1975, this approach to blackout has lived on since then: The NFL has voluntarily imposed the approach since 1976 (although it was modified somewhat in 2012).

As cable, and then open video, and then satellite services gained footholds in the video arena, Congress and the Commission imposed variations of the original blackout rules on each, leading to the present-day state of affairs.

But in 2011, a number of groups petitioned the Commission to toss all the blackout rules. The groups – fan-based (Sports Fan Coalition, League of Fans) and/or traditional public interest (National Consumers League, Public Knowledge, Media Access Project) – view blackout rules as "anti-consumer" and no

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Dan Kirkpatrick Named Member

Fletcher, Heald & Hildreth is pleased to announce that Dan Kirkpatrick has accepted the firm's invitation to become a member of the firm.

Dan first joined FHH as an associate in October, 2009. His primary professional focus has been broadcasting. He has considerable experience with must carry and retransmission consent agreements, ownership, EEO and children's programming questions. And faithful readers of the *Memo to Clients* and CommLawBlog.com are doubtless familiar with his by-line.

Dan is a graduate of the University of Virginia Law School, where he was on the law review and a member of the Order of the Coif (the law school equivalent of Phi Beta Kappa). He received his undergraduate degree (in philosophy and psychology) from The College of William and Mary.

Outside the office, he's Mister Outdoorsman: cycling, marathons (eight under his belt so far, with a personal best of 3:18), and most other kinds of outdoor activity.

And for carbo loading, his preference runs to Belgian beers.

We're happy to have Dan on the team. He can be reached at 703-812-0432 or kirkpatrick@fhhlaw.com.

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longer necessary to protect gate receipts.

The FCC agrees: "It appears that the sports blackout rules have become obsolete."

But before it can take the rules off its books, the Commission must seek public comment. Hence the *NPRM*, where the FCC asks a wide range of questions, including: Does it have the authority from Congress to toss the rules? If so, what effect do the rules currently have, and would their retention serve any purpose? How do the blackout rules affect sports other than the NFL? Are gate receipts still the most significant source of revenue for professional sports teams and, if not, are the rules still necessary to ensure availability of sports telecasts to the public?

The prospect of eliminating the blackout rules raises thorny questions on at least two other fronts. First, because of compulsory copyright licenses to which MVPDs are entitled under the copyright laws (and the related must-carry laws), in the absence of the blackout rules MVPDs might be entitled to retransmit OTA games broadcast by distant stations even when broadcast of such games in the MVPD's local area is blacked out. Avoiding that result could force renegotiation of a wide range of agreements involving TV networks, their affiliates, the sports leagues and MVPDs. Would such renegotiation really be necessary and, if so, would it be practical? (The NFL suggests that renegotiation would be both necessary and hugely complicated; the petitioning fan groups disagree.)

A second issue also flows from the copyright laws: Would elimination of the blackout rules prompt sports leagues to abandon OTA television coverage in favor of direct carriage on MVPD platforms? This concern arises from the fact, noted above, that MVPDs are entitled to retransmit OTA broadcasts in certain circumstances thanks to the compulsory copyright license. That license arguably undermines the leagues' – and particularly the NFL's – ability to control retransmission of their games. Since the compulsory license does not apply to non-OTA transmissions, leagues interested in exercising maximum control of their game content might, absent governmentally-imposed blackout rules, be inclined to abandon OTA broadcast distribution in favor of other methods – such as dedicated, MVPD-distributed sports channels or even Internet services (*e.g.*, MLB.tv).

The result would, in the view of the NAB and others, be a reduction in localism and the ability of local TV stations to make investments in "high quality, diverse informational and entertainment programming". Loss of OTA broadcast coverage would also impose costs on fans who could no longer access local games for free on TV. (Note, however, that the NFL has recently re-upped its deals with CBS, NBC and FOX through the 2022 season, so we're all presumably safe for the time being.) Whether those prospects will discourage the Commission remains to be seen.

While some, including maybe even the FCC, may view elimination of the sports blackout rules as a slam dunk, that's probably not the case. The complex interplay of copyright considerations and elaborate contractual relationships already in place could afford opponents an effective prevent defense. Grab a beer and some chips and stay tuned.

The deadlines for comments and reply comments in response to the *NPRM* have not yet been announced. Check back with CommLawBlog.com for updates.