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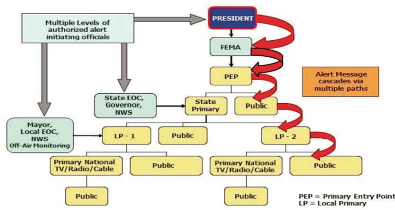
Memorandum to Clients

July 2014 News and Analysis of Recent Developments in Communications Law No. 14-07



Lessons learned from the nationwide test

FCC Seeks Input on EAS Fixes

By Harry F. Cole
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Following up on the request for comments released last September, the Commission has issued a Notice of Proposed Rulemaking (*NPRM*) seeking feedback on a number of possible changes to its Emergency Alert System (EAS) rules in the wake of the first-ever national EAS test conducted nearly three years ago.

While the test went reasonably well, all things considered, it did reveal a number of rough spots that need smoothing over. A couple of the problems involve header codes; others relate to the accessibility of messages, particularly for those with disabilities. Despite the fact that the changes may seem minor, though, they could impose some hefty new costs on EAS participants – so attention should be paid.

As to the header codes, first some explanation. The EAS system is, of course, a "daisy-chain" arrangement by which alerts percolate down through EAS participants and out to the public. An EAS alert – real or test – is triggered when a message is sent by an authorized person or office. The message contains a "header" consisting of certain coded components that permit EAS equipment down the daisy-chain to identify the originator of the message, the type of event in question, the geographic area affected by the alert and other useful information. It is obviously important that this coded information – particularly the "event" and "location codes" – be interpreted correctly by EAS gear downstream so that the message is accurately transmitted to the intended audience.

The goal of the 2011 test was to see how the EAS system would work if a nationwide Emergency Action Notification (EAN) – the kind of notice the President would transmit to all of us in an actual emergency – were to be sent.

Header Problem No. 1: The EAS rules don't include a location code for "nationwide". So in 2011 the Commission improvised, using the Washington, D.C. location code (since that would be a likely place from which the President might issue an alert). While most EAS participants received and transmitted the test, some ran into problems because their gear read the D.C. header to indicate that the emergency was "out of area"; they ended up cutting off the message part way through.

In response, the Commission is proposing an easy fix: designating "000000" (six zeroes) as the *national* location code. All EAS participants would be required to receive and process the code accordingly. According to the Commission, most EAS equipment already in the field can accommodate this change with minimum hassle or expense.

Header Problem No. 2: The rules currently contain no "event" code for a nationwide test. While there is an event code for periodic testing (*i.e.*, NPT, short for National Periodic Test), the NPT code doesn't work exactly right for an EAN situation. EAN's, being national and all, are required to be given the highest priority: EAS gear is required to bump any and all other emergency messages when an EAN comes knocking. Also, the rules provide that EAS equipment can be programmed to reset itself after two minutes, allowing the receiving station or operator to return to normal operation even if no "end of message" (EOM) code is sent. In effect, that means that normal EAS alerts are no longer than two minutes long. The NPT code is subject to that same limitation. But EAN's can be of any length at all. That being the case, the NPT does not perfectly emulate an EAN.

Back in 2011, the Commission (which initially envisioned a three-minute nationwide test) used the "live" EAN code, rather than the NPT code. That eliminated the possibility that the test would be overridden by some local EAS alert or

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One in a million

Coming Clean in the Net Neutrality Proceeding

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[*Editor's Note: While we have not previously covered the net neutrality proceeding in the Memo to Clients, it occurred to us that this particular item might both interest and amuse our readers. Props to the folks at* TechDirt.com*, which is where we learned of Mr. Schaake's filing*.]

Update: Word is that the total number of comments filed in the net neutrality proceeding leapt from around 650,000 the day before the original comment deadline, to more than 1,000,000 by the end of the extended comment period.

First, congrats to those of you who guessed right in your office's over/under on the comment total – but don't get too cocky. There are still a couple of months' worth of reply comments yet to show up, so be sure to read the fine print on your internal office pool rules before you claim any prizes.

Second, with the new total, we have to revise the estimates we laid out in our earlier post on CommLawBlog.com. At that point, we estimated (based on then-available numbers) that, if 650,000 comments had been filed, one FCC staffmember doing nothing but net neutrality comment review for 52 40-hour weeks per year, and processing one comment every five minutes, would take more than 26 years to complete the job. With 1,000,000+ comments now in hand, let's recalculate. Under the conditions we are positing – and now also assuming that the hypothetical staffer would be willing to work beyond the usual retirement age – he or she would require 40 years to complete review of 1,000,000 comments.

And third, we want to highlight one particular submission which arrived in the FCC's ECFS system on July 16. Filed by one Kurt Schaake (of Lawrence, Kansas), these comments consist, *in toto*, of a copy of the user instructions for a Whirlpool Dishwasher. True fact – you can find them for yourself by searching ECFS in Docket No. 14-28 (the Open Internet proceeding) or you can just click here to get there more quickly.

We're frankly at a loss to understand what exactly Mr. Schaake is trying to say with his comments, but it could be a profound commentary about net neutrality. Is it intended to suggest that the FCC needs to come clean in some sense? Possibly the reference to "whirlpool" is meant to summon images straight from Poe's *A Descent into the Maelstrom*, the implication being that the Commission is being sucked to the bottom of an unimaginably chaotic vortex from which the only escape is to abandon ship. (There's a bright side there, though: the narrator in Poe's story did survive.)

Maybe the message is that the FCC should not try to impose net neutrality regulations – after all, the "important safety instructions" ominously caution "do not tamper with controls".

Elsewhere, the instructions inform that "[e]fficient dishwashers run longer to save water and energy, just as driving a car slower saves on gas." Could that be a metaphor for Internet speeds? Apropos of speed, we are also told that "[h]eavier cycles and options affect cycle length" – isn't that one of the primary complaints about heavy Internet traffic generators, like Netflix? But we are then told that "[y]ou can customize your cycles by pressing the options desired" – does that reflect a preference for a "fast line/slow lane" approach to net neutrality?

Obviously, more study is in order here. We suspect it will take more than five minutes to fully grasp the implications. We invite readers to let us know what *you* think Mr. Schaake's comments mean.

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Looking ahead to 2015

Media Bureau Invites Comments on Blanket Extension for New Unbuilt Digital LPTV/TV Translator CP's

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If you're holding onto a construction permit for an unbuilt digital low power television (LPTV) or TV translator station, listen up. The Advanced Television Broadcasting Alliance (ATBA) has asked the FCC for a blanket extension (or rule waiver) – to September 1, 2015 – to complete construction of such stations. And the Media Bureau has now requested comments on ATBA's proposal (which was filed last February).

Although all full power television stations had to convert to digital operation in 2009, in 2011 the FCC extended the deadline for existing LPTV stations to terminate analog operation until September 1, 2015. That date was set as the expiration for all construction permits for flash cut from analog to digital on the same channel, or for digital facilities on a different channel (companion stations). But the FCC denied requests for similar relief for holders of construction permits for *new* digital LPTV stations. Instead, the construction deadlines for such permits were left at their original dates (*i.e.*, three years from their issuance), which meant that some such permittees face a deadline prior to September 1, 2015. Demonstrating that this was not just some inadvertent bureaucratic oversight, the Commission denied a request for reconsideration of the decision not to extend such permits.

It makes little sense to invest in any new digital LPTV facility now, not knowing whether that facility will have to be rebuilt on another channel after the expected channel repacking.

ATBA, whose Executive Director is Louis Libin, is one of two groups currently representing LPTV interests before the FCC. The other is the LPTV Coalition, headed by Mike Gravino.

As ATBA sees it, the reasons justifying an extension of flash cut and companion channel permits apply just as well to permits for new stations. LPTV stations are, of course, secondary to full power stations. As a result, many LPTV stations are likely to have to change channels – and some may not be able to find new channels and may be forced to shut down – after the anticipated repacking of the television spectrum into a smaller number of channels next year. It makes little sense to entrepreneurs to invest in constructing any kind of new digital LPTV facility now, not knowing whether that facility will have to be rebuilt on another channel in a few years, if it survives the repack in the first place.

Sure, there may be distinctions between incumbent LPTV stations and as-yet-unbuilt stations. But from an investment point of view, the risks are similar for both groups. Both incumbent licensees and unbuilt permit holders are, understandably, very unenthusiastic about buying and installing equipment that may not be usable for its normal life cycle. Moreover, you can't claim that permittees of new stations knew when they applied that they did so subject to the risk that a major channel repacking might be coming down the line: most of the applications for stations which remain unbuilt were filed in the 2009-2010 time frame, while the Middle Class Tax Relief and Job Creation Act – the statute which established authority for the Incentive Auction and TV spectrum repack– wasn't enacted until 2012.

In addition to equitable considerations, there are practical reasons for the FCC to consider granting some kind of blanket relief. Under existing rules, each LPTV permittee must file for extension of each permit. The Bureau takes the position that it is able to grant no more than two extensions of six months each; requests for any additional extensions must be referred to the full Commission for a vote. According to ATBA, the Bureau has processed 674 applications for first and second extensions so far, and we know that several applications are pending for third extensions. The individual permit-by-permit application requirement, coupled with the six-month limit on each extension and the need to get full Commission sign-off on extensions beyond the first two, imposes a significant burden on the permittees (who have to prepare that many more requests) *and* on the FCC itself, which then has to process that many more requests. Since it's clear that LPTV permittees are constrained, if not outright spooked, by the upcoming repack, it's equally clear that a blanket extension would simplify life for all involved and allow realistic investment decisions to be made.

Whether September 1, 2015, is a reasonable deadline is a different question. It may be convenient, since it coincides with the deadline for flash cut and companion channel construction, and it may have made sense at a time when, in the flush of early optimism, the FCC hoped to conclude the repack and Incentive Auction in 2014. However, the auction target date is now 2015. In addition, the FCC has promised to undertake a separate rulemaking proceeding to determine how it will deal with displaced LPTV stations, but that rulemaking isn't expected to start for another two months or more.

In other words, LPTV stations are not likely to know

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Once more, with feeling

Music Licensing Study Gets an Encore

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As our readers should know by now, the long-stable music licensing system may soon be in flux. Nearly every aspect of the licensing process is under scrutiny – even attack – on several fronts, and the possibility of change looms large.

Of course, you've got your Congressional hearings, which could lead to changes in the Copyright Act. Then you've got the Department of Justice review of the decades-old consent decrees governing ASCAP and BMI (remember, SESAC isn't subject to a consent decree). And the Copyright Office (CO) is looking not only at those same consent decrees, but also at a much wider range of licensing-related questions.

With so many governmental fingers in the pie, what's likely to get done?

A CO Notice of Inquiry requesting more comments in its "Music Licensing Study" may shed some light on that question.

I wrote about the CO's Study back in March. Looking to "evaluate the effectiveness of current methods for licensing musical works and sound recordings", the CO solicited public input. In response, it received 85 comments. (Click here to read any or all of the comments submitted. For a taste of eloquent passion not often found in stuff submitted to government agencies, you may want to check out the comments of songwriter Michelle Shocked.) The CO also held roundtables in Nashville, New York and Los Angeles.

Those preliminary opportunities for input identified "a number of significant issues" that the CO now believes "merit additional consideration."

First up: the ASCAP/BMI Consent Decrees. Two federal courts have recently held that, under the terms of the decrees as they now stand, music publishing companies (like SONY/ATV) representing individual songwriters cannot withdraw "selected rights" of their copyrighted works from ASCAP and BMI representation. In other words, SONY/ATV and others can't pick and choose which rights they'll manage themselves and which they'll delegate to ASCAP or BMI. So, for example, publishing companies cannot tell ASCAP or BMI that "we'll use you as the clearinghouse for public performance rights via radio and television, but we'll deal directly with anyone who wants to perform our songwriters' content digitally or use their songs in movies". When it comes to copyrights and ASCAP/BMI, it's all in or all out.

I identify SONY/ATV here because it's one of the companies that have recently announced that, given the "all in or all out" dictate, they're considering the "all out" option. That would mean withdrawing their entire catalogs from ASCAP/BMI and, instead, taking care of all copyright licensing in-house. Such a move could send shock waves through the music industry and change the way everyone using music does business.

Many CO roundtable participants expressed concern about that possibility and questioned its implications. How would such "direct" licensing between the publishing companies and the users work? If large publisher withdraw from ASCAP and BMI, what effect would it have on smaller publishers and individual content creators. How would such a withdrawal affect the royalty distribution practices of all performance rights organizations (PROs, *i.e.*, ASCAP, BMI and SESAC)?

> *How would "direct" licensing between the publishing companies and the users work?*

The second big ticket item: the future of the mechanical reproduction license. That's the license, found in Section 115 of the Copyright Act, which requires payment to songwriters for any mechanical reproductions of their works. ("Mechanical reproductions" can range from production of a cover song to creation of a digital download or utilization of a song in a podcast.) This conversation seems headed in one of two directions, both involving elimination of the Section 115 license. Under the first possibility, the current system would be replaced with direct negotiation between the user and the copyright owner (as is currently the case when someone wants to "synchronize" a musical work to audio in a radio commercial or video in a film or TV show). The second possibility: creation of an industry-wide sharing system that would allocate, pursuant to a certain formula, the royalties for any use of a song between both the owner of the musical work and the owner of the sound recording.

A third issue of likely interest to many of our readers: the Section 112 and 114 license applicable to the digital transmission of sound recordings, a/k/a "streaming" or "webcasting". While most roundtable participants seemed to think these licenses work well, many suggested tweaks to the ratesetting system.

Finally, many commenters expressed a need for standardization of the data relating to the ownership and identity of musical works and sound recordings, the International Standard Recording Code (ISRC) and/or International Standard Musical Work Code (ISWC). Such standardization would ideally make it easier to distribute royalties to songwriters and recording artists.

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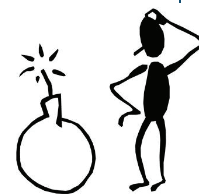
A small sign of progress?

Is the Fuse Lit on the C4 Proposal?



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A proposal to shoe-horn in another class of FM station between existing Classes A and C3 has taken a small but at least observable step ahead. We wrote about the proposal in the January, 2013 *Memo to Clients*, back when it first walked in the door at the FCC. Essentially, the idea is that the FM spectrum could be put to more efficient use if a new class of station – proposed ominous name: Class C4 – were to be established with maximum ERP of 12 kW and maximum antenna height of 100 meters.

The latest – actually, to this point, the only – indication of progress? The Commission has released a public notice formally identifying the petition for rulemaking (now dubbed "RM No. 11727") inviting interested folks to file "statements opposing or supporting" the petition within 30 days, *i.e.*, by Monday, ***August 18, 2014***.

If you think that a new C4 classification would be the answer to your prayers, feel free to let the FCC know. But don't get your hopes up. The invitation for comments is by no means a huge step. Rather, it's a ministerial action that offers no promise of any further progress at all, ever. And the fact that the petition has been pending for 18 months without even getting this far certainly does not suggest a high level of enthusiasm at the Commission.

Credit is due to Matt Wesolowski, the CEO of SSR Communications.

But it is, undeniably, a step. And for that, credit is due to Matt Wesolowski, the CEO of SSR Communications. The petition for rulemaking was filed in the name of SSR, and Mr. W has been working tirelessly in the intervening year and a half, encouraging interest within the ranks of FM licensees while pressing the Commission to move the petition forward. Congrats to him for getting the petition officially on the FCC's radar screen at long last. Where it will go from here may depend on the support – or opposition – the proposal receives from commenters over the next month. So if you do think this is a particularly good or particularly bad idea, now is the time to start letting the FCC know.

But regardless of how the comments shake out, don't be surprised if things continue to move slowly.

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Faced with all this input, the CO is now seeking even more. In general, it's looking for information on whether and how existing music licensing methods serve the music marketplace, including new and emerging digital distribution platforms. The Notice of Inquiry poses nine specific questions (summarized below) relative to the following four general subject areas:

Data and Transparency: How can the collection of information about musical works and sound recordings be improved? Are there ways to incentivize private actors to gather, assimilate and share reliable data? What identifiers are the most widely used now, and could they be more universally adopted? How can the transparency of this process be enhanced?

Musical Works: What would be the logistics, complications and implications of publisher withdrawal from ASCAP and BMI? Are there ways to improve the administration of PRO distribution now, particularly in view of that fact that songwriter income appears to be decreasing at a time when the PROs are claiming record high revenues and distribution? If the Section 115 mechanical license were to be eliminated, how would the transition work?

Section 112 and 114 license: Can Section 112 and 114 (or other) ratesetting proceedings before the Copyright Royalty Board be streamlined or otherwise improved?

International Music Licensing Models: Given the fact that various international music licensing models for the "reproduction, distribution, and *public performance* of musical works" differ from the U.S. approach, should the CO consider any of those other models as it continues to review the U.S. system?

(The Notice of Inquiry also includes the inevitable "catch all" question allowing for submission of any other relevant or thoughts.)

This question posed under the "International Music Licensing Models" heading seems innocuous. But is it? Could the CO be previewing changes to the Section 115 mechanical reproduction license? Or, by specifically including "public performance" (emphasized by me, above), could the CO signaling an interest in pushing hard for the implementation of a "Performance Right" applicable to over the air broadcasting?

We'll know soon enough. All comments are due by ***August 22, 2014***. Remember, there is no real formality to this process. If ou have thoughts on the issue, send them electronically via the Comment Page found at http://www.copyright.gov/docs/musiclicensingstudy (where you can also see the comments filed in the first go-round).

Flexibility, but not necessarily the good kind

Looking for a Way Around a Statute of Limitations?

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One thing you can say about the FCC: If it thinks it's caught a licensee in a violation, it can be persistent in their efforts to impose penalties for that violation. Whether those efforts are entirely consistent with the law is another question entirely.

With respect to any fine it issues, the Commission must consider the relevant statute of limitations. FCC forfeitures are subject to two separate such statutes. First, under Section 503 of the Communications Act, it can levy forfeitures for actions going back to the beginning of the current license term or one year, whichever is earlier.

Once the Commission has issued its formal "forfeiture order", a licensee can simply ignore that order. If the Commission wants to collect the fine in the face of such licensee inaction, it must convince the Department of Justice to sue the target licensee in federal district court. But a second, separate, statute (28 U.S.C. § 2462) says that lawsuits to enforce penalties must be started within five years of "the date the claim first accrued".

A recent forfeiture order reflects the Video Division's awareness of that latter limit and at least one way the Division has devised to try to sidestep it.

The case involves a full-power TV station whose license was last renewed in 1998; it filed for renewal in 2005, but that application (as often happens with TV renewals, seemingly so that the FCC can keep an open noose around a station's neck that it can tighten if it wants to) has yet to be granted. In the 2005 renewal application the licensee disclosed that it had failed to prepare its public file EEO report in 2004. In 2013 the station filed a supplemental renewal application, in which it disclosed that it had failed to file eight of its quarterly Children's Television reports on time during the preceding eight years.

Looking beyond what the licensee reported in its 2013 renewal, the staff checked the FCC's own records and discovered that, in addition to the admitted late filings, sometime between 1998 and 2005 the licensee had filed 14 other reports late.

In its Notice of Apparent Liability (NAL), the Division recited all those facts and then proposed to lower a $15,000 boom onto the licensee's head for failure to timely file its kidvid reports "for multiple quarters".

In response to the NAL, the licensee asked that the forfeiture be reduced because many of the violations occurred more than five years ago, meaning that Section 2462 would appear to prevent the government from trying to collect through the courts. The FCC refused. Instead, it issued a Forfeiture Order in which it added yet another claimed violation (of Section 73.3514, a rule section – not mentioned in the NAL – that requires an applicant to "include all information called for by [the application form]"). The Forfeiture Order also warned that, in any event, the most recent late-filings (in 2012 and 2013) alone would justify the proposed $15K fine.

> *The staff does not seem to have been especially confident of its fall-back position.*

The Forfeiture Order is remarkable for a couple of reasons.

First, the Division's blithe addition of a previously unmentioned violation – the one involving Section 73.3514 – seems to violate Section 503(b)(4) of the Communications Act. Section 503(b)(4) requires the FCC to issue an NAL citing the precise rules supposedly violated ***before*** it can impose a forfeiture. The statute does not appear to authorize the Commission to toss into a forfeiture order extra supposed violations that didn't happen to be mentioned in the initial NAL. So the sudden appearance of Section 73.3514 is unusual, to say the least.

Second, the reference to a supposed violation of Section 73.3514 is plainly an effort to sidestep the five-year statute of limitations. As noted above, Section 73.3514 requires that applicants must provide all the information called for in Commission applications. Recall that the Commission concluded (based on its own review of Commission records) that the licensee had not mentioned in its 2005 renewal application that 14 of its Children's TV reports between 1998-2005 were filed late.

Having noted the licensee's argument about the five-year statute of limitations, the Forfeiture Order refers to the 73.3514 "violation" as "an alternative basis for the forfeiture". Its reasoning: since the licensee failed to report, in its 2005 renewal applications, the 14 late filings that occurred between 1998-2005, that viola-

(Continued on page 11)

Once more, with fining

Update: FCC Re-Whacks TV Max

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If you've been wondering whatever happened to TV Max, wonder no more. As you may recall from the July, 2013 *Memo to Clients*, TV Max is the MVPD in the Houston area that – in the FCC's view – broke the television carriage rules by retransmitting over-the-air stations without getting their permission to do so. If that doesn't ring a bell, how about $2.25 million, which is the amount of the fine the Commission proposed to dump on TV Max in a Notice of Apparent Liability for Forfeiture and Order (NAL).

As is customary, TV Max was given an opportunity to plead its case in response to the NAL, or at least argue that the forfeiture amount should be reduced. It did so, and after giving TV Max's arguments the usual compassionate consideration you might expect, the Commission has now reaffirmed the $2.25 mil in a harsh Forfeiture Order.

The only real surprise here is that the Commission didn't hammer TV Max even harder.

The only real surprise here is that the Commission didn't hammer TV Max for even more. For at least a couple of reasons.

We won't sift through all the background here. Our colleague Paul Feldman did a good job of setting the table in his July, 2013 article (which we highly recommend). One thing you need to know to appreciate the Forfeiture Order is that, in the NAL, one important factual question involved when TV Max had supposedly completed installation of certain MATV facilities. Was it March, 2012 (which would be good for TV Max) or July, 2012 (not good for TV Max)? Unfortunately for TV Max, it had advised the Commission that July, 2012 was the correct date, but only after TV Max's CEO had initially said that March, 2012 was the correct date. According to TV Max (in a July, 2012 statement), the contradiction was the result of an error by TV Max's counsel. So in the NAL the Commission assumed that July, 2012 was the correct date, which was bad news for TV Max.

But wouldn't you know, in its July, 2013 response to the NAL, TV Max returned to its original claim that all the necessary gear *had* been installed by March, 2012. What about TV Max's seemingly contrary July 2012 statement? That, according to TV Max's latest claim, was the result of (wait for it) another error by TV Max's counsel!

The Commission wasn't buying that retread excuse, particularly because it was contradicted by a long list of other TV Max submissions (a list that fills a footnote extending more than half a page). Not surprisingly, the FCC concluded that TV Max's latest claim was "disingenuous" and intended "to obscure the egregiousness of [TV Max's] misconduct." Ouch!

On another front, the Commission routinely allows NAL targets to try to demonstrate that a fine should be reduced because the target doesn't have the financial ability to pay. It is well-established in such situations that the party pleading poverty has to produce reliable records (like tax returns, financial statements prepared according to generally accepted accounting principles, that kind of thing). TV Max did submit some financial materials. The Commission took a look and described them as a "hodge-podge of financial data . . . calculated to prevent the Commission from drawing any meaningful conclusions regarding TV Max's inability to pay claim". Double ouch!

There are more nuggets in the Forfeiture Order, but you get the idea. It seems like TV Max was doing everything it could to prompt the FCC to up the fine well beyond $2.25 million.

The Commission, however, declined to take the bait – it mercifully stuck with the already prodigious $2.25 million. And in another unexpected display of charity, the Commission addressed the Forfeiture Order only to the business entities related to TV Max, and not to their individual principals. The NAL had indicated that the individuals would be on the hook for the fine, but the Forfeiture Order takes that off the table, at least for now. (A footnote does leave open the possibility of personal liability somewhere down the line, though.)

Whether the case will stop here or continue on into some court remains to be seen. But, as our earlier article noted, it's hard to imagine that this matter is likely to end well for TV Max.

More developments on the retransmission front

Image obtained from www.aereo.com

Aereo Loses First Round in Copyright Office, Dish Wins its Next Round in the Ninth Circuit

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Aereo – the gift that keeps on giving, at least when it comes to newsworthy content. As we reported on CommLawBlog in early July, after it got its clock cleaned at the Supreme Court, Aereo bounced back with Plan B, which amounted to declaring itself (a) a cable system and, thus, (b) eligible for the compulsory copyright license granted to cable systems. But you can't just say "I'm a cable system" and expect anybody to believe you. So Aereo went ahead with some of the paperwork required of f'real cable operators; among other things, it filed a bunch (14, to be exact) of Statements of Accounts with the U.S. Copyright Office, along with some royalty and fee payments amounting to the princely sum of $5,310.74.

A nice gesture, but wouldn't you know it, the Copyright Office (CO) was not inclined to play along with the gambit. In a brief letter dated July 16, 2014, the CO let Aereo know that, as far as the CO is concerned, Aereo is ***not*** a cable system entitled to the compulsory license. As it turns out, more than a decade ago the CO had concluded that "internet retransmission of broadcast television fall outside the scope" of the compulsory license. That's bad news for Aereo, whose system is firmly – indeed, exclusively – based on Internet retransmission.

> *Though obviously down, Aereo still may not be entirely out.*

The CO also noted that, in the ivi, Inc. case in 2012, the U.S. Court of Appeals for the Second Circuit had agreed with the CO's interpretation. That's even worse news for Aereo because, at least for the last couple of years, the Second Circuit has been Aereo's BFF in its nationwide litigation wars. Of course, Aereo's view is that the Supreme Court's decision effectively overruled *ivi* so *ivi* really isn't good law anymore. But that's a tough argument to make (credibly, at least) when the Supremes didn't even mention *ivi* in their opinion. Normally, when the Supreme Court wants to overrule something, it'll say so.

Though obviously down, Aereo still may not be entirely out. Despite its view that Aereo is definitely not a cable system, the CO recognized that Aereo is still hip deep in litigation concerning its status. Since Aereo has advanced the "Look-at-me-I'm-a-cable-system" claim in court (*i.e.*, before Judge Nathan in the remand phase of the District Court proceeding in New York) and the court hasn't yet resolved the question, the CO decided not to reject Aereo's submissions out of hand. Instead, the CO is going to hold Aereo's Statements of Accounts and its $5,310.74 check for the time being, just in case Aereo gets lucky. (For Aereo's sake, we hope that the CO is holding that cash in an interest-bearing account, since Aereo's other revenue streams seem to be drying up.) But the CO warned Aereo that it's entirely possible that the CO may change its mind and take "definitive action" on Aereo's filings, action that could include formal rejection of those filings.

Meanwhile, in another proceeding quasi-related to Aereo's travails, a panel of the U.S. Court of Appeals for the Ninth Circuit has declined to enjoin Dish Network from continuing to offer its "Dish Anywhere" and "Hopper Transfers" services. Fox has sued Dish in California, claiming that those two services infringe on Fox's copyrights.

As we have seen in the various Aereo cases, standard operating procedure in such circumstances calls for the broadcast plaintiff to request an injunction to stop the alleged infringer in its tracks until the litigation is completed. Aereo successfully fended off such an injunction before both Judge Nathan and then, on appeal, the Second Circuit. But the Supreme Court reversed those lower decisions, strongly suggesting that an injunction should have issued.

But in the Dish case, in a decision issued *after* the Supreme Court had acted in *Aereo*, the Ninth Circuit did *not* enjoin Dish. Some observers seem mystified that, in the wake of the Supreme Court's *Aereo* decision, the Ninth Circuit could seemingly flout the Supremes' opinion by refusing to enjoin an alleged infringer.

But there's a perfectly simple explanation here.

Recall that, in order to obtain an injunction, a party must make a four-prong showing. One of those prongs calls for the moving party to demonstrate that it will suffer irreparable harm if the injunction is not granted. Another prong requires a showing that the moving party is likely to prevail on the merits of the case at trial.

In *Aereo*, while Judge Nathan had agreed that Aereo's operation could cause the plaintiff broadcasters irreparable harm, she was not convinced that they would ultimately prevail on the merits. That was because of the Second Circuit's 2008 *Cablevision* decision, which Aereo persuasively argued was controlling in the *Aereo* case. So the focus of the Second Circuit's *Aereo* decisions *and* the Supreme Court's opinion was the question of likelihood of success on the merits.

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.media is The Message

Calling all media-related folks interested in getting in on the ground floor of a new opportunity. The Top Level Domain (TLD) ".media" is now available. Come one, come all. For the measly sum of $39.99, you could lay claim to your own private piece of the Internet labeled "[YOURNAME].media". (That assumes, of course, that that particular domain name hasn't already been scooped up.) Check with your favorite registrar to see if they're offering ".media" registrations; if they're not, we know for sure that GoDaddy is. We have previously written about the impending arrival of more than 1,000 new generic TLDs, so ideally readers are familiar with the lay of the land. (If not, check out the posts at this link.)

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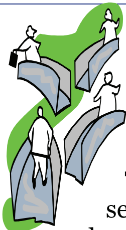
By contrast, in the Dish case, the trial court had concluded that Fox was not going to suffer irreparable harm; accordingly, the court declined to enjoin Dish. Fox's appeal to the Ninth Circuit thus had nothing to do with the likelihood of success on the merits criterion. Rather, it was all about irreparable harm. The Ninth Circuit reviewed the record and, invoking an appropriately deferential standard of review, concluded that the trial court's decision was OK: Fox had not established that it would suffer irreparable harm absent an injunction, so its request for an injunction was correctly denied.

To be sure, we expect that Aereo's cookies are seriously frosted at the thought that Dish avoided an injunction within a matter of a week or two after Aereo got whacked in the Supremes. But the two cases have little to do with one another, at least as each of them currently stands in its respective litigation process. There may come a point at which the issues in both will overlap, in which event it may be reasonable for Aereo and the rest of us to expect conformity between the two. But with respect to the two cases in their present postures, it's apples and oranges.



FHH - On the Job, On the Go

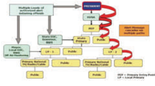
The usually stay-at-home **Harry Cole** will be visiting Austin on August 6-7 to attend this year's Texas Association of Broadcasters Convention and Trade Show. **Harry** will be appearing on a D.C. Regulatory Update panel on August 7.

The following week **Frank Jazzo** will be a panelist for the "Blending Law, Legislation and Politics" session at the 66th Conference of the Tennessee Association of Broadcasters on August 13 in Murfreesboro.

Scott Johnson is set to visit both the South Carolina Broadcasters Association *and* the Alabama Broadcasters Association in August. In South Carolina **Scott** will be a part of the annual STAR Awards program on August 9. At the 2014 ABA Conference in Alabama, **Scott** and the NAB's **Ann Bobeck** will address legislative and regulatory issues on August 15. (Word is that their presentation will be quiz show style – think Jeopardy!). The same day **Kevin Goldberg** will present a program to the ABA Conference on all things music licensing.

It's been a busy July for **Frank Montero**. He attended the U.S. Chamber's Congressional Conference entitled *A 21st Century Broadband Policy: Dynamic Competition, Investment and Innovation* at the Rayburn House Office Building on July 16. On July 28 he moderated a panel (title: *Broadcast Resuscitation*) at the MMTC Access to Capital Conference in Washington. Meanwhile, his article, *Performance Royalties: The State of Play*, was published in Radio Ink's annual *40 Most Powerful People in Radio* issue, too. **Frank** may be taking some time off in August, but he'll be back strong in September, when he's scheduled to attend back-to-back affairs in Indianapolis – first, the RAIN (Internet Radio and Digital Media) Summit on September 9, and then the NAB Radio Show from September 10-12.

And speaking of the Radio Show, count **Davina Sashkin** in, too. She's already slated to appear on a legal and regulatory panel (along with the FCC's **Peter Doyle** as well as a FEMA rep) on September 10.



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cut short at the two-minute mark. But, because EAN messages include no reassuring "This is only a test" notices, use of the EAN code required many EAS participants to improvise by providing their own "This is not a test" notices while the actual message, triggered by the EAN, contrarily announced a national emergency.

The Commission is now thinking about requiring that the rules regarding the NPT code be amended to specify that that code "fully emulate" the EAN code, meaning that it would override all other messages and permit messages of indeterminate length. That proposal is not without its own drawbacks, though. While no significant changes to already-deployed EAS gear are believed necessary to accommodate the "six zeroes" national location code, it would be considerably more expensive, and time-consuming, to develop and deploy an EAN-emulating NPT code.

That puts the Commission in a bind. An NPT code that acts just like an EAN would provide a more reliable gauge of the likely effectiveness of the EAS system in a nationwide emergency – and that would be good. But to achieve that could be expensive for EAS participants, which would be bad. Also bad: the delay factor. As the *NPRM* ominously observes, a presidentially-initiated national emergency alert "could come at any time". Additionally, FEMA has advised the Commission that FEMA would like to run another test in the relatively near future – but such tests could be seriously delayed if significant changes in the system must be made first.

It's clear that changes are on their way, but it's still not clear precisely what those changes will be.

Rather than resolve the emulation issue, the FCC solicits more input on such questions as:

- ? How much would it cost to develop an EAN-emulating NPT;
- ? How much time would it take;
- ? Are there any reliable alternatives (*e.g.*, a test-bed set-up) that might be used to determine whether any or all of the EAS daisy-chain system would reset after two minutes in an NPT situation;
- ? Would an EAN-emulating NPT really take as long as three years to develop.

Header Problem No. 3: The header includes a coded element that specifies "when the message was initially released" by the originator. The problem there is that the time code in a message's header may be different from the time that the message is received downstream. But the Commission's rules provide that EAS messages are to be retransmitted as soon as they are received by EAS participants.

This problem surfaced during the 2011 test, when the message that FEMA sent out included a 2:03 p.m. time code, even though the test had long been announced, and promoted, as occurring at 2:00 p.m. Some EAS participants received the message at 2:00 but held off on transmitting it until 2:03, as the header code seemed to direct. Wrong. As the Commission now makes clear, "EAS equipment must transmit the EAN immediately upon receipt, regardless of the Time of Release provided by the alert originator." Accordingly, EAS equipment should be programmed to, in effect, ignore any time code in the header that would delay any retransmission of the message.

With respect to accessibility questions, the Commission notes that, during the 2011 test, some viewers had trouble reading visual comments. Accordingly, it plans to adopt "minimum standards" for crawl speed, completeness and placement of EAS visual crawls. Acknowledging that its existing video captioning rules address precisely such accessibility questions, the FCC says it's ready to utilize the same general approach taken in those rules to tweak the EAS rules. (Curiously, the Commission asks for comments on some of the nitty-gritty standards that should be imposed, which suggests that, in their current form, the captioning rules – which one might have thought to be a reliable source for such things – don't provide adequate answers.)

Also, because the visual and aural components of EAS messages are not necessarily generated by an identical source, in some instances during the 2011 test the two components appeared to be giving inconsistent information. The Commission's response? "We believe that for an EAS alert to be fully accessible, the audio and visual elements should convey the same message." It's hard to argue with that. But the FCC's unsure about how to achieve such conformity, so it's asking for suggestions.

In addition to the technical operation of the system, the FCC is looking to make permanent the reporting process it used in 2011, but with a couple of minor tweaks that should make life a bit easier for all concerned.

Bottom line on all this: It's clear that some changes to the EAS system are on their way, but it's still not clear precisely what those changes will be, how much they will cost, or how much time will be available to come into compliance. (On that last question, the Commission is currently figuring that six months should be plenty of time once the final rules are adopted.)

Reflecting the Commission's concern about imposing unwarranted costs on EAS participants, the *NPRM* also requests detailed cost/benefit analyses. But don't expect such analyses to be especially persuasive. The

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tion is "continuing", meaning that "a new claim accrued each day that the Licensee failed to report the violation, and therefore the [five-year] statute of limitations does not apply." That seems a somewhat self-serving interpretation of "continuing violation", particularly since any failure to report would ordinarily be thought to have occurred back in 2005, when the licensee, um, failed to report.

Third, the staff does not seem to have been especially confident of this fall-back position, because in a footnote in the Forfeiture Order, it opined that the late-reporting violations that occurred in 2012 and 2013 would in any event be sufficient on their own to support the entire $15,000 forfeiture. In other words, even if the older violations are beyond collection, the newer ones – *i.e.*, violations well within the five-year limit – will still enable the Commission to sue for collection.

What good is a statute of limitations on collection if the FCC can avoid it by some simple artifice?

But if that's the case, what does that say about the fine calculation process? After all, in its NAL determination that a $15,000 fine was warranted, the Division described a total of 22 late-filing violations. But the footnote in the Forfeiture Order says that 2012-2013 late filings (eight in number, apparently) warrant precisely the same fine. And let's not forget that the Forfeiture Order also purports to drag in Section 73.3514 as yet a further violation, the precise cost of which, forfeiture-wise, isn't indicated. While 'regulatory flexibility' is a popular principle often touted by the FCC, flexibility along these lines is troubling.

The Forfeiture Order's strained effort to dodge the five-year statute of limitations is also troubling. Note that the order does not deny the existence of that limit; to the contrary, the order tries to sidestep it. But what good is a statute of limitations on collection if the FCC can avoid it by the artifice of recharacterizing old time-barred violations as new, not-barred, violations? The Commission's apparent preference for holding licensees liable indefinitely for potential forfeitures flies in the face of centuries-old pronouncements by such prominent jurists as John Marshall. (FYI – Way back in 1805 Marshall said, "In a country where not even treason can be prosecuted, after a lapse of three years, it could scarcely be supposed, that an individual would remain for ever liable to a pecuniary forfeiture." Those words have been cited by the current Supreme Court as recently as last year. Marshall's colleague, Joseph Story, was of a similar mind: "it would be utterly repugnant to the genius of our laws, to allow [civil penalty] prosecutions a perpetuity of existence.")

As always, though, the problem with fighting FCC forfeitures is that a judicial appeal costs more than the forfeiture. So it's not surprising that most practical licensees run the cost/benefit numbers and end up caving in and paying the Commission. Eventually, though, we suspect – and certainly hope – that someone will blow the whistle on the Commission's forfeiture practices.

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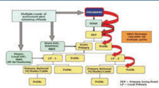
more about their long term fate by September 1, 2015, than they know now: their fate will be determined at least in part by how many full power and Class A television stations participate in the Incentive Auction and how many TV channels the FCC will be able to reallocate for wireless use based on the auction results.

Other questions include whether TV translators should be given the same relief as LPTV stations and whether a September 1, 2015, deadline should apply only to construction permits granted prior to September 1, 2012. If that deadline were imposed on permits granted after September 1, 2012, it would in effect truncate the normal three-year construction period for those stations.

Comments on the ATBA proposal are due to be filed by ***August 14, 2014***. Reply comments may be filed by ***August 29***. Comments may be uploaded to the FCC's ECFS online filing site; refer to Proceeding No. 03-185.



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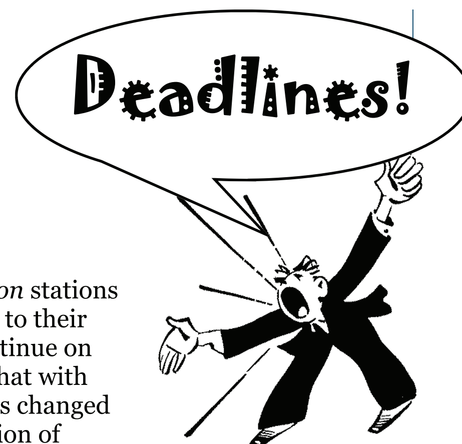
FCC estimates that the total cost of the changes it envisions would top out at $13.6 million – not an insignificant sum. But the Commission then observes that a risk-reduction model used by Department of Transportation "estimates the value of risk reduction, measured in terms of an expected life saved, to be $9.1 million". So all it would take would be two lives saved to offset the anticipated $13.6 million upgrade costs. If the DoT model is going to be used, the net upgrade costs aren't likely to amount to much, no matter how high the gross costs may appear.

Nevertheless, there are obviously a lot of open questions about which the FCC seems sincerely to be seeking input. If anybody has any good ideas, now is the time to toss them in. The deadline for comments is ***August 14, 2014*** and the deadline for reply comments is ***August 29***. Comments and replies can be submitted electronically at this site; use Proceeding No. 04-296.



August 1, 2014

Television License Renewal Applications – *Television* and *Class A television* stations located in **California** 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. LPTV and TV translator stations also must file license renewal applications.

Television Post-Filing Announcements – *Television* and *Class A television* stations located in **California** must begin their post-filing announcements with regard to their license renewal applications on August 1. These announcements then must continue on August 16, September 1, September 16, October 1 and October 16. Please note that with the advent of the online public file, the prescribed text of the announcement has changed slightly from that used in prior renewal cycles. 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.

Television License Renewal Pre-filing Announcements – *Television* and *Class A television* stations located in **Alaska**, **American Samoa**, **Guam**, **Hawaii**, **Mariana Islands**, **Oregon** and **Washington** must begin their pre-filing announcements with regard to their applications for renewal of license on August 1. These announcements then must be continued on August 16, September 1 and September 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 **California**, **Illinois**, **North Carolina**, **South Carolina** and **Wisconsin** 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 **California**, **North Carolina**, and **South Carolina** 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 **Illinois** and **Wisconsin** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323-E.

August 14, 2014

EAS Revisions – Comments are due with regard to proposed revisions to the Emergency Alert System (EAS) to address problems encountered during the first-ever nationwide test of EAS that took place on November 9, 2011.

August 29, 2014

EAS Revisions – Reply comments are due with regard to proposed revisions to the Emergency Alert System (EAS) to address problems encountered during the first-ever nationwide test of EAS that took place on November 9, 2011.

September ?

Regulatory Fees **–** At some point, likely in September and certainly before September 30, 2014, annual regulatory fees will be due. These will be due and payable for Fiscal Year 2014, and will be based upon a licensee's/permittee's holdings on October 1, 2013, plus anything that might have been purchased since then and less anything that might have been sold since then.

October 1, 2014

Television License Renewal Applications – *Television* and *Class A television* stations located in **Alaska**,

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American Samoa, **Guam**, **Hawaii**, **Mariana Islands**, **Oregon** and **Washington** 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. LPTV and TV translator stations also must file license renewal applications.

Television Post-Filing Announcements – *Television* and *Class A television* stations located in **Alaska**, **American Samoa**, **Guam**, **Hawaii**, **Mariana Islands**, **Oregon** and **Washington** must begin their post-filing announcements with regard to their license renewal applications on October 1. These announcements then must continue on October 16, November 1, November 16, December 1 and December 16. Please note that with the advent of the online public file, the prescribed text of the announcement has changed slightly from that used in prior renewal cycles. 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.

Television License Renewal Pre-filing Announcements – *Television* and *Class A television* stations located in **Connecticut**, **Maine**, **Massachusetts**, **New Hampshire**, **Rhode Island** and **Vermont** must begin their pre-filing announcements with regard to their applications for renewal of license on October 1. These announcements then must be continued on October 16, November 1 and November 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 **Alaska**, **American Samoa**, **Florida**, **Guam**, **Hawaii**, **Iowa**, **Mariana Islands**, **Missouri**, **Puerto Rico**, **Oregon,** the **Virgin Islands** and **Washington** 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 **Alaska**, **American Samoa**, **Florida**, **Guam**, **Hawaii**, **Mariana Islands**, **Puerto Rico**, **Oregon**, the **Virgin Islands** and **Washington** 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 **Iowa** and **Missouri** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323-E.

October 10, 2014

Children's Television Programming Reports – For all *commercial television* and *Class A television* stations, the third quarter 2014 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, as the FCC bases its initial judgments of filing compliance on the contents and dates shown in the online public file. Please note that the FCC's filing system now requires the use of FRN's prior to preparation of the reports; therefore, you should 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.