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Memorandum to Clients

November 2014

News and Analysis of Recent Developments in Communications Law

No. 14-11

Five more years!

With STELAR, Congress Re-Ups STELA

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Christmas is coming early this year … if, that is, you're a direct broadcast satellite (DBS), cable or other MVPD operator, or a low power TV licensee. Not so much if you're a full-power TV licensee, although there may be a little something under the tree for you, too.

All this is thanks to Congress, which has passed the STELA Reauthorization Act of 2014, commonly known as "STELAR". All that remains is for President Obama to put his John Hancock on it, which we can expect to happen before New Year's Eve. While the primary purpose of STELAR is (as its name suggests) to extend the provisions of STELA (*i.e.*, the Satellite Television Extension and Localism Act of 2010), Congress couldn't resist the temptation to tweak a number of provisions relating to MVPDs (DBS and others).

The major DBS-specific provisions of STELAR include:

Five More Years for STELA. The principal purpose of STELAR is to extend provisions of STELA, and, in particular, the exemption enjoyed by DBS operators from having to obtain retransmission consent for the carriage of distant network signals to "unserved households". STELAR extends those provisions five years beyond their current expiration date of December 31, 2014.

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Of course, STELA served largely the same purpose for provisions of SHVERA (the Satellite Home Viewer Extension and Reauthorization Act of 2004), which did the same for SHVIA (the Satellite Home Viewer Improvement Act of 1999), which did the same for SHVA (the Satellite Home Viewer Act of 1988). Starting with SHVA, those statutes created, and then extended (usually in serial five-year increments) the right of satellite TV providers to retransmit the signals of local broadcast stations. Why Congress has been reluctant to make these provisions permanent is not clear, but the result has been a new act, every five years, extending and tweaking various aspects of the laws governing DBS operation.

STELAR also extends an expiring provision of the Copyright Act that gives DBS operators a compulsory copyright license for carriage of distant TV signals.

Market Modifications for Satellite and Cable Carriage. Historically, the Communications Act has permitted cable operators and broadcasters to propose the addition or deletion of communities from a station's local market for must-carry purposes. However, there hasn't been any parallel opportunity for market modifications in the DBS carriage context. STELAR changes that: DBS operators and broadcast stations will now have the right to seek DBS market mods based on factors similar to those applicable to cable market mods.

The DBS market mod provisions tweak a number of areas. With an emphasis on the "value of localism", the factors to which the FCC is supposed to pay "particular attention" in market mod matters include:

- whether the station has been carried historically (on cable or DBS) within the community to be added or deleted;
- whether the station provides coverage or other local service to such community;
- whether the proposed market modification would "promote consumers' access to in-state television stations". (This factor is new for both DBS *and* cable market mod proceedings.);
- whether any other TV station eligible for DBS carriage in the community in question provides news, sports or

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It's almost December, 2014

Do YOU Comply with the CALM Act?

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With December just around the corner, full power TV licensees and MVPDs should probably be checking their compliance with our old friend, the Commercial Advertising Loudness Mitigation Act (you probably know it as the CALM Act) and the related FCC rules.

When the FCC's rules governing the "loudness" of TV commercials were first adopted, they were set to take effect on December 13, 2012. One-year waivers were available which, if granted, took the compliance deadline to December 13, 2013. One-year extensions of those waivers were also available; anybody who received such an extension has until December 13, 2014 – less than a month – to get with the program.

The two one-year waivers were expressly provided for by Congress in the CALM Act. But Congress also confirmed that the FCC retains its general authority to waive its rules if the public interest warrants. So theoretically, anybody currently facing a December 13, 2014 deadline may – and we emphasize ***may*** – be able to get a further extension.

But we wouldn't count on it.

Recall that, this past summer, the Commission updated the CALM Act rules to incorporate a revised Recommended Practice (RP). The deadline for complying with that new RP is June 4, 2015. But the Commission was careful to emphasize that that new deadline would *not* affect the deadline for complying with the original RP. One party suggested that previously-granted deadline waivers should be extended to the June, 2015 date because the gap between the December, 2014 and the June, 2015 deadlines will force some TV stations and MVPDs to "pay twice for the equipment and software package needed to comply with the CALM Act". The Commission wasn't buying that. It emphasized that "all regulated entities with existing financial hardship waivers must comply with the CALM Act rules when their financial hardship waivers expire".

Again, further extensions/waivers of the December, 2014 deadline may still be requested pursuant to the Commission's conventional waiver process. But unlike the relatively easy waiver standard applicable to the first two years' worth of extensions, any further extension requests will likely require a showing of extraordinary circumstances. We won't be surprised if, in assessing any new extension/waiver requests, the FCC falls back on the standards it laid out in 2012 for waiver requests submitted by entities that didn't qualify as "small businesses". Those standards required the submission of: (1) evidence of the requester's financial condition; (2) an estimate of the cost of the necessary equipment; (3) a "detailed statement explaining why its financial condition justifies postponing compliance"; and (4) an estimate (with support) of how long it will take to comply.

Another important difference from the last time around: any waiver request must be affirmatively granted by the FCC before a station can consider itself relieved of CALM act obligations. (Under the waiver regime that applied specifically to the first two rounds of CALM Act waiver/extensions, requests were automatically "deemed granted" if they met certain criteria.)

It's also worth noting that, while the FCC's CALM Act rules clearly apply to full power TV stations and multichannel video program distributors (MVPDs), they don't apply to LPTV stations. Some FCC staff have informally advised that Class A stations must comply with the CALM Act – BUT this had never been explicitly, and formally, stated in any published order. Moreover, a footnote in an FCC decision and the language of the CALM Act itself suggest that Class A stations are exempt.

Bottom line: December 13, 2014 appears to be a hard deadline for those of you subject to the CALM Act rules. Good luck.

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Do the math . . .

Unconsented-to Phone Call Recording + Unresponded-to Inquiry = $35,000 Penalty

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Ah, the telephone call rule. Section 73.1206. The fact that we've written about it at all is surprising – surprising because the rule is so clear and so simple that *any* violation of it comes as something of a surprise. And now we have an even more surprising instance: a television licensee (make that *former* licensee – more on that below) managed to get cross-wise with the telephone rule. While such TV violations are not unheard of, the more common instances of phone rule transgressions involve radio station announcers who place on-air prank calls to unwitting victims. So the fact that the Enforcement Bureau has brought a $35,000 hammer down on a TV station serves as a reminder that Section 73.1206 limits *all* broadcasters, radio and TV alike.

Unfortunately, we don't know many details of the violation in question. That's because the guilty licensee entered into a Consent Decree, *i.e.*, essentially a plea deal. The Decree itself says only that, on August 21, 2012, the Commission received a complaint alleging that, the day before, Station KTVX had "twice broadcast a recorded telephone conversation without prior notification to the other party to the conversation", a telephone rule violation to which the licensee eventually confessed without further elaboration.

The telephone rule is alive and kicking, and the Enforcement Bureau is ready, willing and able to enforce it.

Despite this lack of specifics, the Consent Decree does provide a few take-home lessons.

First and foremost, the telephone rule is alive and kicking, and the Enforcement Bureau is ready, willing and able to enforce it. For anyone who may still be fuzzy on the niceties of the rule, here's how the Bureau has previously described it:

[*B*]*efore* broadcasting *or recording* a telephone conversation for later broadcast, a licensee must inform any party to the call of its intention to broadcast the conversation, except where such party is aware, or may be presumed to be aware from the circumstances of the conversation, that it is being or likely will be broadcast.

(Those are the Bureau's italics, not ours.) To paraphrase, when a broadcaster wants to air a telephone conversation, live or recorded, the mike can't be opened and the recorder can't be started unless and until notice of the broadcast/recording has been given – and if, upon receiving the notice, the caller chooses not to participate further, that's the end of the matter. (The limited exceptions apply to call-in shows or other contexts in which the caller may be presumed to have consented to the recording.)

Second, as noted, the rule applies to TV as well as radio. In fact, it seems to apply more forcefully to the former than the latter because here the TV licensee got whacked for $35K. Historically, violations on the radio side tend to draw penalties of $4K or so. But the penalty in this case may have been increased because of an unusual quirk, which leads us to the third take-home here.

As noted, the violation occurred on August 20, 2012. But a month earlier the licensee had filed an application to sell the station; that application was pending when the complaint rolled in. It appears that the licensee was advised of the complaint because, according to a footnote to the Consent Decree, the licensee entered into an agreement "related to the [proposed] assignment" to place funds in escrow to cover the liability that might arise from the allegation. The assignment was then approved in October, 2012 and closed two months later.

Meanwhile, apparently nothing was done about the complaint until April, 2014 – some 20 months after the alleged violation and 17 months since the licensee had stopped being the licensee. In early April, 2014, the Enforcement Bureau finally got around to sending a letter of inquiry (LOI) to the now-former licensee.

The now-former licensee didn't bother to respond to the LOI – and still hasn't responded to it. Why? The Consent Decree doesn't say. But like Alex Forrest, the Bureau is not going to be ignored. It appears that the Bureau somehow managed to contact the licensee, enter into "discussions" with it and, voilà, the Consent Decree emerged. The Decree doesn't explain how the $35,000 penalty figure was arrived at, but it's possible that $25K is attributable to the failure to respond to the LOI. Even then, that would leave $10K attributable to the telephone rule violation, a significantly greater amount than might have been expected if the station involved had been radio rather that TV.

So the final lesson here is that, even if you have stopped being a licensee, the FCC will likely hold you responsible for transgressions that occurred while you were still a licensee. At a minimum, they will expect you to respond to their inquiries about such transgressions (or alleged transgressions). That being the case, it's best not to ignore *billets doux* from the FCC whenever they might arrive.

Flo and Eddie's Excellent Adventures in Copyright-land!

New Hope for Old Performance Right Holders

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The concept of performance rights royalties has been given three limited, but potentially significant, shots in the arm by two judges in California and one in New York. As a result, the date of February 15, 1972 could become less of a barrier preventing artists who recorded songs prior to that date from demanding royalties for the public performance of their recordings.

This is mainly thanks to two of the Turtles, Howard Kaylan and Mark Volman a/k/a Phlorescent Leech and Eddie a/k/a Flo and Eddie. (Curious about those *noms de disque*? It's a long story that involves the Mothers of Invention .) They have successfully sued SiriusXM Radio for royalties arising from its performance of pre-2/15/72 Turtles tunes.

These decisions open the door for mid-20th Century artists to recover royalties from services like SiriusXM, Pandora – and even, in some instances, broadcasters.

These decisions (and another strongly influenced by them) open the door for mid-20th Century artists to recover royalties from services like SiriusXM, Pandora – and even, in some instances, broadcasters (more on that below) – for playing their songs. And make no mistake, the number of artists in question is huge, including the Turtles, obviously, but also the Beatles, the Stones, Hendrix, Led Zeppelin, the Beach Boys, the classic Motown acts, etc., etc., to name just a small handful of artists whose works are still on many playlists today, more than 40 years down the road.

Background – The significance of February 15, 1972. The significance of February 15, 1972 for copyright purposes is not all that well-known among the general public (though recent efforts on Capitol Hill in the form of the RESPECT Act and an accompanying campaign launched by SoundExchange called "Project 72" are changing that). It involves both little understood legal intricacies and even some basic concepts of copyright as applied to music. Let me explain.

As you should all know by now, every recorded song you hear consists of two separately copyrighted works: (a) the "musical work", which is the underlying song (*i.e.*, the music and lyrics); and (b) the "sound recording", which is the version of the song you're hearing at that particular time.

For example, the song "Happy Together" was written by Garry Bonner and Alan Gordon (fun fact: Messrs. Bonner and Gordon had been members of The Magicians. Who knew?). Anytime folks want to use "Happy Together" – whether by performing their own live cover in a bar or concert venue, or by inserting a recording of the song in a TV show, movie or commercial, or by making their own recording of it – they have to pay royalties for that privilege to whoever owns the copyright in the musical work. Here the owners were originally Bonner and Gordon, but often ownership is held by a music publishing company. Radio and televisions stations know that the royalties they pay for performance of musical works go to ASCAP, BMI or SESAC, who represent copyright owners for that purpose.

Lots of people – including Weezer, Petula Clark, the Captain and Tenille, Frank Zappa, the Red Army Band and the Leningrad Cowboys – have recorded "Happy Together". Each different version is a distinct sound recording the copyright to which is owned by the performer (or, more often, the performer's record label). This separate copyright is known as the "performance right" (denoted by the "P in a circle" symbol).

The performance right is relatively new. It was established by Congress in 1971 and became effective on (you guessed it) February 15, 1972, meaning that, under Federal copyright law, recordings made prior to that date were ***not*** subject to that particular statutory copyright protection.

The Federal copyright law provides considerably less protection for the performance right than it does for the "musical work" copyright. Originally, while the 1971 Act did provide the performance right copyright holder exclusive control over the reproduction and distribution of the recorded performance, it did ***not*** afford the holder ***any*** control over the public performance of the recording. It was not until 1998 that the public performance of ***post***-2/15/72 recordings obtained any Federal protection at all, and then that protection extended only to digital transmission of sound recordings, *i.e.*, webcasting, digital downloads, satellite radio services like Sirius XM, but NOT conventional over-the-air radio broadcasts. That still left ***pre***-2/15/72 recorded performances with zero Feder-

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al copyright protection.

Nearly all the states – 49, to be precise – have stepped up to extend state law protections to pre-2/15/72 sound recordings. (Only Vermont has no state law in this area.) Most of these laws, however, are anti-piracy statutes, designed to prevent unauthorized copying or "bootlegging" of recordings. These laws do not apply to the over-the-air broadcast performance of sound recordings. In fact, all but one of the 49 states offering protection to older sound recordings have explicit carve outs specifying that the laws do ***not*** create any public performance right in broadcasting. (Tennessee is the lone exception on this front.)

It has not been clear, however, whether those state statutes protect any *non-broadcas*t "public performances" of the recordings.

Flo and Eddie go to court(s). Flo and Eddie certainly thought California and New York provided precisely such protection, which is why they sued SiriusXM in Los Angeles Superior Court *and* the U.S. District Court for the Southern District of New York, alleging violations of state laws protecting sound recordings, the common law torts of conversion and misappropriation, and unfair competition. (Their L.A. case was eventually removed to Federal District Court in L.A.; they also sued in Florida, but that case is still pending.) They're not the only litigants either, as major record labels have filed suit against SiriusXM and against Pandora as well.

Flo and Eddie have plenty of reasons to push the issue.

As a practical matter, Flo and Eddie and other older recording artists have plenty of reasons to push the issue. Think about it. One of their main revenue streams – music sales – is clearly decreasing, an industry-wide phenomenon. Others – concert tickets and related merchandise – are probably decreasing as well. After all, if you first recorded a song before February 15, 1972, you're probably well beyond the age where you want to tour regularly (or could command significant revenues from shows or merchandising). So identifying and tapping new revenue streams is presumably important. How better to do that than by forcing SiriusXM, Pandora and others who have historically not paid royalties on the pre-1972 songs to finally do just that?

Flo and Eddie win in Cali. On September 22, 2014 Judge Phillip Gutierrez of the United States District Court for the Central District of California granted a summary judgment motion in favor of Flo and Eddie on their claim that Sirius XM had infringed their exclusive right to control public performance of their pre-2/15/72 recordings. (He also found for Flo and Eddie on most of their other claims. Curiously, he concluded that they had not demonstrated that SiriusXM had violated their right to control reproduction of their recordings; that issue will presumably proceed to a full trial.)

The basis for Judge Gutierrez's decision was Section 980(a)(2) of the California Civil Code. That section expressly vests "exclusive ownership" of any pre-2/15/72 recording in the recording's copyright owner. According to Gutierrez, the concept of "exclusive ownership" in this context includes the exclusive right to perform those recordings. SiriusXM had argued that Section 980(a)(2) doesn't explicitly include a right of public performance; Judge Gutierrez did not agree. As a result, SiriusXM's repeated playings infringed Flo and Eddie's performance right copyright.

Record labels join the fight in LA. Capitol Records, SONY, UMG, Warner and ABKCO joined forces to sue SiriusXM in LA Superior Court, claiming (like Flo and Eddie) that, by streaming records from their pre-1972 catalogs, SiriusXM has infringed their public performance rights under California law. The record companies asked the presiding judge, Judge Mary H. Strobel, for a jury instruction that, under California law, ownership of a sound recording includes exclusive digital public performance rights. The specific language they were looking for was:

> The owner of a sound recording "fixed" (i.e., recorded) prior to February 15, 1972, possesses a property interest and exclusive ownership rights in that sound recording. This property interest and the ownership rights under California law include the exclusive right to publicly perform, or authorize others to publicly perform, the sound recording by means of digital transmission--whether by satellite transmission, over the Internet, through mobile smartphone applications, or otherwise.

Judge Strobel initially reached a "tentative" conclusion *not* to agree to that instruction. But then came Judge Gutierrez's decision described above. Within a month, Judge Strobel had re-thought the question and concluded that the requested instruction accurately reflects California law.

So while the labels' case still has to get to the jury, once it gets there it's hard to see how the labels could lose. Think about it for a second. The labels can presumably show without difficulty that SiriusXM played various songs recorded before February 15, 1972 in which the plaintiffs hold all copyrights. And while SiriusXM's position has apparently been that it owes the labels nothing because Internet- or satellite-based performances don't trigger any royalty obligation for that kind of thing, the now-endorsed jury instruction effectively scuttles that claim. So if the jury receives that instruction, it likely has to rule in the labels' favor.

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As Bob Dylan wrote (and originally recorded on January 15, 1965): "It's All Over Now, Baby Blue". I can't see any way that SiriusXM wins this particular case.

Like Judge Gutierrez, Strobel recognized that Section 980 of the California Civil Code isn't entirely clear as to whether ownership rights in a pre-1972 sound recording include the right to publicly perform that recording. She noted that that section had been amended *after* Congress created federal rights in post-1972 sound recordings for the first time. (The federal rights give copyright owners the right to control public performance of their sound recordings via almost any transmission method, including satellite and Internet but ***not*** including over-the-air broadcasting.) From that she *initially* concluded that (a) the California legislature must have known about public performance rights when it amended Section 980 and (b) the legislature's failure then to expressly provide for such rights must mean that the legislature didn't intend to create such rights.

But on reading Gutierrez's decision, she became convinced that California had indeed recognized all the rights that Congress had created. (The logic: Section 980 includes a specific carve-out that provides that "covers" are not infringements. Since Congress had included such "covers" in the federal law along with public performance rights, Judge Strobel reasoned that, had California wanted to exempt public performance rights, it would have carved them out as it did with "covers". Since Section 980 has no such carve-out, the California legislature must have not have intended any exemption.)

Flo and Eddie win big in the Big Apple. In the New York case, Judge Colleen McMahon of the U.S. District Court of the Southern District of New York joined her West Coast colleagues by taking a big step toward granting Flo and Eddie summary judgment on the liability element of their claim against SiriusXM. (If she concludes that summary judgment is the way to go, the case will proceed to a damages phase where a dollar figure can be attached to that liability.)

But Judge McMahon went a bit beyond the California decisions: her opinion may pave the way for judges in other states to hop on the bandwagon more easily, and it may also include a veiled warning for broadcasters as well.

No New York state statute addresses copyright protection the way that Section 980 in California does. Instead, for more than 50 years New York courts have developed a body of copyright-related "common law" relative to sound recordings. So if there's a public performance right to be found in New York law, Judge McMahon had to find it in the court opinions that comprise the state's "common law". She did so, and her opinion is probably the scariest from the perspective of SiriusXM, Pandora and other digital streamers because it is the opinion least grounded in the particulars of the available state laws. In other words, her analysis is pretty "generalist" and should be easy for judges in other states to adapt to their own jurisdictions.

Looking at other New York copyright decisions, McMahon found that there was no explicit recognition of public performance rights for pre-1972 sound recordings. BUT – and this is a big but – she did find plenty of support for the notion that public performance rights are part of the overall bundle of rights encompassed by copyright ownership in any creative work. In particular, New York courts had historically protected public performance rights in other artistic areas, such as plays and compilations of film clips.

This analysis could stack the deck in favor of copyright holders in pretty much any state.

SiriusXM argued, though, that while some such creations might have been protected, there is no indication in the case law that similar protections had been extended to sound recordings. True enough, answered McMahon, but that doesn't prove that the protections didn't exist; rather, it only proves that sound recording copyright holders failed to avail themselves of those protections. (By way of analogy, she point to the fact that the Supreme Court "failed to grapple with many fundamental constitutional questions for the first 150 years of the Constitution's existence.")

Moreover, expanding on her view that ownership of a copyright brings with it a comprehensive bundle of rights, she found that a copyright holder is normally deemed to hold the entire bundle of rights unless state law – statutory or common law – has provided some specific carve-out of one or more of those rights. Since no such carve-out for public performance rights for pre-1972 sound recordings is evident in New York law, Judge McMahon rejected SiriusXM's claims.

This aspect of McMahon's analysis is perhaps the worst news for SiriusXM, Pandora and other digital streamers because it seems to stack the deck in favor of copyright holders in pretty much any state. Under this approach, the lack of express statutory *or* common law for public performance rights for pre-1972 sound recordings is immaterial as long as the state has (a) previously recognized copyright interests generally *and* (b) not explicitly declared that public performance rights are *not* part of a copyright owner's bundle of rights. That analysis is likely to come down in favor of copyright holders in the vast majority, if not all, of the states.

This is a variation of the analysis applied in the California cases – but the difference here is that California had a copyright statute that provided useful guidance; in

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New York, Judge McMahon was left to interpret historical silence, which she did in favor of the copyright holder. To the extent that such silence on the topic of public performance rights is likely to be found in most other states, judges in those states now have Judge McMahon's guidelines to follow. (Of course, those guidelines are *not* binding on courts in other states, but other states' judges can certainly choose to follow McMahon's lead if they are persuaded by her analysis.)

Judge McMahon also rejected a number of other SiriusXM arguments, but her "public performance" rights analysis is likely to have the greatest impact. McMahon herself acknowledged that her decision is unprecedented (other than the parallel California litigation) and that it will have "significant economic consequences". In that vein she observed that

> [r]adio broadcasters – terrestrial and satellite – have adapted to an environment in which they do not pay royalties for broadcasting pre-1972 sound recordings. Flo and Eddie's suit threatens to upset those settled expectations. Other broadcasters, including those who publicly perform media other than sound recordings, will undoubtedly be sued in follow-on actions, exposing them to significant liability. And if different states adopt varying regulatory schemes for pre-1972 sound recordings, or if holders of common law copyrights insist on licensing performance rights on a state-by-state basis (admittedly, an unlikely result, since such behavior could well cause broadcaster to lose interest in playing their recordings) it could upend the analog and digital broadcasting industries.

The biggest impact may still be on the horizon.

Her references to "broadcasters" – especially "analog and digital broadcasting industries" – got my attention. Clearly, Judge McMahon is no dummy. She didn't throw those terms in by mistake. I've talked in my previous articles about whether these cases could be building momentum for an actual public performance right in over-the-air broadcasting. Could she be implying that this already exists? (For the record, my answer to this obvious click-bait question is that no such right already exists, but I'm pretty sure Judge McMahon thinks it should.)

Judge McMahon has ordered SiriusXM to advise the court by December 5 of "any remaining disputes of material fact that would require a trial". If SiriusXM can't find any such material facts – and I'm going to go ahead and say they'll at least try to raise something – the court will enter summary judgment in favor of Flo and Eddie as to liability and proceed to exactly how much to award in damages.

So what? What's the impact of these cases? It could be very broad. Flo and Eddie's suits are class actions. Their wins allow – and yes, almost certainly encourage – others to jump on board as fellow members of the class entitled to damages. And there should be plenty to go around: Flo and Eddie requested $100 million in damages. Other digital providers – Pandora is an obvious example – are also directly in the firing line of such litigation.

For broadcasters, though – especially smaller broadcasters – the impact is likely very limited. Remember, this is a fight about the digital performance of sound recordings created before February 15, 1972. (Sadly, in my mind) fewer and fewer radio stations are playing music that old anymore. And most of those that are streaming older songs online are probably paying royalties anyway. In my experience, it's been hard enough for most radio stations who are streaming to properly compile all the information they are required to submit to SoundExchange. Given the relatively small royalty amounts the average station pays and the effort required just to get to that figure, it's just not worth the effort necessary to calculate and remove the amount attributable to pre-1972 sound recordings.

I should also note that other potential infringement-related issues lurk in this area, as explored in this excellent piece by Joe McKnight of Comm Daily. Services like Pandora, Spotify, Soundcloud and others aren't clearly protected by the Digital Millennium Copyright Act (DMCA) if individual users post songs to those services. That's because the DMCA is a federal law and immunizes the sites against acts of copyright infringement under federal law arising from the acts of third party users. But, of course, what we're talking about here are claims based on *state* law, meaning the DMCA doesn't come into play. So Pandora and others may have to actively review and police uses of pre-1972 sound recordings in order to avoid exposure to liability.

The biggest impact may still be on the horizon. As Joe notes, the decision in the labels' suit against SiriusXM could increase momentum in favor of paying royalties to recording artists, certainly older artists. And we can't ignore the growing push toward the creation of a performance right applicable to over-the-air broadcasting. The recording industry has spent years working toward that goal (which will require Congressional action). While cases like these will not directly result in that performance right – since, again, no such right will exist unless and until Congress says it exists – such cases can build momentum by creating the impression that the performance right might have a strong basis in existing law. And Congress is certainly taking note. We expect Congress to take up the RESPECT ACT (most likely in 2015) – either on its own or, more likely, as part of an omnibus music licensing bill. One must once again think that an overall performance right may clearly be in play.

CPB IG: Re-think Inclusion of In-Kind Trades for CSG/NFFS Purposes?

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Noncommercial (NCE) stations that receive grants from the Corporation for Public Broadcasting (CPB) should pay attention to a recommendation made recently by CPB's Inspector General (IG). She thinks it may be time for CPB to "evaluate the practicality" of continuing to allow CPB grant recipients to include in-kind trades as part of the calculation of their grant amounts.

If this recommendation gets any traction, it could seriously rock the bottom line of many CPB grantees.

NCE stations receiving CPB grants rely on funding from various sources. Private support, in particular, is critical to a public station's success. Such support can influence a station's bottom line in two ways. First and most obviously, contributions are revenues which the station uses for continued operation. But second, private contributions are used in part to determine the size of the CPB Community Service Grant (CSG) that is made available to the station.

CSG amounts are based, in large part, on a matching principle pegged to the amount of private support each station raises in "non-Federal financial support" or "NFFS". Not all forms of local support count as NFFS, and the CPB match is far less than 100% of a station's NFFS. (For example, in Fiscal Year 2015, the CPB match starts at approximately 13 cents for every dollar in NFFS that a public television station reports it raised in Fiscal Year 2013.) But you get the idea: the more NFFS a station can show, the more CPB money may be made available.

NFFS is a statutorily defined term. (Check out Section 397(9) of the Communications Act if you don't believe it.) NFFS can come in many forms, including: individual gifts (from viewers and listeners like you!); corporate underwriting; grants from private foundations and state or local governments; and in-kind support (*e.g.*, donations of property, the use of property or professional services, and indirect administrative and occupancy support from an institution, like a university, that owns a public station).

The problem the IG found is stations aren't correctly reporting the value of their in-kind transactions claimed as NFFS.

In a limited scope audit of in-kind contributions claimed as NFFS by eight stations for Fiscal Year 2013, the IG identified a high rate of non-compliance with CPB financial reporting requirements. (The IG is recommending that those stations be required to submit revised documentation and corrected tallies of their in-kind NFFS amounts. The IG is also recommending CPB reduce those stations' future CSG payments to permit recovery of any CSG overpayments resulting from the overstated NFFS.)

The apparent cause for the inaccurate reporting? CPB's own financial reporting guidelines. While CPB has established policies and documentation requirements covering all kinds of NFFS reporting, the IG – who routinely audits CSG compliance and therefore is familiar with such things – concluded that those policies and requirements are "extensive and less than clear". That complexity and lack of clarity have led to "historical and continuing challenges" in valuing and documenting in-kind trades. Having had first-hand experience in reviewing stations' efforts to meet those challenges, the IG has concluded that CPB should re-visit including in-kind trades in grant calculations.

The apparent cause for the inaccurate reporting? CPB's financial reporting guidelines.

Since CPB grantees may rely on in-kind support for a significant portion of their NFFS, such a re-think could be very bad news. If there is a set dollar amount available for all CSGs, how much each station receives from the pool will be based on its NFFS amount in relation to the other stations in that pool. For a station that relies heavily on in-kind support, if CPB were to decide to not allow (or greatly restrict) the value of in-kind trades as NFFS, that station could easily see a decrease in its CSG.

The mere fact that the IG has seen fit to initiate a conversation along these lines is a Big Deal that could have a serious eventual impact – to put it mildly – on CPB grant policy and, ultimately, stations' operating budgets.

Of course, the IG's recommendation is only that – a recommendation which the IG has made to CPB management. CPB is free to ignore the IG, or not. It remains to be seen how CPB will react. Check back on CommLawBlog.com for updates.

Wilkommen, Bienvenue, Welcome!

Bob Winteringham Joins FHH

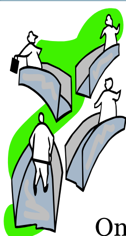
Fletcher, Heald & Hildreth is pleased to announce that Bob Winteringham has joined us as Of Counsel. A former Deputy General Counsel at the Corporation for Public Broadcasting, Bob will focus on assisting clients in the public broadcasting industry. He'll be advising stations and other CPB grant recipients with CPB grant compliance issues as well as other areas of public broadcasting decision-making.

Bob is a 15+ year veteran of CPB's Office of General Counsel (and CPB's Deputy GC from 2005-2013). He has also collaborated with CPB financial reporting compliance professionals through the Public Media Consulting Group. At FHH Bob will be providing, among other services: guidance with respect to CPB Community Service Grant agreements, including on-site compliance reviews and compliance-oriented strategic advice on policy formulation, policy updates, best practices, and documentation development; assistance to CPB grantees facing a CPB OIG audit; and facilitation of public broadcasting meetings or training seminars.

Bob got his J.D. (*cum laude*) from Indiana University – Bloomington (Go Big Red!), where he was the Articles Editor for the Federal Communications Law Journal. Before that he received his undergraduate degree (with high honors) from Michigan (Go Blue!). During college, he worked as a riverboat captain at an amusement park ("Here at Cedar Point, we have two docks for our boats, one in front and one in back. You could say we have an interesting … paradox!").

On the fun side, Bob is a cinema devotee who has seen every movie nominated for a Best Picture Oscar® since 1998.

Bob can be reached at winteringham@fhhlaw.com or by phone at 703-812-0417.



FHH - On the Job, On the Go

On November 10, **Kathy Kleiman** showed her documentary, "The Computers" to an audience of more than 100 at the London offices of Google. The showing was followed up with a Q&A by **Kathy** and then a separate panel discussion in which she joined with Googlers to discuss women in computer science generally and at Google in particular.

On November 20, **Kathy**, **Kevin Goldberg** and **Jon Markman** presented a webinar on the arrival of the new gTLDs.

Paul Feldman will be moderating a panel on Net Neutrality at Team Lightbulb's Broadband Conference at the Consumer Electronics Show in Las Vegas, on January 5.

Frank Montero was interviewed by RBR/TVBR (the piece, which ran on November 7, was titled "Montero Illuminates") *and* by a local TV station in San Juan on November 14. The San Juan gig was by Skype; **Frank** spoke about Net Neutrality. He then attended the Radio Ink Forecast conference ("Radio's Premium Networking Event"!) at the Harvard Club of New York on November 19. After a quick Thanksgiving break, he'll be attending the National Hispanic Media Coalition Impact Awards at NAB headquarters in Washington on December 3.

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

Paperwork Reduction(?) Act

By Anne Goodwin Crump
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Has the FCC changed the process for applying for DTV construction permits? Probably not, but a recent notice in the Federal Register seemed to suggest otherwise. It turns out, though, that the real story here is the hypnotic effect of the Paperwork Reduction Act (PRA).

The PRA – usually referred to as "hilariously named" here in the *Memo to Clients* bunker – is a pleasant vestige of the 1980s. It was intended to curb the wretched excesses of federal regulatory agencies. The idea was that, before an agency could impose a new paperwork burden on the public, the agency would have to take the time to quantify, and justify, the anticipated burden. The Office of Management and Budget (OMB) was appointed the final checkpoint on the regulatory assembly line to ensure that agencies were not overstepping.

This being Washington, the PRA process is more elaborate than might have been expected. The agency first devises the proposed "information collection" and determines who will have to submit the information and how much time it's likely to take them. (While the former is generally easy for the FCC to pinpoint, the latter not so much. Example: Several years ago a Commission PRA notice advised that completion of a particular LPFM form was expected to take anywhere from one-seventh of a second (that would be 0.0025 minutes) to 12 hours. It's hard to say which is more dubious, the accuracy of that estimate or its utility.)

It turns out that the odd language is a vestige of the DTV transition.

The FCC then publishes that information in a nondescript notice in the Federal Register, giving anybody who wants to comment a generous 60 days to do so. Following that period, the FCC packs up the proposed form and any comments received, slaps on an explanatory cover memo, and ships the whole shooting match over to OMB, which then issues its own nondescript Federal Register notice soliciting a second 30-day round of comments. OMB then dutifully reviews any comments that roll in and, in nearly all cases, rubber-stamps the form.

Which brings us to DTV CPs.

Historically, you filed for DTV permits on Form 301. As we have reported, the FCC is in the process of overhauling its on-line application file system. In connection with that, new DTV CPs must now be applied for using Form 2100, Appendix A, which recently showed up in a Federal Register PRA notice. With respect to DTV permits and Form 2100, the notice said:

To receive authorization for commencement of Digital Television ("DTV") operations, commercial broadcast licensees must file FCC Form 2100, Schedule A for a construction permit. The application may be filed anytime after receiving the initial DTV allotment and before mid-point in the applicant's construction period.

This statement struck us as puzzling. Normally you don't have a broadcast construction period until you have a construction permit, and you can't get a permit until you apply for one. So what's all this about filing your Form 2100, Appendix A, "anytime … before the mid-point" of the construction period? Could this be something radically new and different?

Quite to the contrary.

A little research led us on a jaunt down memory lane. It turns out that the odd language is a vestige of the DTV transition. Yes, *that* DTV transition, the one that happened more than five years ago.

Back in the late 1990s, as the Commission was teeing up the transition, it allotted each full-power TV station a separate DTV channel for transition purposes. Stations had to construct their DTV facilities within a certain timeframe, with deadlines ranging from 1999 to 2003. In light of the theoretically fixed deadline for transition, there was some urgency in making sure that licensees had at least applied for construction permits in a timely manner, and, thus they had to apply for the necessary permit "before the mid-point in a particular applicant's construction period has expired." Since that timing consideration was an important aspect of the application process, specific reference was made to it in the PRA notice relating to Form 301, Form 2100's antecedent, back in the 1990s, as far as we can tell.

And once the language about filing for a DTV CP by the mid-point of the construction period was included, it planted deep roots.

While OMB's online records aren't particularly complete prior to 2007, we found a December 2007 notice (concerning Form 301) that featured precisely the same language that showed up in the recent notice about Form 2100. So it would appear that language tied to a 1997-vintage DTV transition requirement that was relevant only for a finite period of time has hung on in PRA notices related to DTV CP applications to this day, even though that language hasn't been relevant to anything

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Check your mailbox for more details

Court Preliminarily Approves TVMLC-SESAC Settlement

By Kevin Goldberg
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If you're a full-power TV licensee, in the near future you can expect to be receiving (or you may already have received) a note from the Television Music License Committee (TVMLC) notifying you that a court has preliminarily approved a settlement the Committee has reached with SESAC. You have the option of objecting to the settlement or opting out of it, but if you do neither you'll be bound by its terms (unless you happen to be Univision or Telefutura, in which case you're not part of the Settlement Class).

In any event, this is something you should pay attention to. (Spoiler alert: I generally agree with the TVMLC's assessment that the settlement is "fair and a good result, providing long-term protection" for television broadcasters.)

The settlement represents the near-culmination of a lawsuit brought by a number of broadcasters and funded by the Committee. In 2009, Meredith Corporation, The E.W. Scripps Company, Scripps Media, Inc. and three Hoak Media companies – "individually and on behalf of all other similarly situated local television stations" – sued SESAC. They alleged various violations of federal antitrust law. (Such allegations have previously been raised by radio broadcasters as well. It will be interesting to see what effect, if any, the TVMLC settlement may have on radio's lawsuit against SESAC.)

On its face, the agreement seems like a positive development for both sides.

Until 2007 the rates and terms for performance, by TV broadcasters, of musical works in the SESAC catalog had been subject to an industry-wide deal. But that deal expired in 2007 and no extension or replacement deal was cut. So since then broadcasters have been left to negotiate individually with SESAC while the litigation chugged on.

But the settlement gives rise to the prospect of avoiding the trial that had been scheduled to start next March. Perhaps more importantly, it could provide television broadcasters with certainty about their royalty obligations to SESAC for the next two decades. It would protect broadcasters from going it alone against SESAC, though that option does remain available to those unsatisfied by any future TVMLC negotiated efforts.

The settlement was first announced on October 15, when the parties filed a copy with the U.S. District Court for the Southern District of New York. They asked the judge to: certify the "settlement class" (*i.e.*, the universe of folks who will be eligible to join in the settlement); preliminarily approve the deal; authorize the parties to notify all members of the settlement class of the terms of the settlement; and set deadlines for those members to object or opt out of the class. The finish line will theoretically be reached next March, when the court will hold a hearing to determine whether the settlement should be finally approved.

You can read the settlement in full here (although at a hefty 86 pages, including attachments, it's not the easiest read in the world). There are also plenty of settlement-related materials on the TVMLC website. For the Cliffs Notes version, the highlights include:

- © Payment by SESAC to the television industry in the amount of $58.5 million. Taking out the lawyer's cut, that amounts to $42.5 million to be distributed to television stations based on the royalties each station paid during the years 2008-2014. So the good news is that you can expect some money coming your way sometime in 2015.
- © The settlement otherwise effects no change to the SESAC rates for the rest of 2014 and 2015. So expect to pay the same amount through the end of next year that you're paying this year (though, again, you should be getting money back for prior years).
- © The TVMLC will resume negotiations with SESAC on behalf of the television industry next year, with an eye toward getting a deal covering the rate period 2016-2020, just like it negotiates on behalf with ASCAP and BMI on behalf of the TV industry as a whole.
- © The deal covers performance of musical works on both your main over-the-air channels ***and*** your multicast channels and station websites. It also reinstates the "per program" license option which can be helpful to any station that does not, as a conscious choice, use a lot of music.
- © You'll still be able negotiate directly with a SESAC-represented composer for rights on an individualized basis. So, for instance, let's say you make a conscious effort not to play *any* copyrighted music on your station. But you happen to carry Boston Red Sox games and you feel obliged to show the eighth inning from Fenway which – for reasons that aren't obvious to me – involves the crowd singing "Sweet Caroline", a song penned, of course, by SESAC-repped composer Neil Diamond. Under the terms of the settlement you could conceivably go to Neil Diamond's people, sign a direct deal with him

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for a license for that one song (thereby cutting SESAC out of the process). That one-song-only license would not, however, give you any protection if other music happened to slip through onto the air.

What do you have to do vis-à-vis the settlement? The information packet you'll be receiving (or may already have received) will provide detailed information, including how to object to the terms of the agreement or how to "opt out" entirely (but if you opt out, you'll be going it alone against SESAC). After any objections and "opt outs" are collected, the District Court will decide whether to give a final stamp of approval.

Court approval of the deal should be a one-and-done situation.

I can't tell you what to do. But I can say that on its face, this seems like a positive development for both sides.

SESAC avoids a consent decree like the one imposed decades ago on ASCAP and BMI. That consent decree subjects ASCAP and BMI to the continual oversight of the courts. SESAC dodged that bullet because, when the consent decree was entered back in the 1940s, SESAC was so small that it was not deemed to pose a threat to competition, unlike ASCAP and BMI. While the current SESAC/TVMLC settlement does require court approval, that's a one-and-done situation. Once approved, the settlement would not be subject to further judicial oversight, so SESAC would remain free from continual court oversight. SESAC would not be free of oversight entirely, though: If negotiations do not result in an agreement, the parties will move to binding arbitration. (This will be the case through 2035, long past the time that many of you are still working in this field…)

There's probably an even greater benefit to the broadcasters. Individual television stations, especially those that aren't network-owned-and-operated or owned by larger corporations, will once again enjoy strength in numbers and strong representation at the negotiating table through TVMLC. The binding arbitration component will afford independent oversight of the process should SESAC refuse to play ball.

While I know that not everybody has historically been 100% happy with the results produced by TVMLC (or its radio counterpart, the RMLC), my experience has shown that, in the long run, these organizations achieve better overall results when negotiating on behalf of the industry. The reinstatement of the per-program option alone should prove beneficial to a number of stations.

So keep your eyes peeled for formal notification of the settlement from the TVMLC and make sure to consult with your attorney if you have any questions about how this will specifically affect your station(s).

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for more than five years (and probably longer in many cases).

This retention of bureaucratese could be intentional, although we're at a loss to understand why.

More likely, we suspect that the language hangs on because no one at the Commission has read it lately or, if they *have* read it, they didn't think to question its current substantive vitality (or lack thereof). And apparently, when it comes to PRA notices, nobody up the review chain thought to read and/or question it, either. And nobody outside the FCC who might have read any of the PRA notices that included this language years after its sell-by date seems to have taken note of it.

Which raises the question: if little or no thought is given to their preparation, and nobody (other than us, of course) reads them, and if comments that do get filed in response to them seem to be ignored, why bother to publish PRA notices in the first place? What real purpose do they serve? The PRA was intended to reduce the voluminous paperwork burdens that then plagued the public. Despite the PRA's intended goal, those burdens seem only to have grown since the PRA was enacted. While it's easy to suppose that things might be even worse but for the restraining effect of the PRA over the years, do we have any reason to believe that that supposition is true?

To be sure, the PRA might – we emphasize *might* – make sense if it caused anyone to give real thought to particular information collections and whether those collections actually serve any useful purpose, how they might be streamlined or otherwise improved, how some of their burden might be lifted. But there's very little evidence that that's the way it works. Instead the PRA process has morphed into a rote drill that, it appears, nobody – agency personnel who prepare PRA notices or members of the public to whom they are theoretically directed – pays much attention to.

Meanwhile, the PRA process chugs along, generating hundreds or thousands of largely unread notices whose content may or may not be valid.

Paperwork reduction indeed.

Three years in the making

Finally Bringing Broadcast Contest Rules into the 21st Century?

By Harry F. Cole
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Big News! The Commission has taken the unusual step of proposing a rule revision requested by broadcasters and of potential benefit to broadcasters, both TV and radio! The on-air contest rule – Section 73.1216 – is up for a long-overdue overhaul. And while there may be plenty to criticize in the FCC's less-than-prompt attention here, let's not focus on that just now. Instead, let's take a look at how the Commission figures to make broadcasters' lives a little better.

As we have reported previously, the contest rule requires (among other things) periodic on-air disclosure of all material elements of the contest. You can find some examples of the rule in action here, here and here. For many contests, that imposes a considerable burden on both stations (who must be sure to intone the rules on the air, often at auctioneer speed – or scroll them in infinitesimal print – regardless of how much that can interrupt program flow) and audience members (who have to suffer through the interruptions).

Bottom line: Props to Entercom for getting the ball rolling.

Nearly three years ago, Entercom filed a petition for rulemaking advancing an unquestionably reasonable proposal: instead of the over-the-air requirement, why not let broadcasters post contest rules on their websites (or, if a broadcaster doesn't happen to have a website, on a state broadcast association site) for all the world to read whenever all the world happens to want to read them? As Entercom put it, this would be consistent with "how the majority of Americans access and consume information in the 21st century".

The Commission is now on board with the idea.

In a Notice of Proposed Rulemaking (*NPRM*), it has proposed expanding the rule to permit broadcasters to post on-air contest rules on "the station's Internet website, the licensee's website, or if neither the individual station nor the licensee has its own website, any Internet website that is publicly accessible". (In the alternative, broadcasters would still be able to satisfy the disclosure requirement through "a reasonable number of periodic" on-air announcements.)

Material contest terms disclosed online would have to conform in all substantive respects to those mentioned over the air – probably not a big deal. Ditto for the proposal concerning any changes to the material terms during the course of the contest: such changes would have to be fully disclosed on air, or the fact that such changes had been would have to be announced on air (with interested audience members being directed to the written disclosures online).

Stations choosing to disclose contest rules online would have to announce on-air that the rules are accessible online, which might not be a problem but for one gotcha: the "complete, direct website address where the terms are posted" would have to be announced "***each time*** the station mentions or advertises the contest". (The emphasis there is ours, not the FCC's.) For stations which prefer to promote the bejeebers out of their contests, that requirement could get real old real fast for stations and audience alike. Still, such details can be addressed in comments in response to the *NPRM* and, ideally, the Commission might be convinced that a "full-website-every-time" notice requirement is probably overkill.

The *NPRM* also seeks comment on a variety of practical questions, such as:

- What steps can be taken to ensure that contest terms are easy for consumers to locate on a website?
- How long should a licensee be required to maintain contest information online?
- Should licensees be required to distinguish in some way contest terms deemed "material" from other contest information to ensure that "material" terms aren't buried in lengthy fine print?
- Does the term "material" need to be refined?
- To the extent that the Commission really hasn't decided any of these questions – and we should be willing to take them at their word here – input from affected broadcasters could prove

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other coverage of interest to the community; and

- viewing patterns in households that subscribe, and in households that do not subscribe, to MVPD services.

Additionally, STELAR will exempt DBS operators from having to carry a signal pursuant to a market mod if "it is not technically and economically feasible for [the DBS operator] to accomplish such carriage by means of its satellites in operation" at the time of the modification decision.

Under STELAR, no market modification will affect the eligibility of satellite households, in the community targeted by the mod, to receive distant signals under the DBS "if local, no distant" rule.

STELAR also directs the FCC to "update what it considers to be a community" for market mod purposes. Congress's motivation here may be the fact that the FCC currently considers a "community" to be a cable TV franchise area for purposes of a cable market modification.

In addition, STELAR addresses a number of issues that affect both DBS *and* cable operators. Several of these provisions will probably not please many TV licensees. Among these are the following:

Protection for Significantly Viewed and Other TV Signals. STELAR directs the FCC to prohibit a television station from limiting an MVPD's ability to carry a "significantly viewed" TV signal – or, for that matter, any other signal that the MVPD is otherwise authorized to carry – as long as the other station is not commonly owned with the MVPD. As a result, broadcasters will be prevented from demanding the inclusion, in retransmission consent agreements, of terms that would prevent the MVPD from carrying certain other stations. Such a prohibition could affect network contract provisions relating to the ability of affiliates to grant retransmission consent outside of their home markets.

Repositioning or Deletion of Stations During Sweeps. STELAR eliminates the Communications Act provision (and the related FCC rule) that prohibits cable operators from repositioning or deleting a local station during a national TV ratings "sweeps" period. In other words, cable operators will be free to reposition or delete stations even during sweeps.

Joint Retransmission Consent Negotiations and "Good Faith" Standards. As we all know, all parties to retransmission consent agreements are required to negotiate the terms of those agreements "in good faith". Precisely what constitutes "good faith", however, has been a matter of considerable contention for years. We know that the FCC is supposed to assess certain specific factors, as well as the "totality of the circumstances", but beyond that, there has been little specific guidance.

As we reported last April, however, the FCC has decided to bar joint retransmission consent negotiations by two or more of the four most highly rated stations in a DMA where those stations are not commonly owned. In the FCC's view, such joint negotiations would be a *per se* violation of the "good faith" requirement.

STELAR broadens the FCC's prohibition against joint retrans consent negotiations.

As unhappy as some broadcasters might be with that position, STELAR broadens the FCC's prohibition against joint negotiations. Congress has now instructed the Commission to prohibit joint retrans negotiations by ***any*** stations in the same DMA that are not under "common de jure" control. STELAR also directs the FCC to commence a rulemaking to "review its totality of the circumstances test for good faith negotiations". The direction to "review" the test does not suggest how that review should be resolved. However, in view of the fact that STELAR seems designed to limit broadcaster leverage in retrans negotiations, the mandatory review of the "totality of the circumstances" test may be viewed as subtle Congressional encouragement to the Commission to effect similar limitations.

But STELAR is not ALL bad news for broadcasters. For example:

Delayed Application of JSA Attribution Rule. Also as we reported in April, the Commission has determined that certain TV joint sales agreements (JSAs) will now give rise to attributable interests under the multiple ownership rules. As a result, in many markets, longstanding arrangements that had been viewed as consistent with the multiple ownership rules will have to be modified or unwound in order to bring them into compliance. The FCC has given affected parties until June 19, 2016 to take care of that. STELAR extends that compliance deadline by six months. (While the FCC will presumably issue a notice specifying the new deadline, we calculate it to be December 19, 2016.)

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Expansion of Local Service Area for Cable Carriage of LPTV Stations. Low power television (LPTV) stations often have trouble obtaining cable carriage, in part due to limitations under the Copyright Act. Specifically, the "local service area" in which such stations may be carried least expensively under a compulsory copyright license has been limited to the area within 35 miles of the station's transmitter site (in smaller markets) or 20 miles (in the top 50 markets), rather than the station's entire DMA (as is the case for full-power stations). For LPTV folks STELAR includes a nice stocking-stuffer: it amends the Copyright Act to define an LPTV station's local service area as the station's entire DMA ***including*** any community outside of the DMA that is wholly or partially within 35 miles (in smaller markets) or 20 miles (in the top 50 markets) of the station's transmitter site.

For LPTV folks STELAR includes a nice stocking-stuffer.

And one STELAR provision simply acknowledges the reality of the marketplace:

Repeal of MVPD Set-Top Box Security Integration Ban. One of the most controversial and hard-fought issues in STELAR involved the FCC's regulation of TV set-top boxes. Some background explanation: in order to watch MVPD-provided programming, customers typically connect their television to a set-top box, leased from the MVPD, which offers a programming navigation guide as well as security features that protect programming from copyright infringement. Nearly 20 years ago Congress tried to spur competition and innovation in the set-top box market: it mandated that consumers should be permitted to purchase set-top boxes directly from retailers. To facilitate the consumer embrace of such third-party-provided boxes, the FCC banned the "integration" of program navigation and security functions in boxes. It also required MVPDs to make available a security device known as "CableCARD" that can be popped into a third-party set-top box to permit access MVPD-encrypted video programming.

For a variety of technical and market-based reasons, the CableCARD concept never really caught on, and most subscribers today continue to lease set-top boxes from their MVPD, much to the chagrin of independent manufacturers and some consumer advocates. As an apparent concession to reality, STELAR repeals the ban on integrated set-top boxes, effective a year after STELAR is enacted. Some folks already have a waiver of the current ban. For anyone with a waiver that's set to expire before this provision of STELAR takes effect, Congress provides an automatic extension through December 31, 2015.

The FCC must also convene a working group of technical experts to explore performance objectives, technical capabilities, and technical standards for a "technology and platform-neutral, software-based downloadable security system designed to promote the competitive availability of navigation devices". The working group is required to meet within 90 days of the date of enactment of STELAR and to submit a report within nine months of enactment.

While many of the provisions of STELAR benefit cable and satellite operators, the impact on full-power TV stations appears mixed at best. Delay of the application of the JSA attribution rule may benefit some TV stations. The new provisions on market modifications may cut either way, depending on the facts in a particular market. But STELAR provisions on joint retransmission consent negotiations, program line-up modifications and deletions during ratings sweeps, and carriage of significantly viewed signals, all undercut the leverage of stations in retransmission consent negotiations. Exactly how extensive the reduction in leverage will turn out to be will depend in large measure on a number of STELAR-mandated rulemaking proceedings. Congress has directed that those proceeding be completed within nine months. Check back on CommLawBlog.com for updates.

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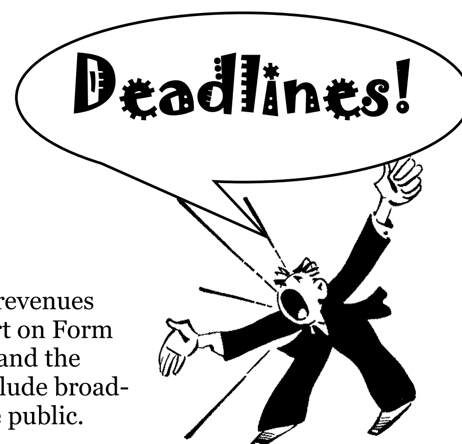
very beneficial in the development of standards that comport with the reality of the industry. Deadlines for comments haven't been set yet. Check back here for updates on that front.

Bottom line: props to Entercom for getting the ball rolling. And props, too, to the Commission for keeping the ball rolling on a proposal likely to do broadcasters some good.

But we've got to wonder exactly why it took the Commission so long. Entercom's proposal was filed nearly three years ago. Not only was it unopposed, it attracted considerable support. In adopting the *NPRM*, all five Commissioners patted themselves on the back for embracing Entercom's proposal. Given this universal, unanimous love-fest in support of the proposals, what exactly was the hang-up for three years?

December 1, 2014



DTV Ancillary Services Statements – All *DTV licensees* and *permittees* must file a report on FCC Form 317 stating whether they have offered any ancillary or supplementary services together with its broadcast service during the previous fiscal year. ***Please note that the group required to file includes Class A TV, LPTV, and TV translator stations that are offering digital broadcasts***. If a station has offered such services, and has charged a fee for them, then it must separately submit a payment equal to five percent of the gross revenues received and an FCC Remittance Advice (Form 159) to the Commission. The report on Form 317 specifically asks for a list of any ancillary services, whether a fee was charged, and the gross amount of revenue derived from those services. Ancillary services do not include broadcasts on multicast channels of free, over-the-air programming for reception by the public.

Television License Renewal Applications – *Television* and *Class A television* stations located in **Connecticut**, **Maine**, **Massachusetts**, **New Hampshire**, **Rhode Island** and **Vermont** 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 **Connecticut**, **Maine**, **Massachusetts**, **New Hampshire**, **Rhode Island** and **Vermont** must begin their post-filing announcements with regard to their license renewal applications on December 1. These announcements then must continue on December 16, January 1, January 16, February 1 and February 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 **New Jersey** and **New York** must begin their pre-filing announcements with regard to their applications for renewal of license on December 1. These announcements then must be continued on December 16, January 1 and January 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 **Alabama**, **Colorado**, **Connecticut**, **Georgia**, **Maine**, **Massachusetts**, **Minnesota**, **Montana**, **New Hampshire**, **North Dakota**, **Rhode Island**, **South Dakota** and **Vermont** 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 **Alabama**, **Connecticut**, **Georgia**, **Maine**, **Massachusetts**, **New Hampshire**, **Rhode Island** and **Vermont** 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 **Colorado**, **Minnesota**, **Montana**, **North Dakota** and **South Dakota** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323-E.

January 10, 2015

Children's Television Programming Reports – For all *commercial television* and *Class A television* stations, the fourth 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 continues to require the use of FRN's prior to preparation of the reports;

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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.

February 1, 2015

Television Post-Filing Announcements – *Television* and *Class A television* 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. 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 **Delaware** and **Pennsylvania** must begin their pre-filing announcements with regard to their applications for renewal of license on February 1. These announcements then must be continued on February 16, March 1 and March 16. Please note that, with the advent of the online public file, the prescribed text of the announcement has been changed slightly from that of previous renewal cycles.

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

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

February 2, 2015

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