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Memorandum to Clients

December 2016 | News and Analysis of Recent Developments in Communications Law | No. 16-12

(Speculation Abounds, But Much Will Stay the Same)

What Will a Trump FCC Look Like?

By Laura Stefani
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A new administration always brings many questions from clients about how their FCC issues may be impacted. A Trump presidency brings even more questions than usual, because his campaign did not set out detailed proposals on telecommunications and spectrum policy.

While much speculation brews inside the Beltway, this is what we can say for sure:

- The FCC is an independent federal agency. That means that it is not a cabinet agency and, at least theoretically, is independent of the president's control. (The White House sets its telecommunications policies through the Department of Commerce's National Telecommunications and Information Administration.) But President Trump will select the new FCC Chairman and his party will hold a majority of the five Commissioner positions. Those selections will dictate the tone of the Commission's activities, if not the specific policies.

- It will take time to get a new FCC Chairman. Based on recent history, we doubt that a new FCC Chairman will be nominated and confirmed until late spring or early summer. While the lack of information from the Trump campaign does not mean that no one has thought about possible nominees (and certainly there are plenty of Republicans itching to push their favorite nominee), FCC appointments are not highest on a new president's to-do list. Meanwhile, the most senior Republican, Ajit Pai, likely will become Acting Chairman after the inauguration.

- The FCC's professional staff will keep the agency running. The Commission employs a large number of highly competent and professional staff – lawyers, engineers and others – who are well-versed in running the Commission's day-to-day activities. Most work is done at the "staff level" and that work should continue on schedule. Whatever big policy issues are not wrapped up by December will be on hold until new leadership arrives.

Inside this issue . . .

This is what we don't know:

- How much will FCC policy change? While Trump was elected based on populist support, many in D.C., as well as in industry, speculate that his election will bring back more traditional Republican ideas of less government, meaning fewer regulations and more limited review of mergers and other transactions. It is unclear right now what will trickle down to the FCC.

- Who will be the next FCC Chairman? Again, that is highly speculative. It could be that Commissioner Pai gets the nod, or perhaps another Hill staffer (three of current Commissioners are former Hill staffers). Or it could be an outsider or someone from industry. The same is true for Democrat Commissioner positions that will be opening up.

- Will the Commission "roll back" regulations? One of the most criticized recent FCC actions is the Net Neutrality rules, which were upheld by the D.C. Circuit but presently

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Hundreds of millions of "takedown requests" are sent from copyright owners to website operators every year.

Copyright Office DMCA Proceeding Asks: It's 2016, so why are we Copyrighting Like It's 1999?

By Kevin M. Goldberg
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> "I was dreamin' when I wrote this, so sue me if I go too fast…"

Those are lyrics from the dearly beloved and extremely talented musician Prince's epic 1982 hit "1999" from the album of the same name. He was writing about the possibility that within just 18 years none of us might exist because Nuclear Armageddon was possible at any minute (he always excelled at masking dark lyrics with a catchy beat).

Other than the fact that it's awesome, why am I quoting "1999" in this post? Because in 2016 – 18 years after the passage of Section 512 of the Digital Millennium Copyright Act (DMCA) – the Copyright Office is taking a hard look at whether the law should still exist and, if so, whether changes need to be made. And because a Notice issued by the Copyright Office (CO) on November 8, 2016 seeking further comments on several DMCA-related topics can trace its roots, in part, to a lawsuit relating to another hit from the Purple One himself: "Let's Go Crazy." Comments must be submitted by February 6, 2017; empirical research studies must be submitted by March 8, 2017.

Should penalties for filing false or abusive notice-and-takedown requests be strengthened? If so, how?

Section 512 was enacted as part of the DMCA in 1998. It was a different time; in fact, as a Sign O' the Times it is worth noting that less than 5% of the world's population used the Internet. But the potential for Revolution(ary) change was there – as long as copyright infringement lawsuits didn't prevent it first. The purpose of Section 512 was to try and keep small copyright infringement disputes out of the courts – especially those which might be filed against Internet Service Providers ("ISPs") who could otherwise be sued for the infringing activities of third parties. Under the law, qualifying service providers who meet certain obligations and requirements can receive immunity from liability for contributory infringement.

These service providers generally fall into 4 different categories with varying levels of "safe harbors":

Those who serve as a ***conduit*** for the automatic online transmission of material as directed by third parties

Those engaged in ***caching*** (i.e., temporarily storing) material that is being transmitted automatically over the Internet from one third party to another

Those who ***host*** material at the direction of a user on a service provider's system or network

Those who refer or link users to online sites using information location tools as a ***search engine***

The eligibility requirements vary from category to category, as do the obligations to act in the event of an alleged 3rd party infringement.

Here is a **non-comprehensive, basic outline of those requirements and obligations:**

	Adopt Policy to Terminate Repeat Infringers?	Accommodating Standard Technical Measures to identify or protect copyrighted works	Maintain a Compliant Notice and Takedown Process	Publicly Designate Agent for Receipt of Notice and Takedown Requests	Act Expeditiously to Remove or Disable Access to Material Upon Actual Knowledge or "Red Flag" Knowledge of infringing activity	Not receive a Financial Benefit directly attributable to the infringing activity
Conduits	Yes	Yes	No	No	No	No
Caches	Yes	Yes	Yes	No	No	No
Hosts	Yes	Yes	Yes	Yes	Yes	Yes
Search Engines	Yes	Yes	Yes	No	Yes	Yes

By far and away the best-known requirement involves maintenance of a notice-and-takedown process, including acting expeditiously to remove or disable access to infringing material upon actual knowledge or notification by the copyright owner of an alleged infringement. It is also the source of significant Controversy.

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Copyright owners don't love this regime because it often amounts to a game of "whack-a-mole." They may send a takedown request and successfully have their copyrighted content removed from a particular site, only to see it arise somewhere else – or even on the same site – later. Smaller copyright owners don't have the resources or technology to scour the web to even find infringing uses. Many have suggested that the "notice-and-takedown" procedure should be converted into a "notice-and-staydown" procedure whereby a service provider would have to make commercially reasonable efforts to keep infringing material off its site once an effective and uncontested takedown notice has occurred.

Several parties – especially website operators — also feel a burden to keep up, even as they acknowledge that they are benefiting from the immunity provisions. Hundreds of millions of "takedown requests" are sent from copyright owners to website operators every year. According to an earlier Notice and Request for Public Comment in this proceeding , Google alone received approximately 230 million requests in 2013 and 345 million in 2014. Imagine if Google could have been sued – or threatened with suit – in all those instances (hint: YouTube probably wouldn't exist today).

Finally, many individuals and free speech organizations feel the notice-and-takedown regime is too weighted in favor of copyright owners, putting individual webizens in a defensive position upon the filing of any Takedown request, especially if that individual doesn't have a good understanding of his or her right to file a "counter-notification." There are also concerns that abusive takedown requests have become the norm – or at least are all too common – as evidenced by the takedown requests that have been catalogued for years on the Lumen (formerly Chilling Effects) website.

This, of course, is where we get back to Prince. As I have documented in earlier posts , litigation surrounding a YouTube video including a short clip of "Let's Go Crazy" went on for almost a decade and has only now resulted in the first "teeth" behind a requirement that a copyright owner consider whether the allegedly infringing content is authorized by law. This may have an effect on the amount of takedown requests filed each year – both abusive and legitimate – but my guess is that it will not be a profound effect.

So the big question raised by the CO is whether a law passed in the 20th Century is still the best policy in the 21st. They aim to answer this by receiving "public input, including, where available, empirical data on the efficiency and effectiveness of section 512 for owners and users of copyrighted works and the overall sustainability of the system if, as appears likely, the volume of takedown notices continues to increase."

This is actually just the latest attempt by the CO to get to this thing called the DMCA. The CO issued a Notice of Inquiry on December 31, 2015 seeking answers to 30 questions across 8 categories. It received more than 92,000 written submissions . The CO also convened separate two day roundtables in New York and San Francisco in May 2016 which provided additional opportunity to address the original 30 questions, as well as any other questions relating to the DMCA. Transcripts of those proceedings are available online.

These earlier public comments and round-table discussions revealed certain general themes in three broad topic areas:

Characteristics of the Current Internet Ecosystem

Participants noted a wide diversity of experiences and views among DMCA participants, even within similar stakeholder groups. For instance, content creators come in all sizes. Larger companies have tools available to them which make it easier to address infringement than it is for smaller companies or individuals. There is even a noticeable difference in the quality of takedown notices drafted by these larger entities vs. smaller companies or individuals. The same is true on the ISP side, where larger companies are better equipped to respond to takedown notices.

Operation of the Current DMCA Safe Harbor System

While some participants said the current system works well, many did not. ISPs tended to favor the current Internet ecosystem, describing it as thriving

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and vibrant even as they receive an ever-increasing number of takedown notices. At the same time, they identified abusive takedown notices as a major problem.

Content creators largely described the system as inefficient and ineffective. They countered the ISPs' view of takedown notices by claiming abuse is rare. In fact, they see identified ISP-specific web forms as barriers to effective use of the DMCA.

Potential Future Evolution of the DMCA Safe Harbor System

There was a common enthusiasm for creating government and private-sector educational materials on copyright and Section 512, perhaps targeted to individual groups (i.e., ISPs, content creators, users, etc.). Also generating support was the idea of industry-wide or sub-industry-specific voluntary measures. However, potential legislative changes were also proffered, including a possible "notice-and-staydown" procedure that might pre-screen user uploads.

[Editorial Note: I actually wrote, but did not post, something about that first Notice of Inquiry back on December 31 (which is one of the reasons I was thinking about 1999, since it always seems to be played around New Year's Eve). Of course, in the intervening time, Prince died. I'm sure we all hope he's in a place of never-ending happiness, where you can always see the sun, day or night.]

This time around, the CO raises 16 questions across those same 3 major topic areas, as well as some miscellaneous questions:

Characteristics of the Current Internet Ecosystem

How should improvements in the DMCA safe harbor system account for the diversity among the content creators and ISPs who comprise the Internet ecosystem, especially with regard to the size of the requester and receiving entity?

Are there specific issues for which it is particularly important to take into account the perspective of individual Internet users and how do we factor them in?

Operation of the Current DMCA Safe Harbor System

How can the CO account for the widely divergent views on the overall effectiveness of the DMCA? Is there a neutral way to measure the effectiveness of the DMCA safe harbor in terms of supporting Internet growth and addressing online privacy?

What are the most significant barriers to use of the notice-and-takedown and counter-notice procedures and how can they be addressed?

Are changes to the DMCA timeline needed (both with regard to the amount of time it takes to get content removed from a website via notice-and-takedown and to get it reinstated via counter-notification)?

How can identified disincentives to filing notices and counter-notifications (such as safety and privacy concerns, intimidating language or potential legal costs) be addressed?

Should penalties for filing false or abusive notice-and-takedown requests be strengthened? If so, how?

What notice or finding should be necessary to trigger a repeat infringer policy? Should the repeat infringer policy vary according to the status of the ISP (i.e., acting as a conduit vs. caching, hosting or indexing)?

Potential Future Evolution of the DMCA Safe Harbor System

How can the CO better educate the public about Section 512?

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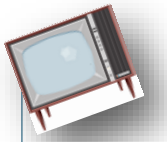

FCC to TV Licensees: Where Are You?

In a somewhat unusual move, the FCC's Media Bureau and Incentive Auction Task Force have issued a joint public notice encouraging "all television licensees" to "ensure that their contact information on file with the Commission is accurate and current". As the notice reminds everybody, licensees are generally required to do so anyway, but it's especially important now in light of the impending spectrum repack process. The Commission will be reaching out directly to stations concerning channel reassignments, and it wants to be sure that it will be able to reach each affected station. Note that this includes not only stations whose reassignment is made as a result of participation in the reverse auction but also non-participating stations subject to repack.

For stations participating in the reverse auction, the Commission will be using the contact information set out in the Form 177 filed last January in the run-up to the auction. For other stations, it will be using contact information currently showing up in the FCC's Licensing and Management System (LMS). The public notice provides detailed step-by-step instructions for checking (and, if necessary changing) contact info in both places.

In view of the importance of repack-related notifications, it would be a good idea for all TV licensees to take a couple of minutes to double- and triple-check the contact information currently on file, just to be sure.

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Should industry-wide or sub-industry-specific technical measures be adopted? If so, what should the government's role be?

As opposed to (or in addition to) the notice-and-takedown system, should there be a "notice-and-staydown" regime? How would it operate? How would legislative language read? If not advisable, why?

What other specific legislative provisions or amendments could improve the overall functioning of the DMCA safe harbor regime?

Other Developments

What is the impact of the two court decisions that have been released since this study began?

What approaches have jurisdictions outside the US taken to address the question of ISP liability and the problem of copyright infringement on the Internet?

And, of course, there's the ubiquitous "catch all" request to "Please identify and describe any pertinent issues that the Copyright Office may wish to consider in conducting this study."

So, taking us out with some more lyrics from "1999", if you have lion in your pocket, and baby he's ready 2 roar, make sure you get your comments in to the Copyright Office by February 6, 2017; empirical research studies providing quantitative or qualitative data must be submitted by March 8, 2017.

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RMLC Seeks to Subject GMR to the Same Competitive Restraints Governing ASCAP's, BMI's, and SESAC's Licensing Practices

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We have previously written here, here, here, and here about the Radio Music License Committee's ("RMLC's") successful attempt to impose on SESAC some of the same competitive restrictions that limit ASCAP's and BMI's ability to demand inflated license prices for publicly performing the musical compositions of their members. It was only a matter of time before someone would challenge on antitrust grounds the aggressive tactics of the new kid on the music licensing block – Global Music Rights ("GMR").

On November 18, the Radio Music License Committee ("RMLC") did just that.

The RMLC is a trade association that represents the interests of thousands of commercial radio broadcasters in music licensing matters (other entities that are active in these matters on behalf of radio broadcasters are the National Association of Broadcasters and the National Religious Broadcasters Music License Committee). Over the years, the RMLC has been particularly active in negotiating licenses with ASCAP, BMI, and SESAC that allow radio stations to broadcast and webcast musical compositions.

GMR is the fourth – and newest – performing rights organization ("PRO") that negotiates licenses to perform the musical compositions owned by its members (it joins ASCAP, BMI, and SESAC in this function). GMR was founded in 2013 by Irving Azoff with an express goal of extracting much higher music license fees than those that have been negotiated with other PROs such as ASCAP and BMI. Its strategy has been to attract a small, but select, number of members representing high-value compositions that music users won't easily be able to avoid playing. It claims to represent the interests of members owning the copyrights to compositions performed by artists such as The Beatles, Pharrell, Blake Shelton, Bruno Mars, and Taylor Swift, among others.

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The RMLC sued GMR in the same court where it had sued SESAC and achieved a favorable settlement following some interim court rulings in its favor. It claimed that GMR's licensing practices amounted to monopolization and attempted monopolization under the Sherman Act. The RMLC specifically called out GMR for:

- "demand[ing] outrageous fees that are grossly disproportional to the underlying share of works in its repertory," which the RMLC claims is "'take it or leave it' pricing fully divorced from market constraints";
- "demand[ing] additional rate increases for each of 2018 and 2019, regardless of whether GMR's repertory will contain fewer or less frequently played works, or a smaller percentage of fully-controlled works";
- offering no alternative other than a full blanket license with no fee reductions for directly licensed works, which means that radio stations can't save any money by negotiating separate deals with some of GMR's members;
- "offer[ing] only a fractional license," which means for works only partially owned by GMR's members, the license, standing alone, offers no protection from infringement claims; and
- failing to be "transparent about what its repertory contains," which makes it even harder for radio stations to know what rights they are purchasing and whether they even need those rights given their airplay patterns.

The RMLC also claims that the harm from GMR's actions "goes far beyond GMR and its repertory" because ASCAP, BMI, and SESAC are watching GMR's negotiations and attempting to obtain for their own members any fee increases that GMR is

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able to extract.

The RMLC seeks a preliminary injunction that would require GMR to:

- grant immediate licenses upon the request of a user while fees are being negotiated;
- "submit to a judicial rate-making procedure comparable to what the consent decrees regulating ASCAP's and BMI's behavior impose";
- submit to a judicial procedure requiring it to disgorge monies that a court determines exceed a reasonable license fee;
- refrain from entering into de facto exclusive licenses with its members;
- "make available economically viable alternatives to blanket licenses, such as per-program licenses, blanket carve-out fees, and commercial only licenses; and
- "offer only full-work licenses" rather than fractional licenses.

Why does GMR and this lawsuit matter to radio broadcasters and other music users?

Stations have been used to paying *three* PROs – ASCAP, BMI, and SESAC – for the right to broadcast and webcast musical compositions (they also pay SoundExchange for the right to webcast *recordings* of those compositions). They need to adjust to the new reality that there are now four PROs for them to consider as they secure licenses for this right. While GMR's catalog is still small (the RMLC estimates that it represents only 5-7.5% of all musical works), GMR has strategically courted copyright owners for big-name works that radio stations will find difficult to avoid in creating their programming – particularly in programming over which they have little to no control, such as syndicated programming and some commercials.

The RMLC has sued GMR because, among other reasons, GMR has demanded fees that the RMLC claims far exceed its share of musical works, amounting to some 15% of all royalties paid for publicly performing those works, and the RMLC has not been willing to agree to those fees. On November 22, the RMLC shared some useful tips with radio stations regarding the lawsuit and four possible approaches that radio stations could pursue as they consider how to respond to this new entrant to the music licensing world:

1. pay the fees demanded by GMR (which the RMLC discourages given how high those fees are);
2. attempt to avoid playing any GMR compositions (which could be hard given the prominent names that figure in GMR's catalog and the difficulty of clearing performances in commercials and third-party programming);
3. continue to play GMR music without attempting to negotiating license (a risky venture given how high infringement damages can run); and
4. challenge GMR's anticompetitive conduct in a lawsuit, as the RMLC did.

Stations have been used to paying three PROs – ASCAP, BMI, and SESAC – for the right to broadcast and webcast musical compositions (they also pay SoundExchange for the right to webcast recordings of those compositions). They need to adjust to the new reality that there are now four PROs for them to consider as they secure licenses for this right.

The RMLC's lawsuit is still in its infancy, and GMR has not yet filed its answer to provide a window into its response strategy. It is relatively safe to assume, though, that it will fight the RMLC's claims vigorously, as they strike at the heart of GMR's founding purpose to extract more license royalties for its members than the members of the other PROs receive. The case has been assigned to the Honorable Darnell Jones in the Eastern District of Pennsylvania – the same federal judge who presided over the RMLC's litigation against SESAC that settled on favorable terms for the RMLC last year. If that litigation is any indication, radio stations may soon see some of the same competitive restraints that limit other PROs' ability to demand supracompetitive license fees imposed on GMR as well.

If you have any questions about this lawsuit or would like advice about how to deal with GMR, we are here to help. In the meantime, stay tuned ....

NAB Announces Waiver Agreements with Sony and Warner Affecting Non-Royalty Aspects of Webcasting

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The National Association of Broadcasters (NAB) announced agreements it had reached with two major record labels that relieve radio broadcasters from certain compliance conditions associated with the sound recording streaming statutory license that are inconsistent with traditional broadcasting practices. They do not, however, alter radio broadcasters' royalty payment obligations under the license.

In a press release circulated to radio stations around the country on October 26 with the subject line "Urgent - Opt into Streaming Music Waiver," NAB announced that:

> The National Association of Broadcasters has successfully reached agreements with Sony Music Entertainment and the Warner Music Group on streaming waivers. These agreements will allow radio broadcasters to continue bringing Sony and Warner artists to millions of listeners online without risking copyright liability.

These waivers are NOT what some radio stations think (or hope) they are. They do NOT affect the obligation of a station that is engaged in webcasting to pay royalties and make certain filings to SoundExchange under the statutory license granting the right to perform sound recordings digitally. They ARE, however, a good thing because they will make it easier for radio broadcasters to comply with some of the lesser known, but also important, eligibility conditions found in that statutory license.

Most webcasters are naturally focused on their interactions with SoundExchange, which administers the royalties paid under the statutory licenses found in Section 112 and 114 of the Copyright Act. SoundExchange collects those royalties from webcasters (and other digital service providers like Sirius XM, music services provided through cable and satellite systems and certain business establishments) and distributes payments to the owners of digitally performed sound recordings (primarily recording artists and record labels).

What many do not realize, however, is that eligibility for the statutory license requires more than just paying those royalties and filing the corresponding paperwork; if you don't comply with certain other conditions, you run the risk of being prevented from enjoying the statutory license. And, yes, though I know many of you dislike the royalty rates and filing obligations, I intentionally chose the word "enjoy"; after all, consider the alternative: having to get the permission from each and every recording artist or record label before streaming their songs.

The Warner and Sony waivers deal with some of these other aspects of the statutory license. NAB has done a fantastic job of listing the majority of the "Important Statutory Requirements" on its website in case you need a refresher (or are just learning about them for the first time). Please review them.

For several years, radio stations engaged in webcasting enjoyed an NAB negotiated waiver of four of these requirements. These included limited waivers of:

> The "sound recording performance complement," *i.e.*, a limitation on what a webcaster may play during any 3-hour period; absent a waiver, the maximum limits are:
>
> - 3 different selections of sound recordings from a particular album or CD;
> - 2 different selections of sound recordings consecutively from the same album or CD;
> - 4 different selections of sound recordings by same artist;
> - 4 different selections of sound recordings from the same boxed set of albums; and
> - 3 different selections of sound recordings consecutively from the same boxed set of albums.
>
> The prohibition against prior announcement that a particular artist will be played in a specified time period;

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The requirement that stations have in text, on their website, at the time the song is performed, the:

- song name;
- album title:
- artist name: and

The 6-month limitation on maintaining ephemeral copies of recordings (such as songs from a CD copied onto a station's hard drive music system to facilitate streaming).

These waivers expired at the end of 2015. A temporary extension of the Warner waiver was obtained through September 30, 2016; there were also a series of short term extensions of the Sony waiver.

Now, both waivers have been extended for the next few years, with some modifications to both eligibility for the waivers and the scope of the waivers themselves.

Under the Warner Waiver (good through September 30, 2019):

There is no obligation for radio stations engaged in webcasting to opt-in;

There is no requirement that the station be an NAB member to take advantage of this waiver; and

This is limited to ***commercial*** broadcasters only (its terms do not specifically cover noncommercial broadcasters).

Under the Sony Waiver (good through December 31, 2020):

A radio station ***must opt-in*** to take advantage of this waiver;

A station does not have to be an NAB member to take advantage of this waiver but NAB members can simply fill out an online form to participate while non-members have to take the additional step of contacting NAB at 202-429-5400 or membership@nab.org to participate;

The waiver is applicable to both commercial and noncommercial webcasters;

There are important additional conditions that will require additional action on the webcaster's part:

Stations that (1) play music and (2) have more than 80,000 music "aggregate tuning hours: (ATH) per month must place a prominent and proximate "buy now" button on their website, player or mobile app, in order to allow listeners to purchase a song through a Sony-authorized download store (e.g., iTunes, Amazon).

Stations that (1) regularly transmit music programming, (2) stream more than 80,000 music ATH per month AND (3) make their simulcast streaming available as transmissions syndicated or aggregated through third-party websites or mobile apps must limit their streaming to the United States.

Waiver agreements have not yet been reached with other labels, such as smaller and independent labels or, more importantly, Universal Music Group.

It is important to note that waiver agreements have not yet been reached with other labels, such as smaller and independent labels or, more importantly, Universal Music Group. Thus, stations should be very careful when, *e.g.*, seeking to play multiple songs by the same artist or from the same album, CD, compilation or boxed set, or when seeking to pre-announce songs to ensure that those songs are from the Warner or Sony catalogs.

Note also that in some instances, the waivers do not waive compliance with the listed eligibility conditions entirely but only provide limited relief. Please call us if you would like to know more or have specific questions regarding the scope of the waivers.

NAB (and Warner and Sony) should be congratulated for reaching these waiver agreements as they do have a big impact on a radio broadcaster's ability to maintain compliance with the statutory webcasting license. For stations whose webcasting consists of simulcasting the over-the-air broadcast via the Internet (which is the vast majority of radio stations engaged in streaming), the waivers ensure that, at least for Sony and Warner music, the tail will not wag the dog, so to speak, in terms of modifying that over-the-air programming to meet the confines of the sound performance complement and pre-announcing prohibition.

Please do not hesitate to contact us if you have any questions about these waivers or the eligibility requirements generally, including the required filings and payment to SoundExchange that are mentioned but not explained in depth in this post.

Deadlines!

December 1, 2016

DTV Ancillary Services Reports - All DTV licensees and permittees must file an Ancillary/Supplementary Services Report in the FCC's Licensing and Management System (LMS) stating whether they have offered any ancillary or supplementary services together with their broadcast services during the previous fiscal year (October 1, 2015, through September 30, 2016). ***Please note that the group required to file includes both full-power TV stations and 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 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.

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. Radio stations in the top 50 markets and in an employment unit with five or more employees will have to place these reports in the new online public inspection file; all other radio stations may continue to place hard copies in the paper public file for the time being. 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.

EEO Mid-Term Reports – All radio stations with eleven or more full-time employees in Colorado, Minnesota, Montana, North Dakota, or South Dakota and all television stations with five or more full-time employees in Alabama or Georgia must electronically file a mid-term EEO report on FCC Form 397, with the last two EEO public file reports attached.

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**, or **South Dakota** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323-E.

December 27, 2016

Promoting Diverse and Independent Programming – Comments are due regarding the Commission's Notice of Proposed Rule Making with regard to proposed steps to promote the distribution of independent and diverse video programming to consumers. The comment deadline initially announced was December 24, 2016, but the Commission apparently realized that this date was not only Christmas Eve, but a Saturday, and silently made the correction before the notice appeared in the Daily Digest.

January 10, 2017

Children's Television Programming Reports – For all *commercial television* and *Class A television* stations, the fourth quarter 2016 children's television programming reports 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 as was the case the last few quarters, use of the Licensing and Management System for the children's reports is mandatory, and this system requires the use of the licensee FRN to log in; therefore, you should have that information at hand before you start the process.

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Deadlines!

(Continued from page 10)

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 online 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 *commercial* and *noncommercial 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 in the top 50 markets and in an employment unit with five or more employees will have to place these reports in the new online public inspection file, while all other radio stations may continue to place hard copies in the paper file for the time being. Television and Class A television stations will continue 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.

Class A Television Continuing Eligibility Documentation – The Commission requires that all Class A Television maintain in their online public inspection files documentation sufficient to demonstrate that the station is continuing to meet the eligibility requirements of broadcasting at least 18 hours per day and broadcasting an average of at least three hours per week of locally produced programming. While the Commission has given no guidance as to what this documentation must include or when it must be added to the public file, we believe that a quarterly certification which states that the station continues to broadcast at least 18 hours per day, that it broadcasts on average at least three hours per week of locally produced programming, and lists the titles of such locally produced programs should be sufficient.

January 23, 2017

Promoting Diverse and Independent Programming – Reply Comments are due regarding the Commission's Notice of Proposed Rule Making with regard to proposed steps to promote the distribution of independent and diverse video programming to consumers.

February 1, 2017

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. Radio stations in the top 50 markets and in an employment unit with five or more employees will have to place these reports in the new online public inspection file; all other radio stations may continue to place hard copies in the paper public file for the time being. 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.

EEO Mid-Term Reports – All radio stations with eleven or more full-time employees in **Kansas**, **Nebraska**, or **Oklahoma**, and all television stations with five or more full-time employees in **Arkansas**, **Louisiana**, or **Mississippi** must electronically file a mid-term EEO report on FCC Form 397, with the last two EEO public file reports attached.

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Update: New EAS Foreign-Language Reporting Requirement Now In Effect

But EAS Participants have a year to advise their SECCs of what, if anything, they're doing to provide EAS alerts to non-English speaking audiences

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As we reported last spring, the FCC declined to require that non-English language announcements be provided by Emergency Alert System participants. But the Commission did decide that all State EAS Plans (which are routinely subject to FCC approval) include a description of what actions, if any, EAS participants in the geographic area covered by the Plan have taken – or plan to take – to make EAS content available for non-English speaking audience(s). Also to be included in State Plans: "[a]ny other relevant information that the EAS Participant may wish to provide, including state-specific demographics on languages other than English spoken within the state, and identification of resources used or necessary to originate current or proposed multilingual EAS alert content."

Of course, the various State Emergency Communications Committees (SECCs) responsible for preparing State Plans will need certain information to comply with the new requirement. So the Commission also required all EAS Participants to provide their local SECC a "description of their efforts and activities to make available EAS alert message content to persons who communicate in languages other than English."

The deadline for the first step in the process – *i.e.*, Participants' provision of their respective descriptions of efforts and activities – was set at a year ***after*** the effective date of the new requirement. If you're an EAS Participant, get your calendar out: that one-year period has started.

According to a notice in the Federal Register, the Office of Management and Budget completed its review of the new "information collection" last month and, with the publication of the notice in the Register, the revised rule became effective as of November 3, 2016. That means that, by ***November 3, 2017***, EAS Participants will have to have clued their SECCs into what, if anything, those Participants have done – or might be planning to do – to deliver EAS message contents to non-English speaking audience members. (The SECCs will then have six additional months to integrate the newly-received information into their respective State Plans.)

Thus far there does not appear to be any officially-endorsed template for the required "description", but it's possible the Commission may flesh that out sometime in the next year. We'll keep any eye out for any news on that front.

As we noted last April, the FCC is ***not*** requiring that EAS Participants actually ***do*** anything vis-à-vis foreign language EAS alerts. To the contrary, the new reporting requirement expressly contemplates that the reports may reflect simply that no steps have been taken at all – and that's apparently OK with the Commission. In fact, that's what the Commission seems to expect will happen. What the FCC may eventually choose to do with all this information is the real question, but we won't know that until a couple of years from now. Stay tuned.

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Deadlines

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Noncommercial Television Ownership Reports - All noncommercial television stations located in **Arkansas**, **Louisiana**, **Mississippi**, **New Jersey**, or **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 located in **Kansas**, **Nebraska**, or **Oklahoma** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323-E.

FHH - On the Job, On the Go

Kathy Kleiman wins the prize for the FHH attorney travelling the farthest in November — all the way to India. She attended the ICANN Meeting in Hyderabad, which is considered the Silicon Valley of India. ICANN57 was November 4-10. "We discussed an array of topics, including a) how the roll-out of 1000+ New Generic Top Level Domains (New gTLDs) is going, and b) rules that should be in place when ICANN opens its next round of applications for New gTLDs," says Kleiman.

Closer to FHH's world headquarters, **Frank Jazzo** co-chaired the Rockefeller College Advisory Board meeting in Washington, D.C. on November 4. Then he jetted off to Alaska to speak on November 11 at the annual convention of the Alaska Broadcasters Association in Anchorage.

On November 16 **Frank Montero** attended the *Radio Ink* Forecast conference at the Harvard Club of New York where he conducted an exclusive one-on-one off-the-record interview with NAB President/CEO Gordon Smith on the presidential election and its impact on broadcasting and the FCC. On November 30, Frank attended the National Hispanic Media Coalition's Impact Awards at NAB Headquarters in Washington, DC.

Coming in December, **Frank M** will attend the annual FCC Chairman's Dinner hosted by the Federal Communications Bar Association on the first. On December 20 he will join the New Jersey Broadcasters for their board meeting in Point Pleasant, N.J.

At the January 26 South Carolina Broadcasters Association Annual Winter Conference in Columbia, S.C., **M. Scott Johnson** will present an FCC and congressional regulatory program with engineer John George of RF Specialties covering legal and engineering issues of importance for broadcasters along with relevant updates.

You won't want to miss **Kevin Goldberg**'s Continuing Legal Education Webinar for Lawline on December 12. Titled "Anti-SLAPP Laws: Past, Present and Future," it's available (for an $89 registration fee) to anyone who wants to watch live or on tape.

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waiting for "en banc" review by all the judges at the D.C. Circuit. There is the chance that the Commission will either withdraw its appeal or decide not to enforce the new provisions. Or at some point Congress repeal of many new regulations.

- What will be the biggest policy change? Both the current Republican Commissioners and the Trump campaign have focused on the issue of wireless infrastructure, such as making the placement of new small cells less burdensome for industry. In fact, Commissioner Pai gave a speech at a CTIA event outlining five initiatives that he sees are necessary to promote broadband deployment. If the Trump administration is amenable to working with the Hill on these issues, we could see legislation in the next year or so that follows some of the Pai proposals, cutting some of the red tape being faced by broadband providers at the national, state and local levels.

- What other changes may we expect? The FCC's Enforcement Bureau under Chairman Wheeler has been notorious (and criticized by the Republican Commissioners) for issuing take-no-prisoner-level fines. It is possible that the Bureau will engage in less aggressive activity after the change of administration.