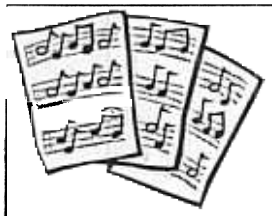
FLETCHER, HEALD & HILDRETH, P.L.C.

Memorandum to Clients

March, 2002 | *News and Analysis of Recent Events in the Field of Communications* | No. 02-03



"The best things in life are free, but you can keep 'em for the birds and bees

Internet Streaming: Recommended Royalty Rates, Reporting Requirements, Wreak Potential Havoc

By: Alison J. Shapiro

Internet streaming – a glorious system in which anyone, whether or not a broadcaster, can provide his or her programming to the entire world through the miracle of the Internet. Sounds swell, right? Don't get your hopes up. Between recently-announced licensing fees for streaming and recently-proposed recordkeeping requirements for streaming activity, the desirability and ultimate financial viability of streaming appears bleak.

As we reported in our last issue, on February 20, 2002 the Copyright Arbitration Royalty Panel ("CARP") recommended rates and terms for statutory licenses relating to the transmission of sound recordings on the Internet. The rates adopted were surprisingly high, to put it mildly. In addition, the Copyright Office is currently considering a wide range of incredibly detailed record-keeping requirements. If the rates are adopted by the Copyright Office and ultimately upheld on appeal, and if the proposed record-keeping requirements are adopted, the resulting burdens could easily stifle the still embryonic broadcast-streaming/Webcasting industry.

> *"The bottom line is that the free-wheeling joy-ride of Internet streaming is about to slam headfirst into the concrete wall of traditional copyright licensing."*

The CARP's Fee Recommendations

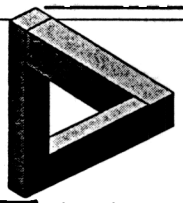
The recommendations by the CARP would require commercial radio stations who simultaneously broadcast their signal over the air ***and*** stream their signal on the Internet to pay 0.07 cent (seven one-hundredths of a cent) ***per performance, per listener***, for any work or song streamed over the Internet. The CARP would also require Internet-only Webcasters – *i.e.*, folks who do ***not*** transmit a simultaneous over-the-air signal – to pay 0.14 cent (14 one-hundredths of a cent) ***per performance, per listener*** for any work streamed. Both the traditional broadcasters and the Internet-only Webcasters would have to pay an additional fee in the amount of 9% of the total of performance royalty fees to cover ephemeral recording rights (*i.e.*, the right to make the digital copies used in the streaming process).

The "per listener" component of the fee calculation for any particular song is based on the number of listeners accessing the Internet stream while that song is being played. Broadcasters and webcasters will be required to maintain logs reflecting a variety of information about their Internet listeners.

On the noncommercial side, for copyright licensing purposes, the universe is divided into two distinct segments. Noncommercial licensees who are either (a) members of National Public Radio and/or (b) qualified to receive funds from the Corporation for Public Broadcasting are subject to the terms, not yet publicly disclosed, of a separate arrangement which has been negotiated relative to streaming license fees. For those noncommercial licensees who are neither NPR members nor CPB-qualified, the CARP set rates of 0.02 cents ***per performance, per listener*** of a copyrighted work streamed simultaneously with its broadcast, and 0.05 cents per performance per listener for non-simultaneous Internet transmissions. Such non-NPR, non-CPB-qualified, noncommercial broadcasters would also be required to pay a fee to cover

(Continued on page 12)

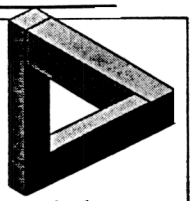
The Scoop Inside



"Meet the new boss, same as the old boss . . ."

FCC Restructured, Mass Media Bureau Folded into New "Media Bureau"

By: Lee G. Petro



The changes to the Commission's organizational infrastructure which have been in the works for several months have at long last been formally announced. The FCC has renamed three bureaus, and merged two into one, supposedly to make the Commission more effective, efficient, and responsive. The new organization formally went into effect on March 25.

Perhaps the most noteworthy change is the merger of the Mass Media and Cable Services Bureaus into a new "Media Bureau". According to the Commission, this reflects the continuing convergence of the mass media industries. The new Media Bureau will be headed by W. Kenneth Ferree, formerly Chief of the Cable Bureau. Roy J. Stewart, longtime Mass Media Bureau Chief, will remain as Chief of "Office of Broadcast Licensing," which will oversee the work of the Audio Service and Video Service Divisions. Peter Doyle will remain as Chief of the Audio Service Division, and Barbara Kreisman will remain as Chief of the Video Services Division. Several other Divisions were created within the Media Bureau to assist in the administration of the SHVIA requirements and the transition of AM, TV, and cable to digital operations. Many of the responsibilities assigned to the former Cable Bureau have been re-assigned to the "Engineering Division" of the Media Bureau.

The Commission also re-named and re-organized the former Common Carrier Bureau along the same lines. Several of the other Bureaus shuffled their staff and division offices in an attempt to make them more accessible to their constituent industries and the public, and to keep the local stationary companies in business. A breakdown of the new structure is provided below:

Media Bureau (formerly the Cable Services and Mass Media Bureaus)
- Office of Broadcast Licensing Policy
  - Audio Services Division
  - Video Services Division
- Policy Division
- Industry Analysis Division
- Engineering Division
- Office of Communications and Industry Information

Wireline Competition Bureau (formerly Common Carrier Bureau)
- Competition Policy Division
- Pricing Policy Division
- Industry Analysis and Technology Division
- Telecommunications Access Policy Division

Consumer and Governmental Affairs Bureau (formerly Consumer Information Bureau)
- Policy Division
- Disabilities Rights Office
- Consumer Centers
- Consumer Affairs and Outreach Division
- Reference Information Center

International Bureau
- Policy Division
- Satellite Division
- Strategic Analysis & Negotiations Division

Enforcement Bureau
- Investigations and Hearings Division
- Market Disputes Resolution Division
- Technical and Public Safety Division
- Telecommunications Consumer Division

Wireless Telecommunications Bureau
- Auctions and Industry Analysis Division
- Commercial Wireless Division
- Data Management Division
- Policy Division
- Public Safety and Private Wireless Division

Office of Legislative Affairs (formerly Office of Legislative and Intergovernmental Affairs)

If you have questions about the new organization, please call the FHH attorney with whom you normally work or Lee G. Petro at 703-812-0453 or petro@fhhlaw.com.

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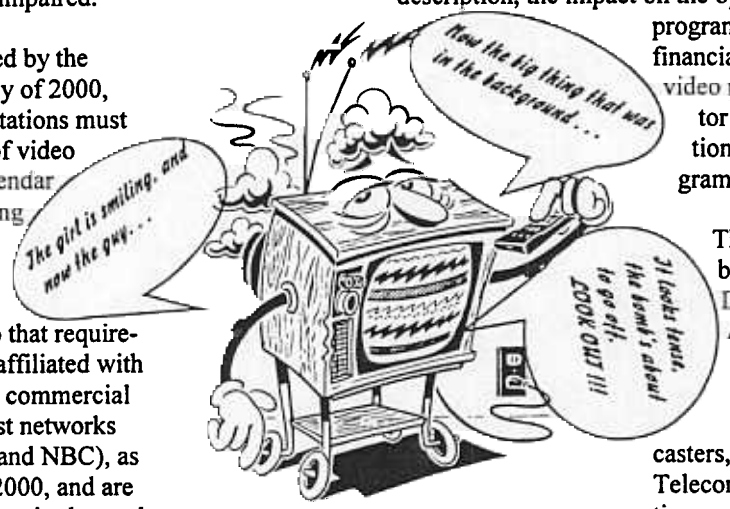
Coming soon to a television near you . . .

Video Description Rules Take Effect April 1

By: Liliana E. Ward

Attention broadcasters and video programming distributors -- Starting April 1, 2002, the Commission's video description rules for video programming will become effective. Video description is the description of key visual elements in programming, inserted into natural pauses in the audio of programming to make television programming more accessible to the visually impaired.



Under rules adopted by the Commission in July of 2000, certain broadcast stations must provide 50 hours of video description per calendar quarter, either during prime time or children's programming. Stations are subject to that requirement if they were affiliated with one of the top four commercial television broadcast networks (ABC, CBS, Fox, and NBC), as of September 30, 2000, and are licensed to a community located in the top 25 DMAs, as determined by Nielsen Media Research, Inc. for the year 2000. Television broadcast stations that are affiliated or otherwise associated with ***any*** television network, must pass through the video description when the network provides video description and the station has the technical capability to pass through the video description (subject to some technical exceptions).

Multi-channel video programming distributors (MVPD's) that served 50,000 or more subscribers, as of September 30, 2000, must provide 50 hours of video-described programming per calendar quarter during prime time or children's programming, on each channel on which they carry one of the top five national nonbroadcast networks. MVPD's of any size must pass through video description on each broadcast station and nonbroadcast network they carry, when the station or network provides video description (subject to some technical exceptions).

Once a broadcaster or MVPD has aired a particular program with video description, it is required to include video description with all subsequent airings of that program on that same station.

Petitions requesting exemptions from the video description rules can be submitted based on a claim that compliance would impose an undue burden. Factors in determining whether compliance would be an undue burden include the nature and cost of providing video description, the impact on the operation of the video programming distributor, the financial resources of the video programming distributor and the type of operations of the video programming distributor.

These rules are currently being challenged in the D.C. Circuit Court of Appeals. The Motion Picture Association of America, National Association of Broadcasters, National Cable & Telecommunications Association and National Federation of the Blind ("Petitioners") are attacking the rules on statutory and First Amendment grounds. The National Television Video Access Coalition, Metropolitan Washington Ear, WGBH Educational Foundation, American Council of the Blind, Blinded Veterans Association and the American Foundation for the Blind have intervened on the side of the FCC, which is defending the rules as necessary and properly promulgated.

In late February, the Petitioners asked the Commission to stay the implementation of the rules pending the outcome of the appeal. As of press time the Commission had denied the stay request, but a similar request was pending before the U.S. Court of Appeals in D.C. and no decision on that request has been issued. Absent a stay, the rules will go into effect on April 1. Oral argument in the appeal before the D.C. Circuit is scheduled for September 6, 2002. Stay tuned, folks!

If you have any questions regarding the requirements of the video description rules, please contact the FHH attorney with whom you normally work or Liliana E. Ward at 703-812-0432 or at ward@fhhlaw.com.

Focus on FCC Fines

By: R.J. Quianzon

This month's fines from the FCC arose largely from the content of broadcasts and actions of on air personalities. Radio clients are reminded that listeners are usually the primary source of many complaints received by the FCC. Several other fines were issued for technical violations.

"If you're easily offended, please turn off your radio." This line during a Chicago morning show did nothing to alleviate a $21,000 fine for an FM broadcaster. The station's morning personality warned listeners that he was broadcasting an "adult" show, but the FCC found that extensive discussions of sexual organs and activity merited fines. The station was fined for three different morning shows in which on-air personalities discussed aphrodisiacs and graphic descriptions of sexual activities, even though those descriptions were to some degree couched in an argot which did not include conventional terminology.

An interesting - - and "incriminating" - - factor in the Chicago case was that the FCC was provided with audio tapes of the station's broadcasts of March and May, 2001. However, the tapes were not produced by the station. A listener had recorded the radio programs, compiled the recordings and sent them to the FCC as part of the complaint. The radio station raised the issue that these complaints "were initiated by a single individual or group whose standards do not accurately reflect those of the national community as a whole." The FCC ignored the source of the recordings and instead focused on the content. In this instance, the recordings by a listener coupled with a complaint were sufficient to put the issue of "indecency" smack on the FCC's doorstep.

"We're not home, leave a message." Broadcasting an answering machine message, without the prior consent of the machine's owner, resulted in a $6000 fine. The FCC's rules unequivocally prohibit the broadcast of telephone conversations without the other party's prior consent. In a new twist to this policy, the FCC has decided that a station which broadcast an answering machine message should have given prior notice of intent to broadcast to the other party. Although the only voice which was broadcast was an answering machine message, the FCC hit the broadcaster not only with the $4000 standard fine, but a $2000 penalty.

Technical Foul. A Mississippi AM station was assessed a $3,500 fine for a series of technical violations. The FCC received a complaint about the AM station. Commission agents checked their records to see if the towers for the station had been registered. They had not been properly registered – boom, first FCC fine. The agents then traveled to the station and inspected its tower and lighting. Upon arriving at the station, the feds noticed that the fence surrounding the broadcast tower was not locked – boom, second FCC fine. Finally, as the sun set over the station, the G-men observed that the towers displayed no lighting – boom, third FCC fine. But the story has a happy ending, if you're the licensee. While the Commission initially hit the station up for a $20,000 fine, the agency later reduced it to $3500.

Finally, of a general note, readers should soon be hearing a change in long distance directory assistance. At the request of two Federal District Courts in class action lawsuits, the FCC has ruled that AT&T and MCI automated directory assistance should note that two calls may be made for the price of one. The class action lawsuit arose when several plaintiffs complained that the automated directory assistance, which frequently asks "What city please. . . what listing," misleads consumers into believing that they can only request one number when, according to tariffs on file, they may request two. The proceeding is still pending.

Clients with questions regarding FCC rules and broadcast content restrictions should contact the attorney at our firm with whom they normally work or contact R.J. Quianzon at 703- 812-0424 or at quianzon@fhhlaw.com.

DEPARTMENT OF CORRECTIONS

Nostra culpa, nostra maxima culpa

As the result of a last-minute production error, the by-line on the article in last month's issue concerning recent court decisions about pirate broadcasters was omitted. That article was written by Jennifer D. Wagner, who has continued to contribute to our humble publication throughout her maternity leave. We regret the oversight.

The ABC's of LUC's

By: Liliana E. Ward

IT is the season to start worrying about the impact that your normal commercial advertising rates may have on your "lowest unit charge" ("LUC") for political advertising purposes. During the political "window" - 45 days before a primary or primary runoff election and 60 days before a general or special election - stations may not charge "legally qualified" candidates who "use" station facilities more than the "lowest unit charge" for the same class and amount of time for the same time period. The LUC applies to both federal and non-federal candidates, but *not* to ballot-issue ads. The following are guidelines for the computation of a station's LUC:

How to Compute the LUC

Identify every class of time you offer to commercial advertisers based on features such as notice periods for preemption, make-good policies or scheduling flexibility. Stations ***must*** disclose and offer to political candidates ***every*** class of time offered to commercial advertisers.

Review your rate schedules for each class of time offered to commercial advertisers. Candidates are entitled to the lowest price you charge to any commercial advertiser regardless of the amount of time the candidate buys. This includes rates for:

Package Plans - Candidates do ***not*** have to buy the package to gain the benefit of package rates; they simply get the lowest per spot rate which would be available through the package.

Bonus Spots (including paid PSAs) - Assign a value to bonus spots. The candidate's contract price must equal the total value of the basic ***plus*** bonus spots.

Barter and Promotional Incentives - While pure barter deals (those not involving ***any*** cash payment) do ***not*** need to be considered in LUC calculations, combination barter/cash deals require a computation of barter value for determining the LUC.

Prepare a disclosure statement. You must notify political candidates, in a written disclosure statement, of ***all*** rates, package plans, rotations, discount privileges and levels of preemptability that are available to normal commercial advertisers. Waiting for the candidates to ask for the information does not satisfy this notice requirement. You are under an affirmative obligation to provide the disclosure statement when the candidate first makes contact with you.

Keep track of discounts given to advertisers during the window. If you sell time for a particular class and time period at a rate lower that the rate paid by the candidate, the candidate is entitled to the lower rate either by rebate or credit toward future purchases, at the ***candidate's*** option.

The LUC obligation applies only to candidates who are "legally qualified" and only when the political ad to be aired is a "use" as defined by the FCC. There are a number of rules and guidelines to be used in determining which candidates are "legally qualified" and what constitutes a "use." In addition, there are guidelines regarding access to stations for federal candidates and equal opportunity (sometimes referred to as 'equal time') for all candidates. For more information regarding political broadcasting, including a sample Disclosure Statement, you can refer to our political broadcasting primer - *A Summary of Political Broadcast Regulation.*

If you have any questions concerning compliance with the political broadcasting rules, or would like to purchase a copy of our political broadcasting primer, please contact the FHH attorney with whom you normally work or Liliana E. Ward at (703) 812-0432 or ward@fhhlaw.com.

And now a word from a broker...

The Radio Sales Market: Interesting Times

By: Bob Connelly[*]

Sales of radio broadcast properties have taken interesting turns over the past two years. Prices in major markets have held their own or increased depending on availability. The major players still buy on a much more limited basis, picking and choosing to fill out a portfolio. Public offerings are not the norm as compared to previous years. There are still companies being put together by entrepreneurs and investment bankers and they make occasional buys. Prices for major market properties are about the same as in years past or higher. . . but the availability of such properties is limited.

Below the top 75 markets there have been some changes, particularly in the medium and small markets. The typical multiple of cash flow for an acquisition has dropped into the range of six to eight times in most medium-sized markets and five to seven times in smaller markets. That contrasts with levels of ten times cash flow and more a few years ago. The multiple of sales is running from one and one-half to five times. As always, the smaller the market, the lower the multiple. The use of comparable sales has become less of a valuable tool in pricing stations, (more than two years back), because yesterday's prices in all but the large markets are unrealistic in today's economy.

So you want to sell but there are very few buyers out there. Here are some thoughts. The following can apply to almost any market size. Some Sellers are entering into LMA's with an option at the end of the lease for a period of, say, five years. While no up-front payment is required, we strongly suggest that the Buyer pay an agreed sum up front, perhaps an amount equal to at least the first year's LMA payments. This usually is much less than a down payment but enough to give the Seller some security. The up front payment can be credited against the selling price at the end of the LMA should the Buyer exercise the option to purchase.

Seller financing is making a comeback. We are seeing more of this old tool from days past. Get a fair down payment and get paid out over an agreed term. Naturally, there has to be collateral including the station and assets, (excluding the license), and other guarantees. Bank financing is pretty much a thing of the past for new Buyers and it's not a piece of cake for current owners. These selling and buying ideas can be as varied as the imagination of the parties involved. Be creative! It's a different broadcast world from just a short time ago, but every day is a great day in broadcasting.

[*] *Bob Connelly celebrated 50 years in Broadcasting in January of this year. Starting as a DJ in Boston he worked in both Radio and TV, in Management and Ownership. He opened a Brokerage and Consulting Firm in 1998. He can be reached in Tampa, Florida at The Connelly Company Inc., at 813-991-9494.*

Your input is requested

Feds Forming Uniform Informal Complaint Process

By: Lee G. Petro

The Commission has proposed new rules that would create a uniform process for filing informal complaints against ***all*** FCC-regulated entities, including broadcast licensees, cable franchisees, and unlicensed service providers.

The proposed rules are based on the informal complaint process already in place for common carriers. Under this process, the consumer/complainant is required to provide information relating to the complaint, including the specific cause for the complaint and the relief that is being requested. Once the Commission has reviewed the complaint to ensure that it has jurisdiction over the substance of the complaint, the Commission will provide a copy of the complaint to the licensee, and require a response within a specified time. In the common carrier industry, most complaints are resolved through a private settlement among the parties. If the complaint is not resolved to the satisfaction of the consumer, or the Commission's staff, then a formal complaint may be filed. In addition, while the Consumer and Governmental Affairs Bureau will administer the informal complaint process, should the complaint raise possible violations of the Communications Act, or the Commission's rules, the Enforcement Bureau may come knocking as well.

These new rules may cause problems for licensees, including broadcasters, who have not previously been subject to a complaint process like the one used as a model here. As noted, the proposed process is based on the process used in the common carrier area. But in that area, as in others, the FCC-regulated industries usually have a direct contractual relationship with

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EAS Rules Tweaked

By: Ann Bavender



The FCC has made several changes to its rules governing the Nation's Emergency Alert System ("EAS"). Broadcast stations and cable systems are required to participate in EAS on a national basis. This means they must install EAS equipment that receives and transmits national alerts, and they must broadcast national alerts over their stations. They must also participate in tests of the EAS system. Stations and cable systems have the option of participating in EAS on a state or local basis, which involves broadcasting state or local alerts.

The FCC made the following changes to EAS at the request of the National Oceanic and Atmospheric Administration, National Weather Service, and Society of Broadcast Engineers:

- New state and local event codes have been added to further specify the nature of an alert. These include Child Abduction Emergency (when police believe a child is in danger), Nuclear Power Plant Warning, Avalanche Warning, Earthquake Warning, Fire Warning, Hazardous Materials Warning, 911 Telephone Outage, and Volcano Warning codes

- On a going-forward basis, new codes will adhere to a naming system in which the third letter of the code is one of four letters. This will allow consumer products to check the third letter and generate a generic message corresponding to the level of alert (*i. e.*, warning, watch, or emergency).

- New location codes have been added to cover adjacent offshore areas. Location codes specify the area of alert.

- EAS equipment manufacturers may now include an optional feature allowing stations to program their decoders to selectively display and log only those state and local messages which contain certain codes. This is more consistent with the voluntary nature of state and local EAS. ***All national*** EAS messages ***must*** continue to be displayed and logged.

- Existing EAS equipment need ***not*** be updated to receive and transmit new state and local event and location codes, or selectively display and log only certain state and local codes. However, all equipment manufactured after August 1, 2003 must have these capabilities. ***In addition, stations which replace their EAS equipment after February 1, 2004 must install equipment with these capabilities.***

- Stations will now have 60 minutes after receipt to retransmit the required monthly test. Previously, stations had only 15 minutes to retransmit the test.

- Stations will in a national emergency be permitted to broadcast the President's voice message using a higher quality audio source instead of the EAS decoder audio. Stations may not delay the broadcast in order to substitute alternative audio.

- Satellite and repeater stations which rebroadcast 100% of the programming of their lead station will no longer be required to install EAS equipment. Lead stations are encouraged to monitor the EAS sources of their satellite stations where these are different from their own EAS sources.

- Low Power FM ("LPFM") stations, which are currently required to install only a decoder rather than the normal combined decoder/encoder unit, will be temporarily exempted from installing EAS equipment until decoder-only units become available for purchase.

EAS rule violations are a regular source of fines issued to broadcasters. If you have any questions regarding the EAS changes or the EAS rules in general, please contact the FHH attorney with whom you normally work or Ann Bavender at (703) 812-0438 or bavender@fhhlaw.com.

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consumers. But there is no direct contractual relationship between broadcasters and, say, members of their audience. So while the usual method for resolution of telephone billing complaints may be, for example, issuance of a credit or refund of monthly subscription fees, it is difficult to conceive of a correspondingly simple resolution when a listener complains that he or she finds Howard Stern offensive. Further, the tight turn-around on replies to complaints, along with the pressure on the licensee to disprove the complaint or be forced to reach settlement, could impose substantial burdens on broadcasters finding themselves on the wrong end of a complaint.

Making matters worse, the Commission proposes to retain any and all other informal complaint procedures that are already in place. So the new procedures would not relieve broadcasters of any existing procedural burdens.

The deadlines for comments and reply comments on the FCC's proposal had not been established by press time. If you would like help in preparing comments, you should contact the FHH attorney with whom you normally work or Lee G. Petro at 703-812-0453 or petro@fhhlaw.com

Four Weddings and a Funeral?

FCC Acts on Five "Flagged" Assignment Applications, Sheds Some (But Not Much) Light On Local Market Concentration Standards

By Lee G. Petro

In an effort to resolve the longstanding problem of "flagged" assignment applications, the Commission has granted four "flagged" applications but, for the first time since 1969, has designated an assignment application for hearing. But let's not panic – even in the face of the truly extreme facts of that last case, the Commission nonetheless gave the parties the option of postponing the hearing until the Commission gets around to adopting new local ownership rules.

As we have described in past issues of the Memorandum to Clients, the Commission has long expressed concern about the effect which ownership consolidation has had on local competition in the radio industry. For several years the FCC has been "flagging" certain assignment applications which, if granted, might lead to excessive concentration of control and a corresponding unacceptable reduction in competition. However, as we have also noted in these pages, the Commission's policy on "flagging" has been criticized for a number of reasons, including its lack of apparent standards and its seeming inconsistency with certain aspects of the Communications Act.

"What comes through loud and clear from these cases is that the Commission is willing to look for alternative reasons to grant acquisitions even if the market revenue concentration level is higher than might previously have been thought to be acceptable."

Last November Chairman Powell ordered the Mass Media Bureau staff to prepare draft dispositions of the handful of "flagged" applications which had been pending for more than a year at that point. Following review of the Bureau's handiwork, the Commission issued its four grants and one designation.

First, it is important not to exaggerate the significance of the designation, for the one case which was designated – involving stations in the Charlottesville, Virginia market – involved truly extreme levels of consolidation. The proposed assignment would have placed 53% of the market's revenues in Clear Channel's hands, and would have meant that 94% of market's revenues would be controlled by only two broadcasters. That level of concentration of local control exceeds anything the Commission has previously granted, and the Commission was unwilling to establish 94% concentration as an acceptable level. Hence, the designation order.

But in designating the Charlottesville application, the Commission signaled that it is not all that concerned even about the extreme level of concentration proposed there. The FCC gave the Charlottesville parties the option of putting the hearing on hold until the Commission gets around to adopting new local ownership rules. In the meantime, the Charlottesville parties can apparently continue their LMA, which as a practical matter means that 94% of the market's revenues will be concentrated in the hands of two broadcasters. The designation order is thus not as aggressive an action as it might appear at first blush.

The Commission's reluctance to reject assignments because of competitive concerns is also clear in its grants of the other four "flagged" applications. The Commission distinguished the Charlottesville situation, on the one hand, and the four other applications, on the other, on the basis of a number of factors, including the supposed mitigating circumstances and other public interest benefits.

For example, the Commission approved the consolidation of the Cheyenne radio market, permitting Clear Channel to own seven stations and 60.2% of the market's revenues. Clear Channel actually owns 15 stations that have some overlap with the stations it wished to acquire, but due to the Commission's methodology for considering intervening terrain, eight of those stations didn't count and, as a result, the acquisition complied with the local ownership rules. According to the Commission, there is a mountain that causes the degradation of the radio signals between Cheyenne and Laramie, Wyoming, which are 40 miles distant, but are part of the same Arbitron market. The Commission decided that, despite Arbitron's designation, these communities were distinct, and granted the applications.

In Columbus, Georgia, Clear Channel sought to acquire six stations from Cumulus, along with two other stations with which Cumulus was under a 15-year local marketing agreement. The LMA required a one-time "fee" of 1.5 million dollars, and the payment of 80% of the purchase price within the first two years of the agreement. The Commission found that these provisions were permissible because the licensee still supposedly retained ultimate control of the station. The grant of that assignment gave Clear Channel 53% of the market's revenues. In granting that transaction, however, the Commission declined to approve a provision of the LMA which permitted the time broker to

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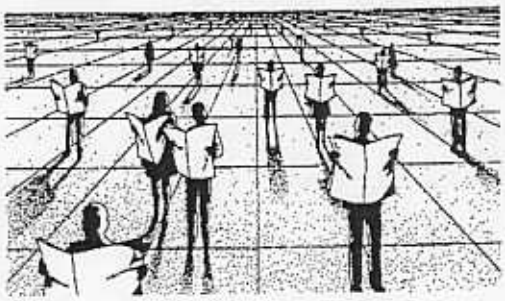
Stuff you may have read about before is back again . . .

Updates on the News

Application Certifications – During an informal meeting with members of the staff of the Audio Services Division, the staff made two points concerning application certifications which came as something of a surprise. First, in an assignment/transfer application, if the applicant chooses not to include in the application all schedules, attachments, exhibits, etc. to the underlying agreement, it is improper to certify "yes" in response to the question which asks whether the agreement being submitted in the entire agreement between the parties. Rather, the correct response to that certification is "no", and the applicant should then indicate (in an exhibit) that certain materials have been omitted but will be made available to the Commission upon request. Second, according to the staff, the certification concerning character issues should be answered "no" if adverse character qualification allegations have been raised in a petition to deny which either is pending or became moot through dismissal of the application. Both of these points strike us, and others, as a change from past policy, but unless and until we determine that the staff information was wrong and we convince the staff of that, applicants should be alert to the staff's view on these matters.



Electronic Filing – If you file your own applications or reports through the FCC's CDBS Electronic Filing service, be advised that, starting ***May 1, 2002***, attachments ***must*** be filed in PDF format.

NextWave Redux – The continuing saga of NextWave Communications and its efforts to retain spectrum for which it bid (but has not yet paid) about $5 billion, but which the FCC later re-sold for more than three times that much, is ***still*** continuing. Most recently, the U.S. Supreme Court agreed to hear the FCC's appeal of a lower court determination that the FCC could not take NextWave's spectrum away from it, even though NextWave hadn't paid for it. The Supreme Court will not hear the case until next term, and a ruling is therefore months, if not a year or more, away.

Action on FM Settlements Near – In the Commission's on-going efforts to clear out long-pending applications, it opened a "window" last September for the settlement of groups of mutually exclusive FM applications. The window closed in February, and the Commission has now announced that it is prepared to act on those applications. However, since some of the surviving applicants had not previously been subject to any petition to deny filing period, the FCC intends to provide potential petitioners with a 30-day period starting with the inclusion of each such application on a "Broadcast Applications" public notice which will list the applications as "accepted for filing".

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assign the LMA to a third party without prior approval of the licensee. The Commission required the parties to delete this provision.

In approving applications in the Columbus, Mississippi and Trenton, New Jersey markets, the Commission relied heavily upon the proposed benefits arising from common ownership. For example, in Columbus, Mississippi, Cumulus was able to acquire approximately 52% of the market's revenues based in part on its history of improving the stations during the LMA and increasing levels of locally-produced programming on the stations. In Trenton, the Commission focused on the large "out-of-market" stations contributing to the market's revenues, along with the past actions of the acquirer in developing local stations, to grant the acquisition.

What comes through loud and clear from these cases is that the Commission is willing to look for alternative reasons to grant acquisitions even if the market revenue concentration level is higher than might previously have been thought to be acceptable. The Commission's willingness to look the other way is not without limits, however, as the Charlottesville designation demonstrates. But there, the post-acquisition concentration would place more than 94% of the market's revenues in the hands of two broadcasters – a difficult level to justify by most any measure. And even so, the Commission has signaled its willingness to tolerate even that extraordinary level of concentration at least for the time being. So it is reasonable to assume that the consolidation of the radio industry will continue largely unabated, without interference from the Commission.

If you have any questions about the Commission's decisions or the FCC's policies on consolidation, please call the FHH attorney with whom you normally work or Lee Petro at 703-812-0453 or petro@fhhlaw.com.

A Lotta Allotments

Editors' Note :

This month we are previewing a new format for our listing of FM channel allotments. The new format is designed to be more useful to broadcasters by providing information not only about the channels and communities involved, but also about whether the changes involve a simple allotment (*i.e.*, drop-in) of new channels, or a shuffling of existing allotments pursuant to Section 1.420, or a counterproposal to a previously-submitted proposal.

A new, or drop-in, allotment is one which will at some point be available for anyone to file for. By contrast, allotment changes effectuated pursuant to Section 1.420 may be used only by the proponent – these generally involve upgrades or substitutions of an upgraded first-, second- or third-adjacent channel, or possibly also a change in community of license. A counterproposal could involve drop-ins, or Section 1.420 proposals, or a combination of the two.

Each of these types of proposal – drop-in, Section 1.420, and counterproposal – could ultimately result in changes to the allotment table, and therefore any and all of them may be of interest to anyone considering his or her own possible changes to the table.

We would appreciate any feedback from our readers about our new format.

FM ALLOTMENTS ADOPTED 3/1/02-3/25/02

State	Community	Channel	Docket No.	Availability for Filing
WI	Boscobel	244C3	01-349	TBA
CO	Olathe	270C2	99-28	TBA
KY	Jackson	247C2	00-79	None (substitution for Ch. 293A – Section 1.420)
KY	Salyersville	293C3	00-79	None (substitution for Ch. 247C3 – Section 1.420)
IL	Sherman	230B1	01-120	None (removal of Ch. 230B1 from Lincoln, IL – Section 1.420)

"TBA" means "to be announced". Newly-allotted channels are not likely to become available for filing until after the Commission has resolved certain difficulties with its broadcast auction processes. The Commission has provided no indication of when those difficulties may be resolved.

FM ALLOTMENT PROPOSALS 3/1/02-3/25/02

State	Community	Channel	Docket No.	Deadlines for Comments	Type of Proposal (i.e., Drop-in, Section 1.420, Counterproposal)
NM	Milan	270A	02-43	Cmt – 4/22/02 Rep – 5/7/02	Drop-in
CA	Westwood	259A	02-42	Cmt – 4/22/02 Rep – 5/7/02	1.420 (removing Ch. 259A from Chester, CA)
GA	Buena Vista	264C3	02-48	Cmt – 4/29/02 Rep – 5/14/02	1.420 (removing Ch. 264C3 from Cuthbert, GA)
LA	Merryville	221C3	02-56	Cmt – 5/6/02 Rep – 5/21/02	1.420 (removing Ch. 221C3 from De Ridder, LA)
FL	Valparaiso	276C2	02-62	Cmt – 5/13/02 Rep – 5/28/02	1.420 (removing Ch. 276C2 from De Funiak Springs, FL)
WA	Burbank	256C1	02-63	Cmt – 5/13/02 Rep – 5/28/02	1.420 (removing Ch. 256C1 from Walla Walla, WA)
MA	Westborough	297B	02-49	Cmt – 4/29/02 Rep – 5/14/02	1.420 (removing Ch. 297B from Worcester, MA)
GA	Rincon	261C1	01-177 01-123	Cmt – 3/28/02	1.420 (upgrading and removing Ch. 261C2 from Statesboro, GA – counterproposal in Dkt. No. 01-177/01-123)
FL	Middleburg	260C0	01-177	Cmt – 3/28/02	1.420 (downgrading and removing Ch. 260C from Palatka, FL – counterproposal in Dkt. No. 01-177)

Consistent with our past practice, Fletcher, Heald & Hildreth PLC provides this advisory on a periodic basis to alert clients both to FM channels for which applications may eventually be filed, and also to changes (both proposed and adopted) in the FM Table of Allotments which might present opportunities for further changes in other communities. Not included in this advisory are those windows, proposed allotments and proposed channel substitutions in which one of this firm's clients has expressed an interest, or for which the firm is otherwise unavailable for representation. If you are interested in applying for a channel, or if you wish us to keep track of applications filed for allocations in your area, please notify the FHH attorney with whom you normally work.

(Continued from page 1)
ephemeral recording rights – 9% of total streaming royalty fees.

Each Webcaster, Commercial Broadcaster, and Non-NPR-Non-CPB-Qualified-Noncommercial Broadcaster which streams its signal over the Internet is required to pay a ***minimum*** fee of $500.00 for each calendar year, or part thereof, in which it streams.

Let's do some sample math. At 0.07¢ per performance per listener, a commercial radio operator simultaneously streaming its signal to 1,000 Internet listeners would be running up a tab of $0.70 per copyrighted song. At 15 songs per hour, that would come to $10.50 per hour, or $252 per day. At 0.02¢ per performance per listener, a non-commercial radio operator would be paying $0.20 per song if it had 1,000 listeners, for a daily tab (assuming the same 15 songs per hour, 24 hours per day) of $72. Annualize the numbers out, and you're talking tens of thousands of dollars per year to provide the streaming signal to a mere 1,000 listeners. And there are no economies of scale here – the more listeners you get, the more the license fee increases. And that doesn't count the 9% fee for ephemeral recording rights. And all of that is over and above the royalty fees radio licensees ***already*** pay to ASCAP, BMI and SESAC for the right to broadcast the copyrighted works over-the-air and on the Internet.

The Copyright Office's Proposed Reporting Rules
So the copyright licensing costs alone would impose a major league financial burden on streaming, whether performed as a stand-alone activity or as a complement to simultaneous over-the-air broadcasting. But the dollars are not the only disincentive.

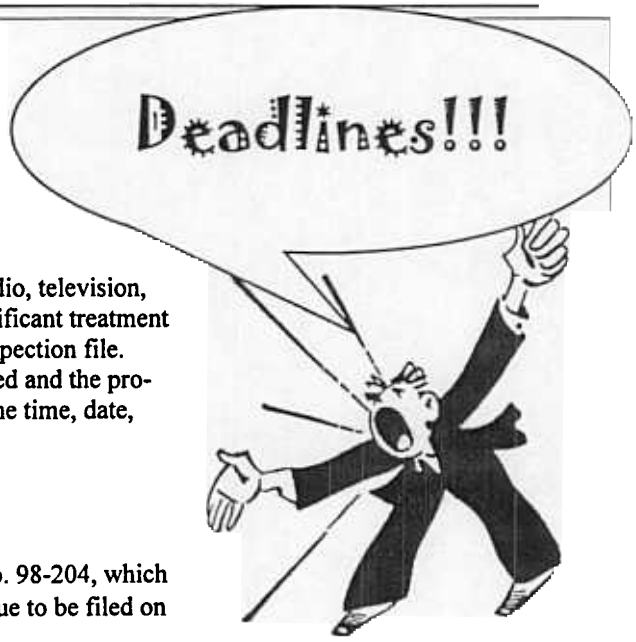
In addition to the CARP's recommended royalty fees proposed to be imposed on streaming activities, the Copyright Office has proposed a boatload of notice and record-keeping requirements which, in and of themselves, present a major disincentive. Under the Copyright Office's proposals, all services (*e.g.*, broadcasters as well as Webcasters) would be required to: (1) file a Notice of Use of Sound Recordings Under Statutory License ("Notice of Use") no later than 60 days following the effective date of the final rule; (2) file an Amendment within 45 days after any of the information contained in the Notice of Use on file has changed, and; (3) file a Report of Use of Sound Recordings Under Statutory License ("Report of Use"); (4) maintain and file a Listener's Log (information about its Internet listeners), and; (5) maintain and file an Ephemeral Phonorecord Log (information about any copies of the copyrighted work made in connection with the streaming). Comments on these proposals are currently due to be filed with the Copyright Office by April 5, 2002, Reply Comments by April 26, 2002.

To illustrate the extreme nature of these proposed requirements, the Report of Use would require broadcasters to compile and submit their intended playlists,which would include a consecutive listing of ***every*** recording scheduled to be transmitted, or if the transmissions are not scheduled in advance, ***every*** recording actually transmitted. The Report would also have to contain: the name of the service or entity, the channel or program, or station identifier used by the service (including the band designation and the FCC Facility ID Number); the type of program; the date of transmission, the time of transmission (except archived programs); the time zone of the place from which the transmission was originated (except archived programs); the numeric designation of the place of the sound recording within the order of the program (for archived programs); the duration of the transmission (to the nearest second, thank you very much); the sound recording title; the International Standard Recording Code embedded in the sound recording; the release year; the featured recording artist, group, or orchestra; the retail album title; the recording label; the Universal Product Code of the retail album; the catalog number; the copyright owner information provided in the copyright notice on the retail album, and; the music genre of the channel or program, or in the case of AM/FM webcast, the broadcast station format.

And if that's not enough of a record-keeping nightmare, consider that the Listener Log would have to include: the name of the service or entity; the channel or program (using an identifier corresponding to that in the Intended Playlist); the date and time that each user logged in (local time at user's location); the date and time that each user logged out (local time at the user's location); the time zone of the place at which the user received transmissions (as an offset from Greenwich Mean Time); the unique user identifier assigned to a particular user or session; and the country in which the user received transmissions.
Representatives of commercial broadcasters, noncom-

(Continued on page 13)

April 10, 2002



Children's Television Programming Reports - For all commercial television and Class A television stations, the reports on FCC Form 398 must be filed electronically with the Commission, and a copy must be placed in each station's local public inspection file.

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 must be placed in the station's local public inspection 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.

April 15, 2002

Comments re Proposed EEO Rules – Comments in MM Docket No. 98-204, which relates to the latest version of the FCC's proposed EEO rules, are due to be filed on April 15, 2002. Reply comments are due May 15, 2002.

April 24, 2002

Reply Comments re Local Radio Ownership Caps – In early March the Commission extended the deadline for reply comments in MM Docket No. 01-317, which relates to the local multiple ownership rules and definition of markets for radio. The new reply deadline is April 24, 2002.

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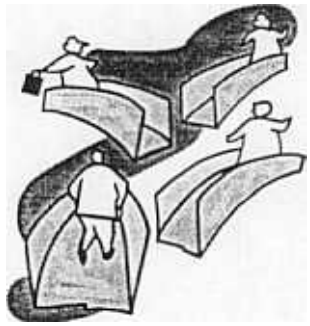
mercial broadcasters, Webcasters, and the background music services have all already filed separate appeals of the CARP royalty rate recommendation. However, even if these appeals are successful, the most that might be achieved would be a reduction in rates, not elimination of the royalty payment requirement. Thus, broadcasters who currently stream their signals are soon going to have to pay royalties, and most likely significant ones.

The bottom line is that the hitherto free-wheeling joyride of Internet streaming is about to slam headfirst into the concrete wall of traditional copyright licensing. While it is possible that the perceived benefits and rewards of streaming – whether for broadcasters or Webcasters – may justify what are likely to be huge costs both in dollars and effort, it seems more likely at this point that streaming activities may shrivel in the face of the regulatory burdens, at least for the foreseeable future. Time will tell.

If you have questions and concerns regarding the new royalty rates for streaming and the related record-keeping requirements, do not hesitate to call the attorney with whom you normally work or Alison Shapiro at 703-812-0478 or Shapiro@fhhlaw.com.



FHH - On the Go, On the Job

Frank Jazzo, along with ***Bobby Baker*** , Head of the FCC's Office of Political Programming, led a political broadcasting seminar for the New Mexico Broadcasters Association in Albuquerque, New Mexico, on March 16, 2002.

Frank Jazzo will participate on a political broadcasting panel titled: "Political Broadcasting in 2002: How to Deal with Campaign Dollars" at the NAB Convention in Las Vegas, Nevada, on Monday, April 8, 2002, from 3:30-4:45 p.m.