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Memorandum to Clients

December, 2005 — *News and Analysis of Recent Events in the Field of Communications* — No. 05-12

Postcard from Payola-land

Further Payola Enforcement Eyed

Senator proposes new disclosure requirements while NY Attorney General squeezes $5M from Warner

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Senator Russ Feingold (D-WI) and New York Attorney General (NYAG) Elliot Spitzer are engaging in a tag-team effort against what they perceive as the evils of payola and other, related music promotion practices.

In late November, Feingold introduced a new bill, pithily entitled the "Radio and Concert Disclosure and Competition Act of 2005", aimed at eradicating practices that currently fall outside of the FCC's rules prohibiting payola and plugola. In his statement presenting the bill, Feingold made clear the target of his work − conglomerates which happen to own radio stations ***and*** concert and venue promotion interests.

The FCC's rules now require disclosure at the time of broadcast of the receipt of consideration in exchange for playing any material. The proposed legislation directs the FCC to amend its regulations to prohibit station personnel and affiliates from receiving consideration, directly or indirectly, from a "record company, recording artist, concert promoter, music promoter, or music publisher" ***unless*** the station discloses such receipts on a monthly basis, at a minimum. But wait, there's more! In addition to the listing of receipts, broadcasters would also be required to disclose a playlist of all songs aired during the reporting period.

> *In addition to a monthly listing of receipts of payments of any kind from record companies, artists and promoters, broadcasters would also be required to disclose a playlist of all songs aired during the reporting period.*

Feingold indicated that he believes such a dual listing (*i.e.*, incoming consideration plus songs played) would create something of a public relations nightmare as interested observers compare and contrast the two components of the disclosures and draw their own conclusions about why any station happened to broadcast any particular song. As Feingold sees it, this kind of publicity could be much more effective than the specter of FCC-levied fines in reducing, or even eliminating, payola problems.

Feingold is, however, smart enough to know not to put all his enforcement eggs in that one compliance-through-public-ridicule basket. As a politician, he is presumably familiar with people who have no shame. His bill would raise the monetary penalty for violations of the rules to from $10,000 to $50,000, adding some extra bite to FCC determinations of liability. Feingold's plan would make exceptions for stations considered "small businesses".

Just a few days after Feingold's proposal was unveiled, the NYAG reached a settlement with Warner Music Group for $5 million, bringing another moment of triumph – or, at least, media attention – to the NYAG in his ongoing payola probe. Warner and the NYAT signed an "Assurance of

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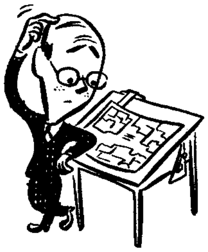
The Scoop Inside



A federal thumb on local franchising scales?

FCC Considers Limits on Local Franchising Authorities

Greasing the skids for more video competition

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The Commission has initiated a rulemaking to seek comment on its implementation of Section 621(a)(1) of the Communications Act, which requires that local franchising authorities (LFAs) not unreasonably refuse to award cable franchises to competitive entrants. The Notice of Proposed Rule Making (NPRM) seeks to further the FCC's interrelated goals of enhanced cable competition and accelerated broadband deployment. The NPRM is largely seen as an effort by the Commission to facilitate the recent efforts by Verizon and SBC to provide competitive video services.

In the NPRM, the Commission tentatively concludes that Section 621(a)(1) should not only be interpreted to prohibit the ultimate refusal by an LFA to award a franchise, but should also bar a broader range of behaviors by LFA's. The NPRM seeks comment on whether LFAs are unreasonably refusing to grant competitive franchises. The NPRM also explores whether the local franchising process is inhibiting the ability of incumbent cable operators to deploy broadband services.

The Commission tentatively concludes that it has authority under both Title I and Title VI of the Communications Act to ensure that the local franchising process does not serve as an unreasonable barrier to entry for competitive cable operators. The Commission also tentatively concludes that any law or regulation of a state or LFA that causes an unreasonable refusal to award a competitive franchise is deemed preempted and superseded by Section 621(a)(1) of the Communications Act.

On the issue of "red-lining", the Commission tentatively concludes that it is not unreasonable for an LFA, in awarding a competitive franchise, to assure that access to cable service not be denied to any group of subscribers because of their income. A cable operator must be given a reasonable period of time, however, to become capable of providing cable service to all households in its franchise area. The LFA may require that cable operators provide adequate public, educational and governmental access channel capacity, facilities, or financial support. The Commission tentatively concludes that it should interpret Section 621(a)(1) broadly so as to prohibit LFA procedures and other requirements that unreasonably interfere with the ability of would-be new entrants to introduce quickly their competitive video offerings.

The Commission plans to hold an *en banc* hearing to supplement the record in this proceeding. The deadline for filing Comments and Reply Comments had not been announced at the time of this writing. If you are interested in participating in this proceeding, please contact this office.

A word to the wise from Joe Di Scipio

Protecting Your Rights in Network Affiliation Extensions

The major TV networks have made a great deal of news lately for the ways they have begun to distribute network programming, ways that don't include you, the network affiliate. The networks' use of alternative distribution sources (*e.g.*, iPod, cable on-demand) highlights the need to protect ***your*** distribution rights. As network compensation has almost completely disappeared, affiliates negotiating for affiliation extensions should give serious thought to bargaining hard for total exclusivity of the network programming they broadcast. For a fall-back, affiliates can insist on a significant time delay before the network programming is released to alternative sources. It may also be possible to bargain with the networks for a share of the proceeds from alternative distribution deals.

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Focus on FCC Fines

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News flash: FCC says public file is not "eye wash" − The FCC was not sympathetic to a broadcaster who argued that the public was not interested in the content of radio station issues and programming lists. The FCC strongly disagreed with the station's characterization of the lists as mere "eye wash" to make it appear that licenses were obliged to provide public service programming.

A Virginia AM station filed its renewal application with the FCC and indicated that it had not placed all of the required items in its public file. Although the station indicated that the document omission was due to a misunderstanding, it also took the opportunity to share its opinion of the FCC's requirement for radio issues/programs lists.

FCC rules require that broadcasters prepare issues/programs lists and keep them in their public files. The station failed to do so. But the station argued that its failure in that regard was not really all that important because "the public has no interest whatsoever in the content of radio station issues and programs lists." *Au contraire*, responded the FCC, such lists provide the public with important information. But that really didn't respond to the licensee's arguments, because it stopped short of saying that the public actually does have an interest in this information. The station went on to share its opinion that these lists were nothing more than "eye wash" designed to make it "appear" that licensees are obligated to provide public service programming. The FCC did not agree with this characterization and fined the station. Due to the station's limited funds, the $3,000 fine was reduced to $500.

As unorthodox as the licensee's response may seem, it is not far off the mark. As a practical matter, quarterly issues/programs lists tend to contain minimal information and are not routinely submitted to the Commission. Moreover, the FCC has never tried to determine whether any members of the public ever even look at these lists, much less utilize them for any particular purpose. So it is not surprising that, in responding to the licensee's argument, the Commission did not deny the argument that the public really isn't interested in the lists.

And the licensee is also correct that the requirement that the lists be prepared does ***not*** impose any independent obligation to air any particular kind of programming. The issues/programs list rule merely requires the preparation of the lists − it does not specify what programming should be aired.

Still, irrespective of these observations, the Commission's rules require that the lists be kept in public files. Moreover, FCC renewal applications require that a station certify that it has abided by these rules. Although neither the public nor an FCC agent may have looked at the station's public file, the renewal applicant must certify that the file was complete, and an inability to certify the same is grounds for the issuance of a fine.

California man brings tears to children's eyes − A California man has been fined $42,000 for maliciously interfering with amateur radio operations. In 1999, the California Highway Patrol arrested an amateur radio operator for interfering with police communications. In turn, the FCC revoked the man's license, but his equipment was not taken away. Bad mistake. Five years later the man was found to have caused significant interference again.

This time the guy claimed that his license had not been properly revoked and that he had a constitutional right to broadcast. He threatened operators in the Los Angeles area that he would jam them. And sure enough, the FCC determined that he did indeed jam other operators − including the local fire department and Coast Guard. In the case of the Coast Guard, the renegade operator went so far as to intentionally prevent a ship which had been damaged by a storm from communicating with the authorities. When the Coast Guard told the interferer to clear the channel so that emergency communications could be initiated, the guy announced that the emergency was merely a sham to try to jam *his* transmission. He then transmitted recorded messages and various sounds for 40 minutes. In another instance, our friend interfered with transmissions of a young ham operator group. The group, composed of operators between the ages of seven and twenty, reported that the interfering messages transmitted by the guy were so intense and vile that it reduced one of their members to tears.

New York Times operations eyed by Feds - The New York Times Radio Company operates an AM station in New York. The FCC has proposed fining the company for operating its station at variance from its licensed facilities. FCC rules permit AM operators to vary their directional antenna relative phase currents by up to three degrees; the FCC strictly enforces this limitation. FCC gumshoes inspected the NYT's AM array and determined that one tower operated at 3.6 degrees below its authorized current and another tower operated at 3.4 degrees below the authorized current. Other

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New Five-Year Plan in the works

2006-2010 Webcasting Royalty Rates On The Table

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A new battle has begun over the music copyright royalty fees which radio stations streaming on the internet will pay to record companies and recording artists for the next five years – 2006-2010. The result of that battle could have a major impact on whether (and if so, the extent to which) internet streaming of over-the-air broadcasts develops as a significant alternative means of distributing radio programming.

The webcasting (internet radio) royalty fees presently in effect were set in 2002 and extend through 2005. The current fees were established after a highly controversial U.S. Copyright Office Copyright Arbitration Royalty Panel (CARP) proceeding, law suits, and negotiations among various groups of webcasters and the record companies. Those negotiations led to separate copyright royalty fees for some groups (small webcasters, noncommercial radio webcasters).

The upcoming battle over royalties could have a major impact on whether internet streaming of over-the-air broadcasts develops as a significant alternative means of distributing radio programming.

Now the fight starts again. The new fees are not likely to be finalized until late in 2006, but, once set, will apply retroactively to January 1, 2006.

Technically, the upcoming battle already began last February, when the Interim Chief Judge of the new three-judge panel of Copyright Royalty Judges (CRJs) announced a new proceeding to set the fees for 2006-1010. (The CRJs are the folks at the Library of Congress who will set webasting copyright fees from here on out.) Entities wishing to participate in the proceeding had until March, 2005 to sign up and pay the filing fee.

A total of 41 parties anted up and are participating in the proceeding. These include: radio broadcast associations (including NPR, NRB and a number of collegiate radio groups); more than 10 large radio group owners; large internet-only webcasters not affiliated with on-air radio stations; satellite radio companies; big internet media companies (Yahoo and America Online); webcasting service companies (which provide a variety of services for large numbers of on-air and internet-only webcasters); and the two biggies which will be doing most of the battling − DiMA (Digital Media Association, the trade association for large internet-only webcasters and big internet media companies, including Yahoo and Apple Computer) and SoundExchange (which represents, collects copyright royalty fees for, and distributes the fees to 1,000 record companies and 12,000 recording artists holding copyrights in 85% of the music recordings sold in the U.S.).

A three-month voluntary negotiation period for the participants to work out some mutually agreeable arrangement ended in May, 2005, without a settlement between record labels and the various groups of webcasters. That set the stage for the submission of written fee proposals to the CRJs in October. Proposals were submitted by DiMA, SoundExchange, and a group of on-air broadcasters which included Bonneville, Clear Channel, Infinity, Susquehanna, and the NRB Music License Committee. The digital media industry, music publishers, satellite radio companies, and other webcasting players also filed proposals.

Not surprisingly DiMa, representing webcasters, proposed much smaller royalty fees than those currently paid. It proposed that webcasters pay 5.5% of revenues, which it said was essentially equal to the royalties webcasters pay to music publishers and songwriters through ASCAP, BMI, and SESAC. Currently only very small webcasters pay fees based on a percentage of revenues (currently at 10.9%), obtained through a hard-fought battle involving Congress. As alternatives, DiMa also proposed that webcasters continue to be subject to the types of fees most webcasters currently pay. Such arrangements, negotiated with the recording industry for 2002-2005, provide for a fixed price per hour of music streamed or a fixed price per song streamed. DiMa proposed a per-hour/per-listener (aggregate tuning hour) fee of 0.38 cents (compared with the current per-hour fee of 1.17 cents) and a per-song/per-listener fee of 0.025 cents (compared to the current per-song fee of 0.076 cents). Large and small webcasters would pay the same fees under DiMA's proposal.

SoundExchange, representing the recording industry,

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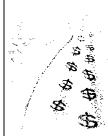

proposed a large increase in royalty fees, with some fees more than double the current fees. It proposed that webcasters pay whichever is the largest of: (1) 30% of revenue; (2) 0.0019 cents per-song/per-listener; or (3) a per-hour/per-listener (aggregate tuning hour) fee of 0.0247 cents for broadcast music simulcasts / 0.0019 cents for non-music broadcast simulcasts / 0.02945 for internet-only webcasts. On top of that would be added an "Adjustment Factor" of 25% for all webcasts not proven to have been transmitted without any wireless component. For webcasters generating revenues, this would work out to paying a total of 37.5% of revenues. As it may not be possible for a website operator to tell whether a user is using a WiFi network, all webcasts may be subject to the higher "adjusted" rate. The SoundExchange proposal also provides for an automatic Consumer Price Index annual increase and a minimum annual fee of $500 per channel or station. These fees are far higher than those in any other industry or in any other nation and ideally represent only a high point at which the downward bargaining will start.

The group of on-air broadcasters proposed a flat annual fee, regardless of the number of listeners, for webcasters simulcasting on-air stations. The flat fee would be based on the on-air station's market position and BIA revenue rank. In the five largest markets, large stations would pay $8,000 annually, mid-size stations $6,500, and small stations $6,000. Fees for stations in smaller markets would be commensurately lower, with rates for markets 101-200 ranging from $500-$1,000. Stations webcasting at least 95% news, business, talk, or sports would pay a lower flat annual fee, ranging from $750 in the top-10 markets to $250 in the smallest markets. Stations webcasting at least 25% news, business, talk, or sports would be subject to yet a different fee structure. The minimum fee for partial-year streaming would be $250. For the first six months, new webcasters would pay one half the normal fees. All fees would increase 4% per year.

Obviously, there are major areas of disagreement here. And no matter how the various disagreements are resolved, it is virtually certain that any royalty system which is eventually put in place will be complex and far from intuitively obvious. Perhaps most important, the new structure will likely have a major impact on the development − or stifling − of webcasting for the foreseeable future. Even stations which don't happen to be streaming now would be well-advised to pay heed to this proceeding, as their ability to jump on the streaming bandwagon may ultimately depend on the nature of the burdens which the royalty system will impose.

Next up is a 60-day factual discovery process overseen by the CRJs, followed by a 21-day settlement conference without the presence of the CRJs. If again no settlement is reached, the CRJs will conduct hearings with live witnesses, cross-examination, and oral arguments by attorneys. The CRJs will then sift through the factual record, consider and weigh all the proposals, and issue a decision establishing the fees for the years 2006-2010. Their decision is expected to be issued in late 2006. Meanwhile, webcasters are still continuing actively to negotiate with the recording industry in hopes of reaching a settlement. With on-air simulcast webcasts continuing to lose money, due in large part to high recording industry royalty fees, broadcasters are hoping for lower fees for the next five years.

Copyright holders − mainly the RIAA and artists groups − have begun a lobbying effort looking to impose a performance royalty on broadcasters, a move which would upset a longstanding balance between copyrights holders and broadcasters.

The prospects for any resolution of these various copyright royalty issues favorable to broadcasters are far from clear. And complicating the royalty future for broadcasters are reports that copyright holders − mainly the RIAA and artists groups − have begun a lobbying effort looking to impose a performance royalty on broadcasters. Historically, radio broadcasters have been exempt from paying royalties to music performers (as distinct from composers' royalties, which are collected through such agencies as ASCAP and BMI). That exemption reflects the mutually beneficial relationship between the broadcast and recording industries: broadcasters get program content from the record companies while the record companies get product exposure from radio stations.

But the record companies and performers are now jostling to upset that balance. In their view, radio should be treated no differently from other distribution platforms − such as satellite broadcasters and cable operators − which pay performance royalties. The copyright owners and their representatives may also be concerned about the fast-approaching arrival of multi-channel digital radio, which could facilitate the copying of music off-the-air, thus potentially depressing record sales.

This pro-performance royalties movement is in its early stages, and may ultimately not amount to anything. But the fact that there is even the slightest shadow of a dark cloud on that particular horizon should be of concern to broadcasters, as a performance royalty obligation would impose significant new costs on the radio industry.

Last minute stay of execution

New KidVid Rules Put On Hold As FCC Mulls Possible Compromise

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The FCC has extended the effective date of the following children's television rules which were set to take effect on January 1, 2006:

- The prohibition on displaying Internet websites in children's programming (in both the program itself and the commercials within the program);
- The requirement to broadcast additional children's programming based on the amount of additional broadcast streams of digital video programming;
- The requirement that no more than 10% of Core Children's Programs may be preempted in order to qualify as Core Programming;
- The change in the definition of children's programming to include promotions of non-core programming.

The effective date is extended for 60 days from the date the Commission publishes its decision on the pending reconsideration petitions before it. It is not clear when the rules listed above, if left unchanged by the yet-to-be-released Order on Reconsideration, will become effective. They are not likely to become effective for at least another six months.

The postponement of the new rules is in large measure the result of a compromise agreement reached by children's TV advocates and broadcasters. Those groups hammered out an understanding which would, if adopted by the Commission, lead to modifications of the new rules, modifications which would considerably ease their burden on broadcasters. The postponement gives the Commission time to evaluate the compromise recommendations.

The extension of the effectiveness of these rules relieves broadcasters of the need to comply with them – at least for now. That should be a relief, as a recent flurry of fines doled out by the Media Bureau indicates that a number of licensees have had a fair amount of trouble complying with the kidvid rules already on the books. (Look for more detailed coverage of those fines in next month's issue.)

(Continued from page 3)

Commission rules provide that current amplitudes may vary by no more than five percent. The FCC found the New York Times current amplitude to be varying by 7.6%. These various variances triggered the issuance of a notice of violation by the FCC and the station now faces a fine.

All readers should attempt to operate exactly in accordance with their authorizations – or at least within the tolerance permitted by the rules. And if a problem arises and the tolerance cannot be met, the licensee should seek special temporary authorization to operate at variance while it fixes its facilities to eliminate the problem.

In the same vein, the FCC has issued a notice of violation against a New Jersey FM station that was operating on an unauthorized frequency. Specifically, the station held a license for a studio-transmitter link to operate on 946.0 MHz. When FCC agents inspected the equipment, they found operations at 946.5 MHz. Close, but no cigar. The 0.5 MHz frequency error was significant enough to the FCC that they cranked up the forfeiture machinery and are likely to be fining the station. Similarly, FCC agents went to a municipal landfill and found that the Town of Islip was operating a walkie-talkie system on frequencies authorized by a license – but oops, the license had long since expired. When a license expires, so does the authorization to operate pursuant to that license, so the landfill's walkie-talkie operation was illegal. The FCC advised the city that the violation was significant and the FCC has dredged up enforcement proceedings for the dump.

Arrgh, mateys, federal scalawags be on the prowl - The FCC also set their sights on pirates in the New York area. FCC agents used directional equipment to track down four pirates in and around the Big Apple and have issued enforcement notices to all four. Agents went after an operator on 87.9 in the Bronx, 94.3 in Brooklyn, 90.9 in Brooklyn and 90.1 in Newark. It is uncertain whether the Newark pirate at 90.1 was causing interference to the Brooklyn pirate on 90.9, conduct which would presumably have been in violation of the Pirate's Code. In the case of pirates interfering with pirates, FCC procedure would be to keelhaul both of the scurvy dogs. Arrgh . . .

(Continued from page 1)

Discontinuance", or AOD, in which Warner, while declining to admit that that it had done anything wrong, still agreed not to engage in certain activities. And those activities, as it turns out, are quite similar to the activities detailed in the Sony BMG settlement order (described in the August issue of Memo to Clients). They include: cash bribes and gifts to programming directors; using independent promoters to act as "conduits" for payments to radio stations in exchange for airplay; and other methods designed to artificially elevate the airplay of certain artists.

In addition to this interesting factual information, the AOD cites the legal basis for the NYAG's investigation and findings, a crucial element noticeably absent from the Sony BMG settlement order. Among the statutes which NYAG cites is a New York state commercial bribery statute which generally prohibits employees from providing a benefit without the employer's consent. However, in the "Statutory Violations" section of the AOD, in which the NYAG alleges that Warner has violated the law, that bribery section is not mentioned. As a result, it is impossible to determine precisely how important the notion of "bribery" may be to the NYAG's case.

But even if the prosecution, or threat of prosecution, for payola violations subsides, it is legitimate to wonder what effect the NYAG's disclosures about song selection manipulation might have on the listening public.

In any event, along with the promise to discontinue the practices specifically mentioned in the AOD, Warner also committed to instituting a series of business reforms, including limiting the activities of hired independent promoters, presumably by contract, since Warner would have no actual authority over these parties.

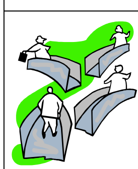
Questions abound as to the actual effect that these tandem actions will have on the music industry. The NYAG's crusade against big business in general could, of course, fizzle out and die. Many observers believe that the payola investigation is designed to generate publicity for Spitzer, timed propitiously to coincide with his anticipated 2006 run for Governor of New York which many view as inevitable. If that theory is valid, then the NYAG's interest in all things payola could evaporate once the election is over.

Would other lawmakers step up to fill the void? As for Feingold, his bill was referred to the Commerce Committee on November 18th, where it has languished since, without much (if any) interest being demonstrated by other legislators. By contrast, when indecency was on everyone's front burner, there seemed to be huge bipartisan support for indecency legislation − and yet, nearly two years after *L'Affaire Janet Jackson* got everybody's knickers in a twist, Congress still has not acted. It remains to be seen if payola, which has had a far lower profile with far fewer proclamations of support by legislators, will meet the same end in Congress.

Since Congress has thus far shown no substantial interest in plunging into the payola pool in the NYAG's wake, and since the FCC's own supposed investigation of the matter (called for by Chairman Martin following the Sony settlement) has not surfaced in public, the loss of the NYAG as spearhead and cheerleader for the death-to-payola partisans could put an end to that movement before it makes any great impact on the targeted industries.

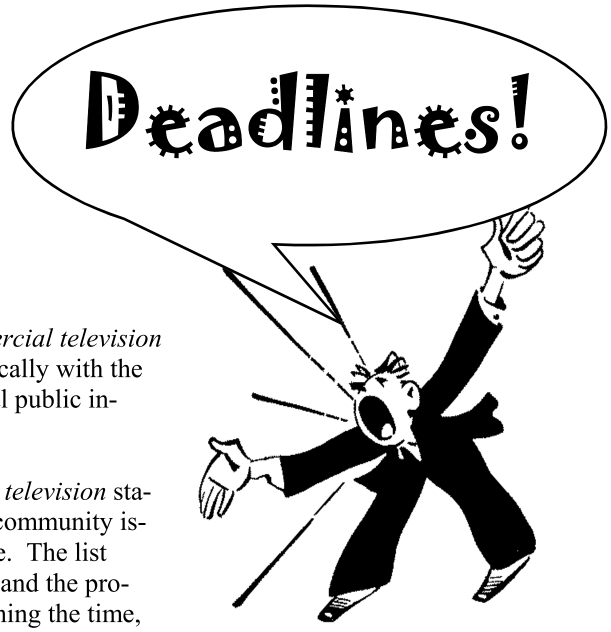
But even if the prosecution, or threat of prosecution, for payola violations subsides, it is legitimate to wonder what effect the NYAG's disclosures about song selection manipulation might have on the listening public. After all, with the advent of internet downloads, file-sharing, and the increasingly ubiquitous iPod, the music-listening public may conclude that it doesn't need the broadcast industry to learn of new music. If the public concludes that radio programmers are merely an extension of the promotional departments of the record labels, listeners may choose to look to other, less biased sources for their new music.

So far, broadcasters have not been caught directly in the bombsights of the Payola 2005 forces. But if the credibility and reliability of broadcast music selection is impaired through the fallout from the NYAG's bombs, the industry may nonetheless suffer collateral damage.



FHH - On the Job, On the Go

Harry Martin and **Frank Jazzo** will join Roy Stewart, Senior Deputy Chief, Media Bureau, in conducting a Legal and Regulatory Session at the Tennessee Association of Broadcasters Convention in Nashville on January 10, 2006.



January 1, 2006

100% Closed Captioning Rules Take Effect - All non-exempt television programming must be closed captioned. (This does not apply to any channel of video programming producing annual gross revenues of less than $3,000,000.)

January 10, 2006

Children's Television Programming Reports - For all *commercial 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 *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.

February 1, 2006

Television Renewal Pre-Filing Announcements - *Television* stations located in **Texas** must begin pre-filing announcements in connection with the license renewal process. **Texas** *Class A television* stations and *LPTV* stations originating programming also must begin pre-filing announcements.

Radio Renewal Pre-Filing Announcements - *Radio* stations located in **Delaware** and **Pennsylvania** must begin pre-filing announcements in connection with the license renewal process.

Television/Class A/LPTV/TV Translator Renewal Applications - All *television*, *Class A television*, *LPTV*, and *TV translator* stations located in **Kansas**, **Nebraska**, and **Oklahoma** must file their license renewal applications.

Radio Renewal Applications - All *radio* stations located in **New Jersey** and **New York** must file their license renewal applications.

Radio and Television Renewal Post-Filing Announcements - All *radio* stations located in **New Jersey** and **New York** and all *television* stations located in **Kansas**, **Nebraska**, and **Oklahoma** must begin their post-filing announcements in connection with the license renewal process, and continue such announcements on February 1 and 16, March 1 and 16, and April 1 and 16.

EEO Public File Reports - All *radio* and *television* stations with more than five (5) 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. 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.

Radio and Television Ownership Reports - All *radio* stations located in **Arkansas**, **Louisiana**, **Mississippi**, **New York**, and **New Jersey** must file a biennial Ownership Report (FCC Form 323 for commercial stations or Form 323-E for noncommercial stations). All *television* stations located in **Kansas**, **Nebraska**, and **Oklahoma** must also file a biennial Ownership Report. All reports filed on FCC Form 323 or 323-E must be filed electronically.

Chairman Martin to Congress: "Never mind"

What A Difference A Year Makes

FCC in 2004: *À La Carte* Stinks!; FCC in 2005: *À La Carte* Rocks!

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In testimony before a Senate "Open Forum on Decency" late last month, Chairman Kevin Martin decried increasing coarseness, violence, profanity, and sex on television and opined that one solution would be for cable operators to offer a "family friendly" programming tier that would allow parents to buy a package of channels that excludes channels with racier programming. Alternatively, the Chairman suggested that programming channels should be offered for sale on a channel by channel, or "*à la carte*", basis.

The Chairman's suggestion was fine and dandy, except that it flew directly in the face of a report, released by the Commission just thirteen months ago (under then-Chairman Powell), that concluded that *à la carte* was ***not*** economically feasible and could lead to high prices and fewer programming choices for consumers. In his testimony, Martin disavowed that earlier report and promised that the FCC's staff would issue a "corrected" report in support of *à la carte*.

The original *à la carte* report was prepared by the FCC's staff after extensive public comments, but was never voted on by the full Commission. Rather, the report was prepared under the direction of then-Media Bureau Chief Ken Ferree and sent to Congress over Powell's signature. Thus, even though Martin was a Commissioner at the time the original *à la carte* report was released, he never voted to approve it. With his elevation to Chairman, Martin now finds himself in a position to express his "concerns" with the report and to direct the staff to "take a more thorough look". Unsurprisingly, this more through look has yielded a revised set of conclusions that are more in line with Martin's long expressed desire for family-friendly programming tiers.

Cable MSOs, satellite operators, and cable programming networks have vehemently opposed *à la carte* requirements, urging that an *à la carte* approach would lead to higher prices as channels raise fees to recoup lost audience reach and reduced ad revenues. The industry also claims that "niche" and new programming channels would fail *en masse* because large audiences would refuse to pay for channels that they have never heard of before. Moreover, cable operators and programming providers' agreements with one another often guarantee placement of certain channels on programming tiers that are available to the

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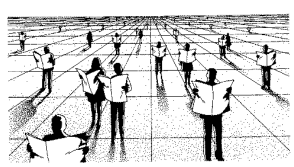
Stuff you may have read about before is back again . . .

Updates on the News

Senate green lights Copps, Tate − The nominations of Michael Copps and Deborah Taylor Tate to the Commission have been confirmed by the Senate. Copps will now remain in the saddle until June 30, 2010. Tate, who is filling the seat formerly held by Chairman Powell, is on a shorter leash − her term will expire on June 30, 2007.



New entry in DTV Conversion Dead(line) Pool − It looks like the deadline for the final DTV conversion is on the move again. When last we reported on this (in October, 2005), the smart money − by which we mean Senate Commerce Committee − was showing April 7, 2009 as the odds-on favorite. That was a dark horse in the race. Originally, it looked like December 31, 2008 was the leading contender when the House put all its chips there. But look out, coming up on the outside is February 17, 2009. The House/Senate Conference Committee picked that compromise date earlier this month. Since 2/17/09 was agreed to by both the House and Senate, it's likely to be the final date − unless, of course, something else comes up in the next three years to change it. We wouldn't be betting the farm yet.

While it was deciding on a new deadline, the Conference Committee also got into the gift-giving spirit by approving the distribution of the proceeds of spectrum auctions. Among the bigger ticket items: a downconverter subsidy of about $1.5 billion, which will be used to help consumers afford the cost of DTV converters when the switchover happens; $75 million for a program to help LPTV and TV translators make the digital transition; and $30 million for an alliance of NYC stations to acquire additional digital gear necessary to allow them to deliver an "adequate" digital signal from the Empire State Building.

FM ALLOTMENTS ADOPTED –11/22/05-12/21/05

State	Community	Approximate Location	Channel	Docket or Ref. No.	Availability for Filing
LA	Hornbeck	157 miles S of Monroe, LA	269A	05-46	TBA
CA	Mojave	96 miles N of Los Angeles, CA	255A	05-109	TBA
CA	Trona	133 miles E of Bakersfield, CA	247A	05-109	TBA
TX	Sanderson	163 miles S of Odessa, TX	274C1	02-253	TBA
TX	Mt. Enterprise	161 miles E of Waco, TX	231A	05-34	TBA
MO	Potosi	72 miles SW of St. Louis, MO	249C2	01-151	None
MO	Rolla	107 miles WSW of St. Louis, MO	276A	01-151	Accommodation Substitution
MO	Linn	111 miles W of St. Louis, MO	248A	01-151	Accommodation Substitution
MO	Eminence	138 miles E of Springfield, MO	281A	01-151	TBA
MO	Lebanon	55 miles NE of Springfield, MO	279C0	01-151	Accommodation Substitution
IN	Madison	92 miles SE of Indianapolis, IN	*265A	05-17	Accommodation Substitution
IN	Richmond	73 miles E of Indianapolis, IN	267B1	05-17	None
KY	Erlanger	17 miles SW of Cincinnati, OH	266A	05-17	None
KY	Lebanon	67 miles SW of Lexington, KY	265A	05-17	None
OH	Norwood	1 mile S of Cincinnati, OH	262A	05-17	None
LA	Dubach	43 miles NW of Monroe, LA	249C2	05-47	None
LA	Natchitoches	110 miles SW of Monroe, LA	248A	05-47	None
LA	Oil City	118 miles W of Monroe, LA	266C	05-47	None
TX	Longview	124 miles E of Dallas, TX	300C2	05-47	Accommodation Substitution
TX	Nacogdoches	178 miles SE of Dallas, TX	299C3	05-47	None
TX	Waskom	173 miles E of Dallas, TX	247C2	05-47	None
MD	Newark	26 miles E of Salisbury, MD	235A	04-20	TBA

FM ALLOTMENTS ADOPTED –11/22/05-12/21/05 *(continued)*

State	Community	Approximate Location	Channel	Docket or Ref. No.	Availability for Filing
VA	Chincoteague	47 miles S of Salisbury, MD	233A	04-20	TBA
FL	Fruit Cove	25 miles S of Jacksonville, FL	231C3	05-244	None
OK	Holdenville	80 miles E of Oklahoma City, OK	265A	01-180	TBA
MI	Lexington	82 miles N of Detroit, MI	256A	01-231	TBA
MI	Pigeon	122 miles N of Detroit, MI	267A	01-229	TBA
MN	Grand Portage	146 miles N of Duluth, MN	245C0	04-339	TBA
GA	Greenville	61 miles S of Atlanta, GA	281C1	03-223	None
GA	Waverly Hall	88 miles S of Atlanta, GA	239A	03-223	None

FM ALLOTMENTS PROPOSED –11/22/05-12/21/05

State	Community	Approximate Location	Channel	Docket No.	Deadlines for Comments	Type of Proposal (i.e., Drop-in, Section 1.420, Counterproposal)
CA	City of Angels (Angels City)	104 miles SE of Sacramento, CA	240A	05-316	Cmnt: 1/17/06 Rply: 1/31/06	Section 1.420(i)

Notice Concerning Listings of FM Allotments

Consistent with our past practice, Fletcher, Heald & Hildreth PLC provides these advisories 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.

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widest possible number of households.

But even though the text of the revised *à la carte* report has not been released, the mere threat of an *à la carte*-friendly report has started producing the desired results from the cable operators. According to a cable industry representative, several major cable companies, including Comcast, Time Warner and Insight, plan to start selling "family tiers" over the next several months. The details of how these tiers will be structured and what channels will be included remain uncertain. It also is unclear whether this move will succeed in heading off calls to subject cable channels to the same level of indecency regulation currently imposed on broadcasters.

Two things are clear, though. First, in view of the cable industry's reaction to Martin's announcement of a new and "more thorough" assessment of the à la carte approach, the FCC's ability to regulate by "raised eyebrow" has been demonstrated again. And second, the agency's about-face underscores the unfortunate but undeniable fact that the shelf-life of any FCC report or policy is, at best, limited and uncertain.