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Memorandum to Clients

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Panic!?!

Will New Internet Royalty Rates Hang the Online DJ?

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The Copyright Royalty Board (CRB) did not exist three years ago. A recent ruling of that body now threatens the existence of one of the major industries it oversees – Internet radio.

On March 2, 2007, the CRB completed a proceeding, begun in 2005, to set the royalty rates to be paid by those who stream audio over the Internet during the years 2006 through 2010. The previous royalty rates were effective only through December 31, 2005, but those taking advantage of the statutory licensing scheme applicable to digital audio transmission continued to pay at the 2005 rates through 2006 and into 2007 (we outlined those rates and other regulations applicable to the statutory licensing scheme in the October, 2006 *Memo to Clients*). The new rates could go into effect in May 2007, although the burning of this virtual discothèque may yet be averted: there are still several procedural steps which must be completed before the increase becomes final, and since the announcement of the new rates there has been an impressive outcry from the internet radio community which may result in a settlement.

> *The new royalty rates– and this is an understatement of the highest degree – strike fear into the hearts of anyone who is currently streaming over the Internet.*

The new rates– and this is an understatement of the highest degree – strike fear into the hearts of anyone who is currently streaming over the Internet. Although those who have to this point taken advantage of the reduced royalty rates created by the Small Webcaster Settlement Act will endure the sharpest increase, ***all*** webcasters – commercial and non-commercial alike – will be forced to reevaluate whether it makes financial sense to continue streaming as rates will double by 2010 and will likely outpace revenues even for simulcast stations whose Internet operations are essentially subsidized by over-the-air operations.

Radio stations streaming on the Internet will have to calculate their rates on a "per performance" basis retroactive to January 1, 2006 and going forward through 2010. This will be a distinct change for many radio stations, as a large number of commercial stations were previously calculating royalty rates using the "aggregate tuning hour" method. The change will be more acute for small webcasters who simply paid according to percentage of their yearly revenues, thereby avoiding the need to calculate payments on the far more complicated (and recordkeeping-intensive) per performance or aggregate tuning hour basis. Thus, the panic of paying increased royalty rates is intensified by the need to learn an entirely new method of calculating those rates.

A "performance" is defined as "the streaming of one song

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The Scoop Inside

FCC to AMers: "Never mind"

Pre-Sunrise/Post-Sunset Power Adjustments Suspended Overnight

Computer problems cited for false start

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The bad news is that the law of unintended consequences applies to the FCC. The good news is that the FCC, upon realizing this recently, reacted quickly to minimize the adverse impact of those unintended consequences on AM broadcasters. As a result, AM daytimers enjoyed something of a reprieve from pre-sunrise/post-sunset power reductions that might otherwise have been imposed on them this month. The reprieve may only be temporary, though – come November (and the return of Standard Time) those reductions may return.

It all started (as most things in Washington do) with Congress. In 2005 our elected representatives decided that it made sense to expand daylight saving time (DST). Accordingly, the start date for DST was moved to the second Sunday in March and the end date to the first Sunday in November. That doesn't seem all that problematic, does it?

But over at the FCC, a shift in times meant that adjustments had to be made to all AM stations with pre-sunrise or post-sunset authorizations.

[Primer for those of you unfamiliar with the nitty-gritty of AM regulation: AM signals mainly travel by ground during the day; while they do radiate into the atmosphere, their signals ultimately shoot out into space because there's nothing up there to stop them. But come nightfall, absent the sun's power, invisible ions in the sky move closer to one another. As the ionosphere thickens, it blocks AM signals and bounces them back to earth, to be received on radios hundreds or even thousands of miles away through the miracle of what is known as sky wave propagation. To prevent interference to nighttime AM service – interference caused by errant signals caroming off the ionosphere to who knows where – many AM stations were, since the dawn of regulation, forbidden to operate at night. Eventually the Commission concluded that daytimers could be allowed to operate with very low power during pre-sunrise (and, sometime, later, post-sunset) hours without causing interference. The Commission calculated the permissible power levels on its own and notified affected stations of their ability (limited though it was) to operate in non-daylight periods. Notations of the pre-sunrise/post-sunset authorizations were added to the licenses of the stations which opted to take advantage of the opportunity.]

Ordinarily, the change required here would not have been difficult. All the Commission had to do was to issue a public notice reminding licensees to adjust their pre-sunrise or post-sunset times to correspond to the readjusted DST times.

But the Commission apparently decided that this would be a good time to tie up some ends which had gotten loose over the years. In particular, the FCC had revised a number of its nighttime protection standards in the years since the pre-sunrise/post-sunset levels had first been established. As a result, those levels did not necessarily conform to the current standards. The Commission set about re-calculating the appropriate levels in light of current nighttime interference protection standards. The idea was that, when the Commission reminded everybody about the minor adjustments necessitated by the DST shift, the Commission would also notify them of the re-calculated power values.

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Focus on FCC Fines

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How not to run a contest – This month the FCC turned the Evil Eye on various radio stations across the country for improperly conducting contests. As with many contest complaints, disappointed listeners (some winners and some losers) ratted the stations out to the FCC. Reporting a station is as simple as sending off a quick complaint e-mail to the FCC, which is how several of these cases got started. And once a complaint is filed with the FCC, efforts by the station to appease the complainant, be he/she a winner or a loser, will ***not*** stop the FCC investigation.

The Commission's contest rules require stations to fully and accurately disclose material terms about the contest and then to conduct contests substantially as announced and as advertised. In some instances, stations rely upon vendors or other third parties to participate in the contest arrangements – often looking to such third parties to provide contest prizes. But stations should be acutely aware that the FCC does ***not*** allow its licensees to pass the contest prize buck: if the station advertises that a certain prize is to be awarded, the FCC expects that prize to be awarded, even if the third party from which the station planned to get the prize has reneged on the deal. All stations should ensure that they have the correct prizes without restriction (unless the restriction is a disclosed term). The following fines provide examples of what not to do.

Winners should actually win something – Rivalry runs deep among those who race to scarf down hot dogs, plates of buffalo wings, pies and all else from the competitive eating cornucopia. It seems that competitive eaters have the choice of joining the Association of Independent Competitive Eaters (AICE) or the Independent Federation of Competitive Eating (IFOCE). If you are in one group, you cannot compete in competitions run by the other. (Possible fight song: "When you're an AICE, you're an AICE all the way, from your first shrimp cocktail to your last cheese soufflé".) Even if they win a radio station contest to compete in an IFOCE competition, AICE members cannot participate in IFOCE events. However, a Pennsylvania radio station neglected to mention this quirk in its contest rules.

An AICE member participated in a station-sponsored contest where the prize was a seat at the presumably large table for the famed Wing Bowl #13, an eating competition sponsored by IFOCE, arch-enemy of AICE. But the Wing Bowl #13 was closed to AICE members, so the contest winner was barred from participating – even though that effectively eliminated the prize which the station had touted (*i.e.*, a seat at the competitive eating table).

The contestant complained to the FCC. The FCC asked the station some questions. The station responded that, while it might have been appropriate to include some reference to the limitation in the contest rules, the contestant in question, being a competitive eater himself and a member of AICE, should have known about it anyway. The FCC was not persuaded, and fined the station $4,000 for not including an official rule that members of one group can't play with the other group.

[Note: The FCC chastised the station because the latest event was simply a modern day version of Wing Bowl #12. The station disclosed that this story was not new and that it previously had disqualified a member of one group who tried to get into the other group using the same radio contest (although not Capulet and Montague). The station noted that this year's contestant should have been familiar with the tale and known better. The FCC did not take this defense lightly and noted that just because the station didn't get caught last year did not excuse this year.]

Winners should be paid their prizes – While handing over a prize may seem fundamentally obvious to readers, sometimes stations forget. But – and this may come as a surprise to some – the FCC does ***not*** generally accept as an excuse the claim that a prize somehow got lost in paperwork. A Kansas station will pay a $4,000 fine to learn this lesson. It seems that, in December, 2005, a listener playing a "Guess What is in the Santa Sack" contest won a $1,000 prize. An employee error at the station resulted in the station forgetting to pay the winner. A month after the contest, the listener fired off an e-mail to the FCC complaining that she had yet to be paid.

Although it took the FCC five months to respond to the listener e-mail and ask the station about the problem, the FCC inquiry set the station into action. When the station heard from the Commission, the station discovered that the prize had yet to be awarded, and it quickly handed the listener her $1,000 check. Not quite as quickly, the FCC handed the station a $4,000 fine. The FCC assessed the fine because, by the station's own admission, it had failed to award the

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Looking to put ACME out of business?

FCC May Ask Congress for Authority Over TV Violence

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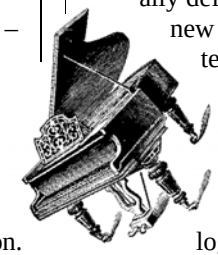
Despite the indecency crackdown over the past few years, the FCC has consistently refused to police violent content on broadcast, cable and satellite. That stance may change, however, as the FCC prepares to submit a long-awaited report on violence to Congress. The report, which was requested by members of Congress three years ago, apparently finds that violent programming has a negative influence on children and suggests that Congress could adjust federal law to permit the FCC to regulate such programming. Moreover, FCC Chairman Martin has suggested that changes should be made to facilitate regulation of satellite and cable programming as well.

As interpreted by the Commission for the last three decades or so, the federal criminal laws on obscene and indecent programming authorize the FCC to regulate programming that includes sexual or excretory acts or body parts. There is no corresponding statute that specifically permits regulation of violence. Thus, a flash of breast lasting less than one second at the Super Bowl can be penalized but slow-motion depictions of mutilated corpses (and the mutilating activity that got them that way) are commonplace – without threat of penalty – in popular shows like *CSI*, *Crossing Jordan*, and *Bones*. For the FCC to act against such programming would require an act of Congress amending current law to proscribe, or at least limit, violent content. In a rare show of bipartisan unity, FCC Chairman Kevin Martin and Commissioner Michael Copps recently urged Congress to take such action.



The fact that the Commission appears intent upon throwing the violence monkey onto Congress's back is ironic, to say the least. It was Congress – or at least a number of House leaders – who, just three years ago, urged the Commission to study the issue of violence and report back to Congress by the end of 2004. In mid-summer, 2004, the Commission did open an inquiry into a wide range of questions concerning violence, but that's pretty much the last we heard about the issue until now.

In a joint interview with The Associated Press last month, Martin and Copps indicated that the Commission may actually have completed a report (albeit a couple of years beyond Congress's originally anticipated deadline). In their interview Martin/Copps asserted that the FCC's report (which, as of this writing, has not been released to the public) concludes that there is "strong evidence" that violent programming can affect children's behavior. They also said that the FCC's report suggests that Congress could craft a law to restrict such programming without violating the First Amendment.

Martin and Copps did not elaborate on what such a law might look like. Martin did, however, press the case for requiring cable and satellite providers to provide channels on an "à la carte" basis, allowing consumers to pick and choose the channels they receive. In theory, allowing customers to not buy certain channels would help them avoid violent programming they find objectionable.

Not long after the Martin and Copps show (which, thankfully, included neither sex nor violence), reports began to emerge that FCC Commissioner Robert McDowell had broken ranks by expressing opposition to Congressional action. McDowell, the trade press reported, admitted that the report passed the buck on actually defining "violent content" for the purposes of the new law and suggested that parents, competition and technology might be better than Congress at protecting children from inappropriate content.

Within days, however, McDowell began to back away from the maverick's role, stating that, "[w]hile the market is developing technological solutions . . . Congress may deem it necessary to place restrictions on the broadcast of violent content. However, should the federal government pursue the noble endeavor of protecting America's children from television violence, it should do so in a prudent and cautious manner that withstands constitutional muster." While the views of Commissioners Jonathan Adelstein and Deborah Tate relative to the draft report have not been widely reported, most observers expect that both will endorse the report, clearing the way for a unanimous recommendation for Congressional action.

Regardless of the report's recommendations, it is far from clear that Congress would be able to draft legislation that could survive First Amendment scrutiny. The courts have never made any associations between obscenity, inde-

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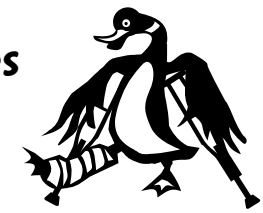
For the birds . . .

Broadcasters and Tower Teammates Dispute Fowl Bawl



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In recent years, the debate over collisions involving migratory birds and communication towers has included enormous estimates cited for the number of avian fatalities. As reported in the November 2006 edition of the *Memo to Clients*, the Department of the Interior's United States Fish and Wildlife Services (USFWS) has reported that as many as *50,000,000* birds have died *each year* as a result of tower collisions.

You might think that, like 50,000,000 Elvis fans, 50,000,000 birds can't be wrong. But a brief filed in early February by several industry organizations suggests otherwise.

The brief was filed with the federal court of appeals in Washington, which is hearing an appeal brought by three environmental groups displeased with a bird/tower-related action the Commission took in 2006. In that action, the FCC (among other things) declined to impose a moratorium on all new tower construction in the Gulf Coast area.

According to a USFWS representative, "anecdotal evidence might be the best biological information possible". Perhaps, but let's think about this a minute.

Joining the FCC in its defense of that action is an informal coalition of media-related groups, including the NAB, a couple of wireless companies, and that National Association of Tower Erectors. Their joint brief suggests that the reports of massive avian death-by-tower are, at the very least, greatly exaggerated. According to their delicate legalese, "[m]uch of the evidence in the [record] documenting collisions is anecdotal or based on biased or limited samples or unscientific estimates."

According to a published report, a USFWS representative responded that "anecdotal evidence might be the best biological information possible". Perhaps, but let's think about this a minute. Presumably most birds that suffer fatal collisions with towers can be expected to die in relatively close proximity to the tower they whack. If that's correct, then their remains should be easy to find by anyone walking in the vicinity of the tower. That is, unlike elephants and their mythic elephant burial grounds (*i.e.*, secret places where elephants supposedly toddle off to die – as reliably depicted in the 1934 classic, *Tarzan and his Mate*), dead birds should be readily findable. And when you're talking about 50,000,000 birds *per year*, it just can't be that hard to document at least some of them. Do the math. Let's say that there are about 100,000 registered towers out there. (Actually, there are about 92,000, but we'll be generous.) That means that, on average, every year *each* tower supposedly kills 500 birds. So on average, each and every tower owner should be finding about 10 dead birds around each and every tower every week, all year long.

As we reported in these page last November, the Commission hired an environmental consulting firm, Avatar Environmental LLC, to evaluate existing research and arrive at tentative conclusions contained in a notice of proposed rule making (NPRM) released in November, 2006. The Avatar study was quoted at length in the joint brief as evidence that the environmental groups' claims are an "unwarranted extrapolation" of a collection of unscientific and anecdotal evidence. (The Avatar study concluded that there was high uncertainty in the estimates cited by the environmental groups, and found that studies do not support the assertion that avian collisions with towers have led to the population decline of migratory birds.)

So there are currently two fronts open in the Bird Wars. The appeal of the 2006 decision has been briefed and is awaiting oral argument, which has not been scheduled as of this writing. In all likelihood argument will be held in the next couple of months, and a decision could be out before the end of the summer.

Meanwhile, back at the FCC, the proceeding initiated by the NPRM is still open for comments – the deadlines for comments and reply comments have been extended to April 23, 2007 and May 23, 2007, respectively. That proceeding involves a broad examination of the effect of towers on migratory birds.

In view of the scope of the relief that the bird advocates have sought in the past – they did, after all, seek a moratorium on essentially all tower construction in the Gulf Coast region – it will be a good idea to keep an eye on both of the active fronts for the foreseeable future.

The FCC, taking care of bid-ness

Auction 70 - Going, Going, Gone

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After three weeks of bidding, 60 winning bidders walked away from the latest FCC auction with 111 FM permits, while the FCC pocketed $21 million in auction proceeds for the federal treasury. Nine of the permits that were up for auction went unsold; several markets in Texas, Michigan and Wisconsin received no bids.

Fetching top dollar, the top five permits were Aguila, Arizona, at $1.7 million, New Hope, Alabama, at $1.4 million, Oliver Springs, Tennessee, at $927,000 and $919,000 each for Pigeon Forge, Tennessee and Firth, Nebraska. Eight markets had only one bidder who walked away with permits at their opening prices. Fifty permits sold for $50,000 or less with a dozen of those for less than $10,000.

Winning bidders will have until late April to pay the FCC for their permits and submit applications to construct their stations. Once the construction permits are issued, winners have three years to build the station. In the event that the permits turn out to be worthless or cannot be constructed, Uncle Sam keeps its money; the FCC is very clear that bidders participate at their own risk.

The Media Bureau appears to have its auction act together now. As a result, we may at long last start to see regular auctions – probably annually. The inventory of permits up for bid in the next auction will likely be released this autumn. We will keep readers posted.

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And sure enough, by public notice issued on March 1, the Commission tried to do just that. The notice said that the staff had recalculated the permissible power levels pursuant to the current rules, and that all licensees with pre-sunrise/post-sunset authorizations should check the FCC's website for the updated values. (Note that this come-and-get-it approach differed substantially from the FCC's usual course of action, in which the Commission sends each affected licensee a copy of its license. Welcome to the computer age.)

It did not take too long before the complaints were heard. As it turned out, some "unanticipated computer error" led to "erroneous power levels" for a number of stations. Again, welcome to the computer age.

But to its infinite credit, the Commission's staff reacted astutely. Learning of the problem within a couple of days of the first public notice, the Commission issued a second public notice on March 7 – less than a week after the first – in which it announced the immediate suspension of the use of the recalculated values. The second notice told the AM universe that they should continue to use the powers that they had been using all along (but with appropriate timing adjustments for DST). A further notice is supposed to be issued later this year (ideally before the return of standard time in November), once the computer bug has been corrected and accurate recalculations completed.

Hats off to the Bureau staff which had to deal with what was undoubtedly a difficult situation. Their immediate acknowledgement of the problem and suspension of the erroneous calculations reflect a responsible approach which, while perhaps not customary in the overall bureaucracy, was very much welcome by the affected folks on the outside of the agency.

Of course, when the correct recalculations are finally made, it is still likely, if not certain, that many AM stations will find themselves with considerably less non-daytime power than they have now – even though what they have now may seem like next to nothing. That will be a factor of the current nighttime interference rules, which have changed some over the last 20 years. So don't be surprised or disappointed if, when the numbers do finally come in, they come in low.

But there may be some hope yet. Apparently spurred by this recent mix-up, a veteran consulting engineer with substantial AM experience, Ted Schober, filed a petition for rulemaking with the Commission on March 13. Schober proposes a range of changes all aimed at cleaning up non-daytime AM operation. You can check out the petition at http://amband.org/documents/Expandedhours.pdf. As of this writing the FCC has not invited comments on Schober's petition.

Late-breaking news from the Portals

Commission Acts on Digital Radio, Citadel Assignment, MX NCE FM's

Shortly before our deadline for this month's *Memo to Clients*, the FCC issued news releases describing three broadcast-related actions it had taken. Unfortunately, the full texts of these decisions have not been released as of this writing, so we can't be 100% sure of the details. We will cover those once the full decisions are released. In the meantime, the following are summaries based on the Commission's news releases.

Digital radio rules adopted, more on the horizon – In an effort to further spur the roll-out of terrestrial digital radio service "as part of the broader digital migration that is underway across all media", the Commission decided (among other things) to:

- Hold off on imposing a mandatory conversion schedule for radio stations to commence digital broadcast operations;
- Allow FM radio stations to operate in the extended hybrid digital mode;
- Require that each local radio station broadcasting in digital mode to simulcast a digital signal of at least comparable audio quality to its analog signal;
- Adopt a flexible bandwidth policy permitting a radio station to transmit high quality audio, multiple program streams, and data casting services at its discretion;
- Allow radio stations to time broker unused digital bandwidth to third parties, subject to certain regulatory requirements;
- Apply existing programming and operational statutory and regulatory requirements to all free DAB programming streams;
- Authorize AM nighttime operations.

Despite a fair amount of grumbling about the FCC's adoption of the privately-controlled (and license fee-demanding) iBiquity IBOC system, the Commission reaffirmed that decision. The FCC did ask for further comment in two areas. First, it is interested in what limits (if any) might be appropriate as to the amount of subscription services that may be offered by radio stations. Second, it is looking into whether the Commission should adopt any new public interest requirements for digital audio broadcasters. Exactly what it might have in mind on these two points is not clear from the news releases; ideally, the full text of the decision will shed some light.

Citadel/Disney sale approved – The long-pending applications for consent to the spin-off of two dozen major-market radio stations from Disney to Citadel has been approved. This is interesting for a number of reasons. First, by getting the Disney stations, Citadel loses grandfathered rights to own more-than-the-maximum-allowed-number of stations in seven markets. That means that a number of stations will go on the market shortly. Those stations are being placed in an "insulated divestiture trust" from which they are to be sold, ideally in the next six months. The trustee is being encouraged by, *e.g.*, Commissioner Copps to get the stations into the hands of "eligible entities", which Copps says include "businesses often owned by women and minorities".

A second point of interest here is that Citadel was reportedly one of the targets of the Commission's payola investigation. By granting Citadel permission to buy stations, the Commission is indicating that it has no problems with Citadel's qualifications, which in turn suggests that the payola investigation has been resolved favorably to Citadel. But interestingly, the FCC's press release says nothing at all about this. In some fine print, the FCC refers to its decision as being a "Memorandum Opinion and Order and Notice of Apparent Liability" – the last four words being a tip-off that somebody is being fined for something. Otherwise, the official description contains nary a word on the subject.

But Commissioner Adelstein, in a separate statement, seems to spill some beans by saying that Citadel "has reached an agreement in principle . . . to settle our ongoing investigation into alleged pay-for-play practices." According to Adelstein, Citadel "does not admit to any violation of FCC rules", but nevertheless "has agreed to a significant fine". That is peculiar, since in the absence of any violation, no fine should be due. Moreover, historically consent decrees have been released as part of the routine out-flow of Commission activity. No such decrees has yet been issued relative to Citadel.

As we reported in last month's *Memo to Clients*, somebody in the Commission has been trying for a month or two to get the word out that some kind of payola-related settlement is in the works. But the Citadel press release falls short of confirming

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Tabula non rasa

FCC Green-Lights Unlicensed Use of White Space

Effective February 18, 2009

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The use of vacant TV channels for wireless communications is no longer a "whether" question, but has advanced to "when" and "what kind". The basic idea first came up in the mid-1980s, when the FCC allocated the last of the spectrum under 1,000 MHz. In those days of purely analog TV, the need to separate stations on the same and adjacent channels, and the complex spacing requirements for UHF stations, resulted in every market having dozens of empty channels. Vacant spectrum shows up as white areas on a map of channel usage, so those areas have become known as "white space" frequencies. Because signals in the TV part of the spectrum propagate especially well, the wireless companies eyed the white space channels with increasing fervor as frequency congestion worsened through the 1990s.

The FCC issued a Notice of Inquiry late in 2002 on the feasibility of letting unlicensed devices similar to Wi-Fi operate in the white space spectrum. A Notice of Proposed Rule Making followed in May 2004. Even then the concept was still just a rough outline, but it contemplated allowing both fixed systems, for delivering broadband to homes and businesses, and portable devices such as laptops and PDAs.

Broadcasters had opposed the NOI with strongly felt concerns about interference to TV reception. In response, the NPRM offered three possible mechanisms for keeping wireless devices away from the channels being used for TV in a given area. First, the device could ascertain its own location, perhaps with a built-in GPS finder, and consult a database to find out what frequencies are safe to use there. Second, a central transmitter could send out a "control signal" that notifies devices of the locally safe frequencies. An unlicensed device would not be able to operate unless it first received and decoded such a signal, and would operate only on the assigned frequencies. Third, each unlicensed device would monitor for TV signals and automatically avoid the channels on which it found any.

Broadcasters were not happy with any of these schemes. Analog TV in particular is exquisitely sensitive to interference even from very weak signals, and none of the proposed methods seemed certain to keep wireless devices far enough away from TV sets on the same channel. Broadcasters were especially worried about portable wireless devices, which would have to adjust their frequency usage as users took them from one place to another. If just one device in a million failed to make the change correctly, it could disrupt TV reception for many thousands of viewers. Moreover, TV stations often add, drop, and change channels, so even a stationary device that was safe on one day might cause interference the next.

The lobbyists are not waiting for the data. "Trust us," they say, in effect. The current, Democratically-controlled Congress is apparently listening.

While the lawyers argued, the engineers went out and solved the problem, at least in part. Their plan was issued under the imprimatur of the Institute of Electrical and Electronics Engineers (*i.e.*, IEEE), which sets technical standards for Wi-Fi and many other communications services. The proposal appears to have satisfied even many, if not all, broadcasters – no small feat, in the polarized atmosphere of the debate. But it has a catch: fixed service only. The IEEE engineers could not find a way to protect TV viewers from unpredictably itinerant portable devices.

Known as "IEEE 802.22", the approach uses all three of the FCC's proposed mechanisms. Base stations, operated by service providers, must be professionally installed. The installer notes the location and sets the device for the locally unused channels. Subscribers can buy their own equipment and install it themselves, but a subscriber station does not operate until it first picks up a base station signal, which carries a list of locally suitable channels. Subscriber stations are then limited to those frequencies. Moreover, all of the devices on the system continuously monitor for TV activity on all channels, share this information among themselves, and mutually lock out frequencies on which any of them detect confirmed TV activity.

Engineers are careful people, and don't like to be rushed. It's part of their work ethic. But while the engineers labored, the lobbyists were exercising a work ethic of their own.

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White Space (Continued from page 8)

Senator Stevens of Alaska introduced a bill in the last Congress that would have required the FCC to adopt rules permitting white-space wireless operation, provided it could do so without causing interference. Subsequent versions included special protections for channels 14-20 (used for public safety communications in some cities) and 37 (reserved for radio astronomy). The bill eventually died with that Congress. But while it was still pending, Chairman Martin of the FCC had a reconfirmation hearing before a committee chaired by that same Senator Stevens. On the evening before the hearing, in what was surely just a coincidence, the FCC released a timetable for adopting rules and testing candidate white-space wireless devices. The schedule culminated in an operational start date of February 18, 2009, when analog TV broadcasting is scheduled to cease.

The FCC has since adopted rules that authorize operation, effective February 18, 2009, and protect channels 14-20 and 37. For now the FCC would permit only fixed use, in accordance with the IEEE recommendation. Many details remain open, including protection of additional channels, whether use should be licensed, and – especially – the question of whether portable devices can safely be permitted. A coalition favoring portable white space wireless use recently sent a prototype device to the FCC laboratory for testing.

The lobbyists, however, are not waiting for the data. "Trust us," they say, in effect, "We're paid by big, brand-name technology companies that know what they're doing." The current, Democratically-controlled Congress is apparently listening. Four pending bills would require the FCC to authorize both fixed and portable devices, although one permits the FCC to hold back portable devices on interference grounds.

The key question is whether decisions about white space operation will be made by engineers and other regulatory experts, or by politicians. Everyone agrees on the need to avoid TV interference. But that is a technical issue, best addressed by the expert agency established by Congress for making just such decisions. The politicians should stand back and let the FCC do its job.

(Continued from page 3)

prize until the FCC looked into the matter. The FCC also was displeased when the station admitted that it had failed to broadcast material contest terms.

Winners should be paid quickly – The FCC has announced that "timely fulfillment is an implied term of any contest." Timely fulfillment is not satisfied by giving a winner his prize six months after a contest. A Massachusetts station ran a "Grand Prize Giveaway" contest in which the grand prize was a two-year lease on a Buick and a trunk-load full of Aerosmith memorabilia. The contest rules provided that the winner could opt for the cash equivalent of the two-year car lease. The winner took the money and was paid a month after the contest.

However, the trunk-load full of gifts did not show up for six months. While the verdict is still out on whether the term trunk-load should refer to a Mini Cooper or a Chevy Suburban, the FCC looked at the time that it took to haul the winner his trunk-load. FCC staff has now officially set out that licensees must provide prizes in a reasonably prompt manner unless the announced contest rules say otherwise. As a reference point, the FCC hit the station with a $4,000 fine for waiting six months to unload its trunk.

Caller Eight should mean Caller Eight – In another story of rules not being fully and clearly announced to participants, a New Jersey station refused to award a prize to Caller Number Eight on the call-in line because he was also Caller Number Seven. In a scenario familiar to many stations (and a scenario which conclusively establishes that some people have too much time on their hands), the on-air personality announced a cash prize to Caller Number Eight. A listener who had a multi-line phone called into the station and was told that he was Caller Number Seven. The listener pushed the button for the other line of his phone and was also the next caller. The on-air personality recognized the listener as having just called and advised him that he was still Caller Number Seven

.

The listener called back to the station and protested. Several members of the station staff responded that multiple phone lines could not be used to participate in these contests. Undeterred, the listener challenged this rule and sent an e-mail to the FCC. The FCC investigated and determined that the station had not published any rules prohibiting multi-line phones and therefore the rule should not have been enforced against the listener. The station now must pay a $4,000 fine.

The "Wake Your Lazy Carcass Up" segment gets fined – A West Virginia station is facing a $4,000 fine for broadcasting a telephone conversation without first clearing it with the other party to the conversation. The station runs a morning show segment entitled "Wake your Lazy Carcass Up" which involves calls to randomly selected indi-

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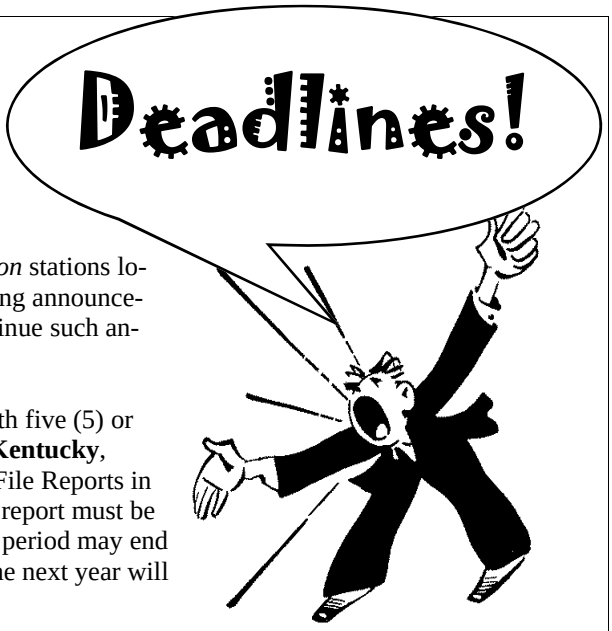
April 1, 2007



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

Television Renewal Post-Filing Announcements - All *television* stations located in **Delaware** and **Pennsylvania** must begin their post-filing announcements in connection with the license renewal process, and continue such announcements on April 16, May 1 and 16, and June 1 and 16.

EEO Public File Reports - All *radio* and *television* stations with five (5) or more full-time employees and located in **Delaware**, **Indiana**, **Kentucky**, **Pennsylvania**, **Tennessee**, and **Texas** 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 Ownership Reports - All *radio* stations located in **Texas** must file a biennial Ownership Report (FCC Form 323 for commercial stations or Form 323-E for noncommercial stations). All reports must be filed electronically.

Television Ownership Reports - All *television* stations located in **Delaware**, **Indiana**, **Kentucky**, **Pennsylvania**, and **Tennessee** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323 or 323-E.

April 10, 2007

Commercial Compliance Certifications - For all *commercial television* and *Class A television* stations, a certification of compliance with the limits on commercials during programming for children ages 12 and under must be placed in the public inspection file.

Website Compliance Information - *Television* station licensees must place and retain in their public inspection files records sufficient to substantiate a certification of compliance with the restrictions on display of website addresses during programming directed to children ages 12 and under.

Issues/Programs Lists - For all *radio*, *television*, and *Class A television* stations, a listing of each station's most significant treatment of community issues 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.

June 1, 2007

EEO Public File Reports - All *radio* and *television* stations with five (5) or more full-time employees located in **Arizona**, the **District of Columbia**, **Idaho**, **Maryland**, **Michigan**, **Ohio**, **Nevada**, **New Mexico**, **Utah**, **Virginia**, **West Virginia**, and **Wyoming** 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.

EEO Mid-Term Review - All *radio* stations with eleven (11) or more full-time employees and located in the **District of Columbia**, **Maryland**, **Virginia**, or **West Virginia** must file Broadcast Mid-Term Reports on FCC Form 397 and attach the two most recent (2006 and 2007) EEO Public File Reports.

(Continued on page 11)

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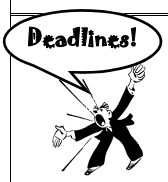
cency and violence. While a branch of First Amendment cases does contemplate some possible restrictions on some aspects of violence-related speech (*e.g.*, most notably, incitements to violence, or so-called "fighting words"), mere depictions of violence have never been considered obscene, indecent, or otherwise outside the full protection of the First Amendment.

Moreover, there would be enormous practical difficulties in crafting any kind of regulation on violence. For starters, simply defining violence seems difficult if not outright impossible. If "violence" includes any act that causes or threatens physical harm, virtually every sporting event from boxing to football to NASCAR crashes could be deemed "violent." What about news programming? Can the news media responsibly report on crime or the war in Iraq without descriptions or depictions of violence? Even if news and sports are excluded, how can the government restrict violence in "entertainment" programming without becoming hopelessly involved in creative and artistic decision making? Violence has been a part of drama since before the first Greek tragedies. Edited for violent content, a televised production of *Macbeth* would last about thirty minutes.

According to some reports, the FCC's report to Congress will not resolve any of these questions, leaving it for Congress to debate these manners in a reasonable and rational manner. We will be watching with great interest, assuming they don't do it during the new episodes of *The Sopranos*.



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Radio Ownership Reports - All *radio* stations located in **Arizona**, the **District of Columbia**, **Idaho**, **Maryland**, **Nevada**, **New Mexico**, **Utah**, **Virginia**, **West Virginia**, and **Wyoming** must file a biennial Ownership Report (FCC Form 323 for commercial stations or Form 323-E for noncommercial stations). All reports must be filed electronically.

Television Ownership Reports - All *television* stations located in **Michigan** and **Ohio** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323 or 323-E.

June 1-10, 2007

Children's Television Programming Reports - Analog and Digital - For all *commercial television* and *Class A television* stations, the reports on newly revised FCC Form 398 must be filed electronically with the Commission between June 1-10, and a copy must be placed in each station's local public inspection file. For the first time, separate reports will be required for both the analog and DTV operations. (*Note: The original filing window for Children's Television Program Reports for the first quarter of 2007 was originally April 1-10. That window was postponed by the Commission by public notice issued on March 20, 2007. The postponement of the reporting deadline does* ***not*** *alter any other children's television obligations.)*

(Continued from page 9)

viduals from the phone book. When calling, the station does not speak with the call recipient prior to broadcasting the call. FCC rules require that parties to a phone call be advised that the call will be broadcast ***BEFORE*** the conversation can be broadcast *or* taped for broadcast. In this instance, the recipient of the call said only, "hello" and "hold on." However, it is not the content of the conversation that results in the fine, it is the broadcast of anything without the prior notice to the other person on the telephone.

The same rule also prohibits recording a call for later broadcast. A Mississippi station was smacked with an $8,000 fine for recording a telephone call and broadcasting it. Prior to recording the telephone call, the station employee should have obtained the other party's consent. However, consent was never obtained. Instead, the station claimed that the consent was not necessary because the other party was calling the station back. With the limited exception for call-in shows and on-air phone lines that are customarily used by listeners to get themselves on the air, FCC rules do not permit a station to assume that a caller has consented to having the call recorded or broadcast simply because the caller has dialed a radio station. The correct procedure is to confirm that the other party consents before broadcasting or recording.

(Continued from page 1)

to one listener," but it does *not* include: (a) performance of non-copyrighted songs or songs for which the station already has separate permission (from the holder of the performance copyright – *i.e.*, probably the record companies, as opposed to ASCAP, BMI, etc.) to play the song, or (b) an incidental performance of the song such as the use of a brief musical transition going into and coming out of commercials or briefly played in the background of a news, talk or sports program or a public news or sports event.

To calculate monthly royalty rates according to the per performance rate, a station must know how many songs it streamed in the month and multiply that by the number of listeners at any given time. This performance total is then multiplied by the new royalty rates, which are:

- $ 0.0008 per performance for 2006
- $ 0.0011 per performance for 2007
- $ 0.0014 per performance for 2008
- $ 0.0018 per performance for 2009
- $ 0.0019 per performance for 2010

As noted above, even smaller commercial stations which were previously able to take advantage of reduced rates calculated as a percentage of the revenue earned will have to pay at these new per performance rates. To illustrate the increase for these stations (defined as those which earned $1.25 million or less in gross revenues), envision an Internet radio station with revenues of $500,000 in 2005. That station would have paid royalties in the amount of $50,000 – ten percent of revenues for the year – but still would have $450,000 in revenues left over. Under rates in effect for 2007, that same station, assuming it played 16 songs per hour to 5000 listeners would incur royalties in excess of revenues for 2006 and beyond.

Noncommercial stations are also affected. Noncommercial webcasters still pay an annual minimum of $500. But they will be subjected to the new rates for any listenership in excess of a monthly aggregate tuning hour maximum. That aggregate tuning hour maximum (calculated by multiplying the number of listeners by the hours of copyrighted material streamed in the month) has increased from 146,000 to 159,140 per month. So, noncommercial stations with large listenerships are also likely to see royalty payments exceed revenues to such a degree that they could be put out of business. These stations, of course, have limited options available to raise extra revenue. More importantly, the specially negotiated agreements benefiting some of the non-commercial community, such as NPR-affiliated stations, are no longer effective (more on NPR's response below).

Barring any of the steps outlined below, the new royalty rates are to go into effect, retroactive to January 1, 2006, on May 15, 2007 (forty-five days after the end of the month in which the CRB released its decision). That would be the day on which extra fees would be due for the months from January 2006 through February 2007 and on which payments for March 2007 would be due at the new rates that would then be applicable going forward.

Despite this dire news, there is reason to practice patience before shutting off Internet streams or making a run on the bank. There are still a number of possible scenarios which could delay the implementation of these new rates or erase them outright.

First, it's possible that the CRB might re-think its decision. National Public Radio has already filed a petition for rehearing, and others may follow suit. Victory will be an uphill climb, as it requires the CRB to agree that its original decision was wrong. But the CRB has announced that it will at least consider the petition, and it has invited further comments on it.

Any party to the CRB proceeding can also appeal the decision to the United States Court of Appeals for the District of Columbia Circuit. Such an appeal would have to be initiated within thirty days of publication of the decision in the Federal Register (which has not yet occurred). This would also be a difficult fight, as the standard for overturning an administrative decision on appeal requires the decision was arbitrary and capricious – a standard of review which generously favors the agency which made the decision in the first place.

The fact that review proceedings – including the NPR petition for rehearing and any other such petitions or appeals which might be filed – have been started *may* stay the need to pay back royalties, at least for the time being. While it is not 100% certain, some believe that the filing of either a petition for reconsideration or federal court appeal would stay payment of back royalties now due, although payment of the new rates going forward would still be in effect. If that interpretation is correct and a challenge successfully leads to a decrease in the royalty rates, those paying royalties would be reimbursed for overpayments incurred for March 2007 and beyond. If the challenges are unsuccessful, the payments for March 2007 and beyond would obviously be unchanged and streamers would have then to pay the

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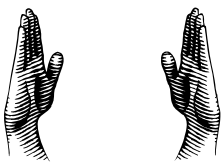
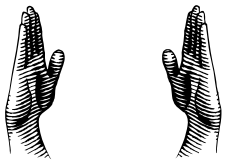
Size does matter



Anti-Trust Thresholds Increased for DOJ/FTC Review of Transactions



By: R.J. Quianzon
703-812-0424
quianzon@fhhlaw.com

Under federal antitrust law, certain mergers or acquisitions which exceed specified thresholds must first be submitted to the Federal Trade Commission (FTC) and the U.S. Department of Justice for their review before the transaction is consummated. The FTC recently adjusted those thresholds for inflation. As the prices of broadcast properties increase, some broadcasters are finding that the values of their proposed deals are exceeding these thresholds, thereby triggering antitrust inquiries (with all the additional hassle, expense and delay that such inquiries entail). For reference, certain new thresholds follow:

1. $59,800,000 voting securities and assets threshold for transactions in which:

   - a non-manufacturing acquisition target has $12 million or more in assets and the acquiring company has $120 million or more in assets or net sales; or
   - a manufacturing acquisition target has $12 million or more in assets and the acquiring company has $120 million or more in assets or net sales; or
   - a target company has $120 million or more in assets or net sales and the acquiring company has $12 million or more in assets and net sales.

2. $239,000,000 threshold for voting securities and assets.

In negotiating deals, it is prudent to bear these thresholds in mind. Once they are crossed, additional time and expense to assure compliance with the preliminary review process is a virtual certainty.

(Continued from page 12)

difference between what has already been paid (at 2005 rates) for January, 2006 – February, 2007 and what should have been paid under the new rates.

A rapidly rising industry outcry could also force changes. The small webcaster community has mobilized efforts to publicize the ill effects of this ruling in the hopes of putting pressure on SoundExchange to reach a voluntary settlement agreement that would change the rates. These efforts, combined with those from larger organizations such as the NAB, have also spurred interest on Capitol Hill, where several lawmakers have indicated (both casually and in official statements before the Telecommunications and Internet subcommittee of the House Energy and Commerce Committee) that these rates are dangerous not just to Internet radio but also to the entire music industry. Congress took action to benefit a class of especially aggrieved stations in 2002 through the Small Webcaster Settlement Act; similar legislation to reverse this ruling is not out of the question.

And even if you happen not to be a streamer, don't think that the recent change in streaming royalty rates may not affect you at some point down the line. A SoundExchange official was quoted in the *Washington Post* as remarking that "there's really no justification for broadcast radio not paying, and we're going to try to address that." He was referring to the existing copyright situation in which broadcasters pay royalties to song composers (through ASCAP, BMI and SESAC), but are ***not*** required to pay any royalties to the owners of the copyright in the recorded performance of the songs.

Those latter owners tend to be the record companies who are the core constituency of SoundExchange. If they were to try to undo the current broadcast-record company relationship in an effort to force broadcasters to pay not only composer royalties but also recorded performance royalties, the result could be a major upheaval in the broadcast industry. Of course, that's not going to happen tomorrow or the next day, but the SoundExchange official's quote suggests that they may have some long-range plans along those lines. While non-streaming broadcasters need not lose any sleep over this possibility just now, they would do well to keep this issue somewhere on their radar screen on the off-chance that SoundExchange tries to make a move in the future.

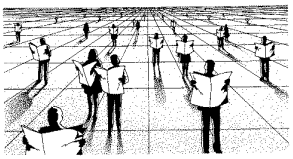
To slightly complicate matters on the practical streaming front further, SoundExchange has not released the new Statement of Account forms that will be used to pay these increased royalties. We will advise you of further developments (including the release of these forms when it occurs) as they happen. Until then, Internet radio operators should take a deep breath, exhale, repeat and stay tuned in and turned on.

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

Updates on the News

Further thoughts on tolling – Last month we reported on the opportunity being provided by the Commission for licensees to enter into "tolling" agreements in order to get their renewal applications granted notwithstanding pending indecency and/or payola complaints. We indicated that tolling made particular sense if the licensee had some specific interest in getting its renewal granted sooner rather than later – say, the need for a clean renewal in order to complete re-financing, or possibly to sell the station.

Upon further reflection, we have concluded that tolling agreements may make sense even if there is no specific transaction-related motivation. The reason is this. Having a renewal in hand would protect the licensee from the worst case scenario that could (but is not likely to) arise should the Commission decide to designate pending renewal applications for hearing. Designation for hearing could mean that (again, in a worst case scenario) the renewal might be denied. But if the renewal has already been granted, then the most that the Commission could do somewhere down the line would be to assess a fine for whatever violation the Commission might find. While a substantial fine is never good news, it would be far better news than loss of license.



We emphasize that the likelihood of the Commission starting to designate renewal applications for hearing is very, very close to zero, as far as we can see. The Commission has not taken such steps (except in rare and extraordinary cases) in decades, and it's hard to imagine that it would change course now. But entering into a tolling agreement is a cheap and easy way to insure against that worst case scenario. Ultimately, as we said last month, whether or not tolling makes sense in any particular situation is something which the licensee should discuss with its counsel.

Now available at the FCC Form Store – The electronic version of Form 397, which is to be used for submitting mid-term EEO reports by broadcasters, is now up and running on-line. We reminded one and all about the upcoming round of mid-term EEO reports which will be starting on June 1, 2007 (for radio licensees in DC-Maryland-Virginia-West Virginia) in the January *Memo to Clients*.

Coming soon to the FCC Form Store – The revised Form 398 (Children's Television Report), in the works since last September, isn't quite ready to roll. Because of the conversion of the Commission's children's TV database system, the Commission has postponed use of the revised electronic version of Form 398 until June. So the Form 398 filing window for the first quarter of 2007 has been pushed back from April 1-10 to June 1-10. Mark your calendars.

And while we have heard that the revised version of Form 340 (for noncommercial broadcast permits) has been approved by OMB, the Commission has still not put out an official notice advising that it's ready for use. As a result, NCE folks looking to take advantage of the relaxed processing standards for FM mods will have to wait a bit longer.

Now available at the FCC Rules Store – You can buy print copies of the FCC's rules from the Government Printing Office. The October 2006 edition just went on sale. For anywhere from $56 to $85.40 per volume, you can get a handsome, if already six months out of date, addition to your library. Or you can go to http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?sid=3df25daba8d74e9ef720c6ed605f8c6c&c=ecfr&tpl=/ecfrbrowse/Title47/47tab_02.tpl for an absolutely up-to-date, searchable version, absolutely free. Let us know if you would like ordering information for the paper edition.

FHH - On the Job, On the Go

It's that time of year again, when the siren song of the NAB Convention beckons us out to Las Vegas. This year FHH will be represented by **Frank Jazzo**, **Frank Montero**, **Jim Riley**, **Kathleen Victory**, **Scott Johnson**, **Lee Petro**, **Joe Di Scipio**, **Ed O'Neill**, **Howard Weiss** and, possibly, **Kevin Goldberg.** The FHH crew will be staying at the Bellagio, so be on the lookout for them. **Frank J** will be moderating a Broadcast Regulatory and Legislative Conference Session entitled "Stay Out of Trouble with the FCC: What Recent Enforcement Actions Mean to You" on Monday, April 16 from 10:30-11:45 a.m. **Harry** will participate as a panelist in "David v. Goliath: How Small and Independent Stations Can Survive" on Tuesday, April 17 from 10:30-11:45 a.m. And **Joe** will moderating a panel on Regulatory Compliance entitled "Follow the Red Tape Road" as part of the ABA/NAB/FCBA confab "Representing Your Local Broadcaster" on Sunday, April 15 at 9:00 a.m.

Frank J also conducted a political broadcasting seminar, along with the FCC's **Bobby Baker**, for the Mississippi Association of Broadcasters in Jackson earlier this month.

FM ALLOTMENTS ADOPTED –1/20/07-3/20/07

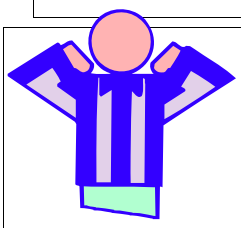
State	Community	Approximate Location	Channel	Docket or Ref. No.	Availability for Filing
TX	Milano	72 miles NE of Austin, TX	274A	05-97	TBA
CA	Wofford Heights	48 miles NE of Bakersfield, CA	251A	03-91	TBA

FM ALLOTMENTS PROPOSED –1/20/07-3/20/07

State	Community	Approximate Location	Channel	Docket No.	Deadlines for Comments	Type of Proposal (i.e., Drop-in, Section 1.420, Counterproposal)
OR	Prineville	145 miles E of Eugene, OR	226C3	07-39	Cmts-04/23/07 Reply-05/08/07	Drop-in

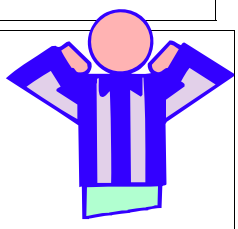
Notice Concerning Listings of FM Allotments

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.



Hey, sports fans – Joe Di Scipio says:

YOU
Make the Call!



We here at the *Memo To Clients* expected a great hue and cry following Prince's halftime show during Super Bowl XLI (well, some of us did – others of us didn't notice anything outsized). Prince closed his half-time show with his 1980s classic, *Purple Rain* (an appropriate choice, given the pouring rain). For approximately 32 seconds during the *Purple Rain* performance a huge white sheet was hoisted from the stage, providing a translucent curtain on which Prince's silhouette was shown as he "excitedly" played his "guitar". (See illustration at right.)

Photo from blogs.usatoday.com

Prince playing his, uh, guitar during half-time at Super Bowl XLI.

Now there is only one reason to place a silhouette of Prince playing his guitar on a white sheet… Given that a shot – which lasted 9/16 of a second (if you believe CBS), or 19/32 of a second (if you believe the FCC) – of Janet Jackson's nipple during the Super Bowl XXXVIII half-time show caused great outrage and resulted in a fine from the FCC to the CBS Network in the amount of $550,000, we expected the same following the Prince half-time show. After all, Ms. Jackson's, er, display lasted only slightly more than half a second, while Prince's – at 32 seconds – had considerably more staying power. C'mon, somebody's got to have been outraged out there, we figured.

Well, we were wrong.

At least, initially.

Sure, there were a few articles following this half time show. Rick Telander ((*Chicago Sun-Times*) was impressed, observing that "[t]he little purple guy with the mighty red Corvette understands silhouettes, for sure. When he stood in profile with his phallic guitar casting a shadow on the white gauze waving behind him, I nearly spat my free soda out of the press box." Other articles acknowledged the visual sexual inyourenddo – wait, spell-check says that's spelled innuendo – but pooh-poohed it, saying that guitars are, of course, phallic, but the half-time show was no big deal.

(Continued on page 16)

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First Class

(Continued from page 7)

that word. We still await further developments.

NCE FM applications moved along – At long last, the Commission has taken a step toward resolving 76 separate groups of mutually exclusive applications (numbering about 200 in all) for new noncommercial FM permits. A substantial number of those applications have been pending for a decade or more. Those applications became trapped in a regulatory limbo when the Commission was forced to abandon comparative hearings but was at the same time prohibited from auctioning off noncommercial authorizations. As a result, the agency had no way to decide which of a group of MX applicants should be awarded the contested permit. Eventually the Commission adopted a relatively crude "point" system for making the call. In its recent action, the FCC has announced its points analysis for each application group, including designation of the tentative winner or tied winners in each group. Once the full text of the decision is released, disgruntled losers will be able to petition against the winners. It's not clear how tie situations will be dealt with.

Unfortunately, the news release did not include a list of the 76 application groups which were addressed, so again, we'll just have to wait for release of the full order.

We will be reporting further on all of these items once the FCC releases its full decision in each.

(Continued from page 15)

Still, having lived through the fury of *L'Affaire Jackson* in 2004, we were *sure* there would be complaints filed at the FCC about the half-time show. And while our instincts initially seemed to be, well, just wrong, it turns out that we were right after all. According to The Smoking Gun, some 150 complaints were filed (including some complaining about the Super Bowl Snickers commercial). The Smoking Gun managed to snag copies of several. They make for some amusing reading. Check it out: http://www.thesmokinggun.com/archive/years/2007/0305072fcc1.html. (We were especially moved by the complainant who closed off his/her complaint by saying "thanks CBS for turning my son GAY".)

Which brings us to the issue of the month: If Janet Jackson's half-second display was indecent, how come Prince's half-minute display wasn't ? Or was it? ***You*** make the call!