Fletcher, Heald & Hildreth

Memorandum to Clients

May, 2011 News and Analysis of Recent Developments in Communications Law No. 11-05

Target: "Loud" commercials

The CALM Act: The Next Step

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As we noted back in December, when the President signed the CALM Act into law, the action on the loud commercial front shifted from Congress to the FCC. The CALM Act, intended to lower the volume (or more accurately, the "loudness") of commercials on television, did not itself change any rules. Instead, the Act merely instructed the FCC to change the rules. To move things along quickly, Congress spelled out, in considerably more detail than is often the case, just how the Commission is supposed to lower the Cone of Silence onto the TV industry (including broadcasters and MVPDs) – and Congress imposed a tight schedule for getting things done. Now, nearly six months later, with the issuance of a Notice of Proposed Rulemaking (*NPRM*) the FCC has taken its first formal step toward meeting that schedule.

If you're not up to speed on all this, you can find a number of posts tracking the history of the CALM Act on our blog, www.CommLawBlog.com (search for "CALM Act").

The vexatious problem of seemingly loud commercials has been around for decades, chronically confounding would-be regulators. The breakthrough that led to the CALM Act arrived with the transition to digital television technology, which affords considerably greater control over the various components of the transmitted signal. As part of their effort to develop the technical standards governing DTV, the Advanced Television Systems Committee (ATSC) devised a "recommended practice" (RP) for "establishing and maintaining audio loudness". A link to that RP – dubbed ATSC A/85 – can be found on our blog. While the ATSC A/85 RP was initially just "recommended", Congress stepped in (via the CALM Act) and ordered the FCC to impose that RP as a mandatory standard.

The FCC's *NPRM* is the next step in that process. And while you might think that the process would be simple – since Congress (by incorporating ATSC's work) has spelled out the technical details to be imposed – the project turns out to be somewhat more complicated.

The *NPRM* proposes to explicitly include the ATSC A/85 RP in the technical rules governing over-the-air and MVPD television. No surprise there – it's what Congress ordered. But the ATSC A/85 RP assumes that the transmission system includes audio compression capability consistent with the Dolby AC-3 DTV audio standard. Since that standard is included in ATSC Standard A/53 (the overall Digital Television Standard incorporated by reference in Section 73.682(d) of the Commission's rules), DTV broadcasters are already subject to the standard. Some, but not all, MVPDs (*e.g.*, cable and satellite operators) also use that standard, but the fact that some don't complicates things. Additionally, programming is often not produced by the broadcaster or MVPD operator who would ultimately be subject to the new rules – that, too, adds a level of complexity to the implementation of the CALM Act.

As best we can tell – and, frankly, there's a reason that some of us went into communications law rather than psychoacoustics – the ATSC A/85 RP is based on a recommended "measurement algorithm" developed by the International Telecommunication Union Radiocommunications Sector. That algorithm ("ITU-R Recommended BS.1770") provides a "loudness measure standard", *i.e.*, a numerical value indicating the "perceived loudness" of any particular audio content. That value is then encoded as a metadata parameter – called the "dialog normalization", or "dialnorm" – in the audio content of the programming. According to the Commission,

> [t]he "golden rule" of the ATSC A/85 RP is that the dialnorm value must correctly identify the perceived loudness of the content it accompanies in order to prevent loud-

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Inside this issue . . .

Senate would throw the book at 'em

S.978: Sending Illegal Streamers Up The River?

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The White House and Congress have finally managed to agree on something. We'll concede that it's a relatively minor issue . . . unless you're engaged in the illegal streaming of copyrighted content, in which case you could be looking at up to five years, maybe even ten, in the Big House and a hefty fine to boot.

In the March *Memo to Clients* we reported on a "White Paper" in which the President's U.S Intellectual Property Enforcement Coordinator laid out a number of "Intellectual Property Enforcement Legislative Recommendations". One of those recommendations: Congress should "clarify that [copyright] infringement by streaming . . . is a felony in appropriate circumstances."

The White Paper wasn't clear whether the recommendation applied to music, video, or both. Nor did it say exactly what standard of culpability would apply. For instance, would innocent mistakes – the streaming of audiovisual content for which you *thought* you had cleared all copyrights – be subject to the felony penalty? We surmised that the Administration was mainly concerned with illegal streaming of video, which is occurring with increasing regularity but not technically punishable under existing law. (Federal criminal law currently applies to illegal file sharing or downloading, but *not* to instantaneous streaming.)

A bipartisan trio of Senators has now acted on the White House's recommendation. On May 12, 2011, they introduced S. 978, which would amend 18 U.S.C. §2319 and 17 U.S.C. §506 to include streaming within the definition of felonious criminal conduct. (For those of you who keep track of such things, Minnesota Democrat Amy Klobuchar is technically the bill's sponsor, but she is joined by fellow Democrat Christopher Coons from Delaware and a Republican from Texas, John Cornyn.)

The bill makes two fundamental changes involving 17 U.S.C. §506 (the section of the Copyright Act that defines "criminal infringement", *i.e.*, the kind of copyright infringement that can result in jail time) and 18 U.S.C. §2319 (the section of the federal criminal code that spells out the potential penalties for criminal infringement).

S.978 would expand the current definition of "criminal infringement" to include streaming (which the bill refers to as "public performance"). Anyone who engages in the unauthorized public performance of a copyrighted work could be criminally charged, as long as (a) the "public performance" involves making the work available on a publicly-accessible computer network and (b) the work was intended for commercial distribution.

Previously, the statutory definition of "criminal infringement" included only reproduction (*i.e.*, copying) or distribution (*i.e.*, actually transfer or sale of a copy for permanent retention) of a copyrighted work. The expansion to include streaming is seen by the bill's sponsors as necessary because prosecutors, concerned that the current law arguably doesn't criminalize unauthorized streaming, have hesitated to try to prosecute streamers.

The penalty for streaming (set out in 18 U.S.C. §2319) would start with three years in prison and fines. Jail time could go as high as ten years if the infringer is a repeat offender.

S. 978 would also insert a new penalty provision into Section 2319 aimed at criminal streaming intended to result in commercial advantage or private financial gain for the infringer. Such infringement would warrant a minimum five-year sentence (plus fine), but only if (a) the offense consists of ten or more "public performances by electronic means" in any 180-day period and (b) either the total retail value of the performances exceeds $2,500 or the fair market value of the license required to offer the performance exceeds $5,000.

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Consent decree is beginning, not end, of licensee's troubles – It turns out that, sometimes, the job's not over even *after* the paperwork is done. An AM licensee found that out the hard way when it got slapped with a $25,000 notice of apparent liability for failing to take care of a couple of items on a to-do list that it had promised the Enforcement Bureau it would take care of.

The story starts back in 2005, when the licensee (real name: "A Radio Company, Inc.") received a notice of apparent liability for a short laundry list of problems, including incomplete public file, inadequate tower fencing, and operating with unauthorized facilities (seems the directional AM was using its daytime directional pattern at night). Total damage: $15,000.

The licensee dickered over the details and managed to get the fine backed down a grand (in 2007), but it kept the ball in play by appealing parts of the remaining $14K fine. In 2008, the licensee entered into a Consent Decree with the Enforcement Bureau that shaved another $6,000 off the bottom line. So at that point the licensee was looking at an $8,000 fine, a bit more than half the original amount. According to the Consent Decree, all the licensee had to do was pay the fine, set up a "Compliance Plan" designed to prevent future violations, and file three (count 'em, three) "compliance reports" with the Commission – one 90 days after the Consent Decree, the second a year after, the third two years after – confirming that the Compliance Plan was up and running. Good deal, right?

Apparently not good enough.

Despite the fact that it had negotiated a pretty sweet deal and had signed off on all the paperwork to tie that deal down, the licensee managed to slip up. In the most recent NAL, the Enforcement Bureau observes that A Radio Company never got around to filing its last compliance report. Oh yeah, and it never paid the fine. Well, actually, it apparently *did* send in a check, but the check bounced for insufficient funds, and the licensee didn't bother to follow up with, like, a good check. (Important practice tip: tendering an NSF check to the FCC does ***not*** constitute payment of the fine. Who knew?)

So now the Enforcement Bureau has lowered the boom to the tune of $25,000 – for the licensee's failure to comply with the terms of the Consent Decree. And while the most recent NAL doesn't directly address the question of the $8K that remains unpaid from the Consent Decree, it wouldn't surprise us if the $6,000 Consent Decree Discount is now off the table (and possibly also the extra $1,000 discount the Bureau agreed to in 2007). If we're guessing right, the licensee would now appear to be on the hook for $40K or so. Ouch.

The take-home lesson here is simple: if you do enter into a consent decree with the Commission, make sure that you know and understand exactly what is expected of you. If the Decree imposes chores that extend over a period of time – for example, the periodic submission of compliance reports – mark those chores in your calendar and make sure that they are tended to. And make sure your check clears.

Focus on FCC Fines

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As the A Radio Company case demonstrates, failure to follow up on Consent Decree-imposed obligations can be considerably more expensive than the original fine.

FCC agents active at all hours – FCC agents are apparently up at all hours of the night. A CBS radio station in Los Angeles found this out the hard way – and the bad news may be a $10,000 fine.

Just before midnight one evening, an FCC agent from the Los Angeles office happened to notice that an AM station's tower in Torrance, CA, was not lighted at its top. The next day the agent checked the FCC database and confirmed that that particular tower was indeed required to have a beacon on top. The Agent called the FAA, was told no outage had been reported (the agent fixed that), and, four days later, visited the station to inspect log books. The station admitted that they did not notice the remote monitoring warning light and had taken at least 5 days to repair the light. In response, the FCC has proposed hitting the station with a $10,000 fine – quite an expensive light bulb.

FCC agents call for back-up – FCC agents investigating a pirate FM operation in San Jose, California, were greeted with an unexpected response when they asked to inspect a station. The agents had received numerous complaints about the pirate, who was operating out of his home. The agents went to the home several times and issued warnings, all to no avail. The agents also insisted that they be permitted access to inspect the equipment. During the final attempt to inspect the equipment, the FCC's request was met with a query from the pirate to the agents: "Do you want to get shot?"

The FCC agents excused themselves (but not before issuing yet another "notice of unauthorized operation") and contacted the local police to advise them of the incident. When the FCC set the fine for the pirate, they started with the base fine of $10,000 and then ratcheted it up 150% – for a total of $25K – thanks largely to that ill-advised threat. The pirate has 30 days to pay the fine or request that the fine be canceled or reduced.

Introducing the "satellator"

LPFM Cheerleader to FCC: Let Translators Originate

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Back in the January, 2011 *Memo to Clients*, just after the Local Community Radio Act of 2010 (LCRA) had been signed into law, we observed that there was still a long way to go before we could fully assess the impact of that Act on the low-power FM universe. After all, the Act imposed a number of new legal twists in the already long-running stand-off between FM translators and LPFM stations; it also gave rise to a welter of practical problems relating to the fate of thousands of translator applications still pending since 2003.

Little did we know that things might get even more complicated. But a recent proposal from the Amherst Alliance could have just that effect.

The Amherst Alliance is a special interest group which was an early promoter of the concept of LPFM service. It has since been a "key player" (in the Alliance's own words) in the debates that have shaped LPFM. And now the Alliance has filed a Petition for Rulemaking proposing to the Commission that translators be permitted to originate programming, including commercial programming. Oh yeah, and they also suggest a new hierarchical structure to be applied to the existing universe of secondary status FM operations, a universe currently populated by translators and LPFM's. (FM boosters are also in that universe, but the Alliance doesn't seem concerned about them.)

According to the Alliance, its proposal could lead to a "revival of 'Mom and Pop' commercial radio".

None of the Alliance's proposals is explored in particular detail in its petition. The Alliance urges simply that "locally originated programming" be permitted on translators. In other words, all translators could become originating LPFM stations, at least part-time. (More on the "part-time" aspect below). In the Alliance's view, this would increase the potential for more local programming pretty much everywhere. Moreover, since the Alliance would apparently not limit the originated programming to purely non-commercial fare (a limitation which has historically been imposed on LPFM stations), this change could lead to a "revival of 'Mom and Pop' commercial radio". According to the Alliance, such small, local operations were muscled into virtual extinction by media consolidation in the 1990s.

And to incentivize existing translator licensees to start originating local programming, the Alliance asks the Commission to create a "lower priority" secondary FM service. The "lower priority" service would consist of translator stations which are fed, "exclusively or primarily", either with satellite programming or with programming originated from a studio more than 120 miles from the translator. If such stations – which the Alliance creatively dubs "satellators" – don't begin to originate at least a minimum amount of local programming, they would . . . well, it's not exactly clear what regulatory limits would be imposed, but at a minimum such satellator stations would not be deemed to be the equivalent of real LPFM or translator stations.

Recognizing that some start-up time might be necessary to get the origination ball rolling, the Alliance suggests that satellators be given an initial deadline by which they would have to broadcast at least two hours a day of locally originated programming. Within a year of that initial deadline, the amount of such programming would have to double; within two years it would have to have reached at least six hours a day; and thereafter it would have to be at least eight hours a day. Failure to meet any of these benchmarks would result in the satellator station being relegated to a new class of service, *i.e.*, "Auxiliary Secondary Service", which would have a "lower priority" vis-à-vis other secondary service stations such as originating translators and LPFM stations.

The Alliance's proposal is an obvious response to one aspect of the LCRA that presumably disappointed the Alliance. The Act requires that "FM translator stations, FM booster stations, and low-power FM stations remain equal in status and secondary to existing and modified full service FM stations." That language seems to say that translators – including 100% non-originating translators – are no better and no worse than LPFMs when it comes to licensing priorities, regardless of any lack of local program origination.

The Alliance, however, chooses to read that particular statutory language to refer only to "new" stations. (It finds the restriction to "new" stations in some language that appears in an introductory section.) In other words, the Alliance figures that the Commission remains at liberty to alter the relative status of any translator stations already licensed as of the day when the LCRA became law. And, since the Alliance clearly thinks that stations that originate are more deserving than stations that don't, the Alliance's proposal is geared toward lowering the status of the latter in favor of the former.

It's not at all clear that the Alliance's reading of the statute is correct. While the word "new" (referring to licenses) for sure appears in the prologue of Section 5 of the LCRA, that word does *not* show up in the subsection in which Congress mandates that *all* secondary FM services (translators, boosters, LPFMs) "remain equal in status". That can hardly be seen as a Congressional green light for the FCC to treat some of those services unequally.

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Because Congress told it to . . .

LPFM Impact Inquiry Initiated

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Last January, when we reported on the enactment of the Local Community Radio Act of 2010 (LCRA), we focused on the practical aspects of that new law – and particularly how it might affect the long-running siege between FM translator licensees and applicants, on the one hand, and low-power FM licensees and applicants, on the other. We didn't bother to mention the homework assignment Congress laid on the Commission in the final section of the Act. In case you missed it, Section 8 of the LCRA instructs that the

> Federal Communications Commission shall conduct an economic study on the impact that low-power FM stations will have on full-service commercial FM stations.

Congress didn't bother to give the Commission any further direction about just what the study should look at or how it should be prepared. The only other detail contained in the Act was that the Commission would have to submit a report about the study to Congress . . . within one year of the LCRA enactment. That means that the FCC's got until January 4, 2012, to wrap up the study and get its report filed.

The clock's running and time's a-wastin', so the FCC is doing the only sane thing: it's asking all of us to help it out.

The clock's running and time's a-wastin', so the FCC is doing the only sane thing: it's asking all of us to help it out.

In a May 10, 2011 public notice, the Commission solicited input on a range of questions concerning, well, the economic impact of LPFM stations on full-service FM stations.

First off, the FCC is looking for tips on "the appropriate subject matter and scope of the study and report". Presumably the Commission is as mystified by the terse and cryptic statutory directive as anybody. Congress wants a report on how LPFM stations ***WILL*** affect full-power folks, but (unless it's managed to locate a really, really reliable crystal ball, or maybe a Ouija board) the Commission can't just peer into the future and tell us what's going to happen; rather, it's stuck looking at historical, or at least currently available, data. What's an agency to do?

The Commission also wants to know what "metrics" it should be considering. Its current thinking is that the study should focus on audience measurements and advertising revenues, since those are the two "most relevant available indicators" for assessing a commercial station's economic performance. Of course, the Commission is wide open for suggestions of other factors to consider.

With respect to audience ratings, the Commission is looking for data demonstrating the effect LPFM operations have had, or are likely to have, on full-service stations' audience shares. The Commission helpfully observes that more than half of all currently operating LPFM stations are located *outside* Arbitron "Metro" markets, which is likely to complicate this particular aspect of the Commission's study.

The FCC's inquiry about revenues is similarly vague: to what extent have LPFM stations had – or are likely to have – any "direct or indirect impact on the advertising revenues" of full-service commercial FM stations. Sure, LPFM stations are, by regulatory definition, non-commercial, but they can still air "underwriting" announcements that sound a lot like – and generate revenues like – advertising. Is there any way that the available data (whatever those may be) can be parsed to produce useful insight into the competitive interplay of LPFM and full-service FM stations with respect to revenues?

Geographically speaking, the Commission plans a two-prong approach. First, it will study the particular economic effects on commercial FM stations whose signals "significantly overlap or encompass" one or more LPFM stations. Second, it will look at the overall impact that LPFMs have in Arbitron markets, regardless of whether or not the LPFMs are overlapped by full-service stations in those markets. Again, though, the Commission is looking for suggestions – particularly since (as noted above) the FCC knows that there aren't that many LPFM stations in Arbitron markets, so the second geography-based aspect of the inquiry may be a bit tricky to pull off.

Interestingly, the one thing the Commission says it does ***not*** plan to look at is the potential interference effect of LPFM stations on their full-service siblings. As the Commission sees it, the interference remediation provisions of the LCRA "adequately protect[ ]" full-service licensees from second- or third-adjacent interference and, anyway, Section 8 of the LCRA (you remember, that terse statutory instruction quoted above) "does not expressly require such an assessment". True enough – but Congress's instruction doesn't really "expressly require" consideration of ***any*** particular factor; nor does it expressly exclude any particular factor. Why, then, should audi-

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2011 Reg Fees Proposed: Going Up!

Remember last Spring, when the FCC issued its proposed 2010 reg fees and they had all gone down from the previous year, so we got all excited, and then when the final 2010 fees were announced, they had gone back up again and we were disappointed? Good news! This year, the FCC is sparing us that emotional whipsaw. It has just released its proposed 2011 regulatory fees, and with only few exceptions, they reflect increases – in some cases, significant increases – over last year's numbers. This way, we won't be surprised and disappointed in a couple of months when the final fees are announced.

While pretty much everybody's fees are proposed to go up, the folks who would get hit hardest are full service UHF TV in Markets 11-25 and Market 26-50. Their fees would increase by 9.5% and 10.8%, respectively. We have prepared a handy-dandy table (see next page) showing not only the proposed fees, but also the change in each fee from last year's. The numbers in parentheses reflect the amount of the proposed changes from last year's fees.

As always, the Commission is giving everybody a chance to comment on this year's proposed fees, but you'll have to act fast. The deadline for comments on the proposed fees is ***June 2, 2011***; reply comments may be filed through ***June 9***.

This year's notice includes a couple of noteworthy points.

First, in recognition of the fact that the digital TV transition continues on for LPTV, TV Translator and Class A licensees, the Commission observes that

> a fee will be assessed for each facility operating either in an analog or digital mode. In instances in which a licensee is operating in both an analog and digital mode as a simulcast, a single regulatory fee will be assessed for this analog facility that has a digital companion channel.

The Commission may revisit its instructions on this point "[a]s greater numbers of facilities convert to digital mode".

Second, this year the FCC will ***not*** be sending out "pre-bill" reminders to broadcasters advising them of the fees they're being assessed. All that information should be available on the FCC's website, though – but it's the licensee's job to make sure that it's sending the correct fee, so don't be shy about double-checking to make sure any information you might pull off the FCC's website is correct.

Third, on the AM/FM side, the Commission notes that a station's fee is based in part on the population it serves. Populations tend to change every ten years when the Census is completed and released, and such changes could affect radio licensees' reg fees. But not this year. Even though the latest Census was technically completed last year, its results are still unofficial and subject to change – which means that this year's regulatory fees will be based on the 2000 Census, not the 2010. (Additional rationale: since 2011 reg fees are calculated based on the subject station's status as of October 1, 2010, the FCC thinks it would be "inappropriate" to rely on incomplete 2010 population figures.)

The proposed fees are just that – proposals. We won't know the final fees until sometime this summer, although historically the final fees tend not to stray too far from the initial proposals. We also do not yet know when the fees will be due, although that tends to be in August or September. Look for an announcement sometime mid-summer.

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ence and revenues – but ***not*** interference – be deemed to be within the scope of the statutorily-mandated study?

The Commission's thinking on this point appears to be that, with the new LCRA remediation provisions in place and with a 2003 study in hand predicting that elimination of third-adjacent interference protections would not create any interference risk, there's no reason to worry about interference. And with this convenient bit of wishful thinking, the Commission proposes to ignore what could be a highly contentious issue.

One might reasonably question the practical utility (let alone the reliability) of the study and follow-up report that the Commission is undertaking. After all, the FCC is starting with virtually no solid data, no established parameters, unclear "metrics", and a potentially important factor (*i.e.*, interference) simply written out of the game plan . . . and with a deadline which, by the time the public notice comment period wraps up, will be barely more than five months away.

But as was true of the Light Brigade, the Commission's role here is not to reason why. Congress told it to do something, so the Commission's got to do it. And once the study is completed and the report filed with Congress, it's likely that we won't be hearing any more about this for some time to come. Having enacted the LCRA and, in so doing, ordered up the study and report, Congress will probably figure that it's done all it needs to do with respect to LPFM matters, and it will move on to other legislative pastures.

Anyone possessing actual, reliable data about the interplay of LPFM and full-service stations would be doing everyone a public service by submitting it in response to the public notice, if only to build a factual record for future reference. While Congress may think that it's put LPFM issues to bed for good, others may not be so sure of that.

The deadline for comments is ***June 24, 2011***; the deadline for reply comments is ***July 25, 2011***.

Fee Category	Proposed 2011 Annual Regulatory Fee (USD)	Change from final 2010 Fees
TV VHF Commercial Stations		
Markets 1-10	**84,625**	**(+3,075)**
Markets 11-25	**68,175**	**(+4,900)**
Markets 26-50	**40,475**	**(-2,075)**
Markets 51-100	**22,750**	**(-1,000)**
Remaining Markets	**6,100**	**(-25)**
Construction Permits	**6,100**	**(-25)**
TV UHF Commercial Stations		
Markets 1-10	**34,650**	**(+2,375)**
Markets 11-25	**32,950**	**(+2,875)**
Markets 26-50	**20,950**	**(+2,050)**
Markets 51-100	**12,325**	**(+775)**
Remaining Markets	**3,275**	**(+225)**
Construction Permits	**3,275**	**(+225)**
Low Power TV, TV/FM Translators/Boosters	**395**	**(-20)**
Other		
Broadcast Auxiliary	**10**	**NC**
Earth Stations	**245**	**(+5)**

Satellite Television Stations	
All Markets	**1,250 (-50)**
Construction Permits	**675 NC**

Commercial Radio Stations

Population Served	AM Class A	AM Class B	AM Class C	AM Class D	FM Classes A, B1 & C3	FM Classes B, C, C0, C1 & C2
<=25,000	**700 (+25)**	**575 (+25)**	**525 (+25)**	**600 (+25)**	**675 (+25)**	**850 (+25)**
25,001 -75,000	**1,400 (+50)**	**1,150 (+75)**	**800 (+50)**	**900 (+25)**	**1,350 (+25)**	**1,500 (+50)**
75,001 -150,000	**2,100 (+75)**	**1,450 (+100)**	**1,050 (+50)**	**1,500 (+50)**	**1,850 (+25)**	**2,750 (+25)**
150,001- 500,000	**3,150 (+100)**	**2,450 (+150)**	**1,575 (+75)**	**1,800 (+75)**	**2,875 (+75)**	**3,600 (+50)**
500,001 -1,200,000	**4,550 (+150)**	**3,750 (+250)**	**2,625 (+125)**	**3,000 (+125)**	**4,550 (+100)**	**5,300 (+75)**
1,200,001- 3,000,000	**7,000 (+250)**	**5,750 (+350)**	**3,950 (+200)**	**4,800 (+200)**	**7,425 (+175)**	**8,500 (+150)**
>3,000,000	**8,400 (+300)**	**6,900 (+425)**	**5,000 (+250)**	**6,000 (+250)**	**9,450 (+200)**	**11,050 (+200)**
AM Radio Construction Permits	**490 (+100)**					
FM Radio Construction Permits	**675 NC**					

Special Renewal Spread
Filing a renewal soon?
Here are four articles to help you get oriented to aspects of the new renewal form!

On again, off again?

Reporting On The Station's Past Operational Status

By Anne Goodwin Crump
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A new question in the radio portion of the revised license renewal application (Form 303-S) for this renewal cycle asks whether the station has maintained its minimum operating schedule as specified in the FCC's rules throughout its entire license term. Each licensee is required to certify whether its station was off the air or operating below the minimum operating hours for any period of more than 30 days and, if so, to provide details of *exactly* when the station was silent or operating with a reduced schedule.

We understand that this question was added to the renewal application at the behest of the Media Bureau's Audio Division, which would explain why the question appears only in the section of the application applicable to AM and FM stations. The main point of the question is to make it easy for the staff to identify those stations that have been off the air for significant periods of time, in some cases several years with only brief periods of operation once a year in order to avoid the automatic expiration of the station license. The Audio Division has indicated that it will view with great disfavor renewal applications of stations that were off the air more than they were on the air during the past license term.

It is not entirely clear exactly how the Audio Division will handle such renewals, however. If the Commission granted the station in question special temporary authorizations (STA's) to remain silent over the course of the license term, the Commission essentially found that allowing the station not to operate was in the public interest with each grant. No rule or enunciated policy would have been violated in those circumstances. On the other hand, the staff has pointed out that if a station has not been operating at all, then it cannot be found to have been operating in the public interest – and the Communications Act requires as a condition to renewal that the Commission find that the station whose license is to be renewed "has served" the public interest. Therefore, there is a possibility that stations that have operated only sporadically could have their license renewal applications designated for a hearing as to whether the license should be renewed at all.

The question also could prove awkward for stations that overlooked the need to obtain an STA within 30 days of going silent or reducing operations below the minimum operating schedule. The rules require such STAs, so by responding to the new certification, licensees in that situation will in effect be flagging the fact that they violated the rules.

Of course, at this point, there is no going back to change the past. Going forward, however, stations would be well-advised to be mindful of the Commission's requirements for seeking an STA, and of the possible consequences of failure to operate for a significant period of time, even with authority.

RF Certification: Same Standards, Less Paperwork

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While the FCC hasn't made any changes to the substance of its RF exposure rules, this renewal cycle the Commission *has* modified the way applicants are required to demonstrate compliance with those rules. As a result, preparing that aspect of the new renewal application form should be a little easier.

As has been the case in previous renewal cycles, applicants must certify that their broadcast facility complies with the Commission's limits on RF exposure limits for controlled and uncontrolled environments. Depending on the station's specific situation, there are a number of ways to figure out whether you can make this certification. The good news this year: unlike in previous renewal cycles, applicants will *not* be required to submit exhibits demonstrating compliance.

The biggest change this year is that the FCC now allows applicants to certify "Yes" regarding RF exposure compliance if there has been no "material change" to the station's RF environment since the grant of the station's last license renewal or technical license application. The renewal application and instructions don't provide a very detailed definition of "material change" – basically, it's any change at or around your site that would either increase the amount of RF in the environment or increase the possibility of someone being exposed to that radiation. Installation of an antenna lower on the tower, for example, would clearly be a material change, as would construction on an adjacent tower. Perhaps less obviously, a material change could also occur if new residential buildings were constructed near the tower that could result in increased exposure.

Also important to remember is that the baseline for material changes is the grant of the station's last license renewal or technical license application (Form 302), *i.e.*, the last application in which the station certified to the FCC – and demonstrated – compliance with the RF exposure rules.

If there *has* been a "material change" at the station, you must take some additional steps to confirm that you're still in compliance with the RF rules. These steps will generally need to be completed by an engineer. If possible, you

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Special Renewal Spread

Filing a renewal soon? Here are four articles to help you get oriented to aspects of the new renewal form!

Non-Discrimination In Advertising Certification

By Davina Sashkin
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The revised application form in effect for the current round of renewals – for the first time ever – requires ***commercial*** licensees to certify their compliance with the FCC's policy on non-discrimination in advertising agreements. This policy provides that (a) commercial broadcasters' advertising contracts shall not discriminate on the basis of race or ethnicity; and (b) such contracts must contain a nondiscrimination clause. (While the Commission hasn't specified precisely how that clause is supposed to read, on our blog at www.CommLawBlog.com we have provided some language which we believe should do the trick. Go to the blog and search for "renewal certification".)

The new certification requirement is intended to combat long-rumored practices in the broadcast advertising business regarding "no urban/no Spanish" provisions through which some advertisers are said to discriminate against stations which feature such formats.

The certification that applicants are required to complete reads:

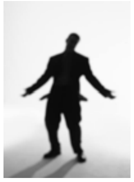
> **Non-Discriminatory Advertising Sales Agreements**. Commercial licensee certifies that its advertising sales agreements do not discriminate on the basis of race or ethnicity and that all such agreements held by the licensee contain nondiscrimination clauses. Noncommercial licensees should select "not applicable."

So far the materials the Commission has provided relative to that certification indicate that a commercial licensee may answer this certification "Yes" *only* if the licensee (a) had non-discrimination clauses in *all* of their contracts ***on or before March 14, 2011 and*** (b) has a reasonable basis (stemming from due diligence) for believing that its advertising sales agents do not discriminate on the basis of race or ethnicity.

Licensees who cannot answer "Yes" to *both* parts of the certification must answer "No" and provide an explanatory exhibit. Informal advice from FCC staff suggests that licensees who demonstrate that they undertook efforts to comply as close to the March 14 date as possible will likely not suffer any harsh penalties – the key, of course, is that efforts must have been taken and a thorough explanation must be provided in this exhibit.

Regardless of actual compliance, licensees should be careful to answer this certification *honestly*. Renewal time is prime time for anyone with a grudge against the station (or some other adverse agenda) to petition the Commission to deny the license renewal. The non-discrimination policy provides a new opportunity for petitioners to allege licensee misconduct and, even if the charge is plainly untrue, the process to fight it can be long and costly. Licensees who did not meet all the criteria for answering "Yes" must answer "No" and provide a thorough explanation. Answering "Yes" without a rock-solid basis for that certification could expose licensees to findings of misrepresentation or lack of candor – charges potentially far more damaging to the license and the wallet.

Pursestrings 2011



Effective Date Of New Application Fees Announced

By Christine E. Goepp
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According to a notice published in the Federal Register, the new schedule of application fees we reported on in the March, 2011 *Memo to Clients* will take effect on ***June 20, 2011***. That's good news for all those radio licensees in Maryland, D.C., Virginia and West Virginia, whose renewals are due by June 1; not so good news for other broadcasters, who will end up shelling out $5 more per renewal application than their radio confrères in MD/DC/VA/WV.

A list of the new fees (all of which are going up by 3%-3.5% or so) is included in the Federal Register notice. (We've provided a link to it at www.CommLawBlog.com.) Also, be on the lookout for a new Application Fee Filing Guide to be posted on the FCC's website. Historically, the Commission provides such guides in connection with the biennial changes in fees.

Whether June 20 will *really* be the effective date may be open to question. The last time the Commission modified its application fee schedule, it ran into considerable complications in implementing an effective date. (The final effective date turned out to be several months after the initially-announced date.) The problem appeared to involve a combination of factors which may be absent this time around, so we're hoping that things go a bit more smoothly this year.

Under Section 158 of the Communications Act, the Commission must notify Congress of new fees "not later than 90 days before the effective date". Since the Commission initially announced the new fee schedule on March 3, and the recently announced effective date isn't until June 20, it would appear that that requirement may have been

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Trolling out the red carpet!

More Trolls On A Roll

By Kevin M. Goldberg
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To paraphrase Chief Brody, they're gonna need a bigger courtroom down at the U.S. District Court for the District of Columbia. That's because Judge Beryl Howell has been at it again. As we reported last month, in March Judge Howell hung out the welcome sign in a big way for plaintiffs seeking to bring "John Doe" lawsuits alleging copyright infringements by 1,000+ unnamed defendants. And now she's issued four more similar decisions in cases with as many as 5,000 defendants! (We've posted links to the four decisions on our blog at www.CommLawBlog.com.)

Welcome to D.C., your go-to spot for BitTorrent litigation. Troll out the red carpet!

We've described the SOP of copyright trolls before in the April, 2011 and November, 2010 *Memos to Clients*. Judge Howell's latest additions to the troll jurisprudence confirm her commitment to the view that troll-plaintiffs using that SOP are pretty much entitled to the identities of the folks associated with the IP addresses relied on to get the litigation started. In other words, when a troll-plaintiff subpoenas ISPs looking for defendants' identities, challenges to those subpoenas don't stand much chance, whether the challenges are based on personal jurisdiction, joinder or First Amendment arguments. Instead, such challenges can be made only ***after*** the defendant's identity has been coughed up. But since the revelation of their identities is precisely what many defendants hope to avoid in such cases – to keep their names from being associated with downloading seemingly racy fare (like "Stripper Academy", or worse) – Judge Howell's position gives the troll-plaintiffs considerable leverage for settlement purposes.

Welcome to D.C., your go-to spot for BitTorrent litigation.

(Note, though, that not all John Doe infringement suits involve seemingly sleazy movies. One of Judge Howell's latest decisions involves allegedly infringing downloads of the critically-acclaimed Oscar® winner, *The Hurt Locker*.)

In her decisions, Judge Howell rejects arguments presented by slews of defendants seeking to keep the lid on their identities in the face of plaintiffs' subpoenas. The defendants claimed variously that: they never downloaded anything; they didn't do anything illegal; they're entitled to remain anonymous; the court lacks personal jurisdiction over the defendants; etc., etc. – the same arguments the judge rejected in her decision last March.

While her rationale on the joinder and jurisdiction issues tracks her earlier order, her latest opinions break some new ground on other issues. In response to defendants' claims that they have not engaged in any infringement and thus need not be identified, Judge Howell says, in effect, "so what?" As she sees it, whether or not any defendant infringed the work is an issue for later, *after* the defendant had been identified (and, presumably, deposed). A "general denial of liability" is *not* a basis for "preventing the plaintiff from obtaining the putative defendants' identifying information".

Similarly, claims of protected privacy are immaterial because "whatever asserted First Amendment right to anonymity the putative defendants may have in this context does not shield them from allegations of copyright infringement." Judge Howell also opines (in rejecting a request for a protective order) that any right to anonymity in the context of BitTorrent activity is minimal and outweighed by the plaintiff's need to get the defendant's identifying information in order to protect its copyrights.

Finally, as Judge Howell sees it, any claims of "undue burden" would apply only to the ISP – which would have to do the heavy lifting of matching up IP addresses with names and street addresses – ***not*** to the individual defendant, who essentially doesn't have to do anything to "respond" to the subpoena.

These cases aggravate the unevenness of the already uneven playing field in this kind of John Doe copyright infringement litigation. Reiterating that I hold no love for copyright infringers, I do believe in strong Due Process protections, especially when those protections are invoked in furtherance of First Amendment values. Even if a BitTorrent user's First Amendment rights may seem minimal to some, those rights do not evaporate entirely. An important component of traditional First Amendment protection lies in procedural measures that require plaintiffs to clear certain hurdles before a suit can go forward.

For my money, Judge Howell's rulings have written these hurdles out of the law as far as John Doe copyright cases go. In Judge Howell's view, a plaintiff will apparently be allowed to bring a single suit to be heard in a single court against thousands of people who have only the barest connection to each other or to that court's jurisdiction. Those thousands of defendants will then be effectively forced, regardless of their claimed innocence, to opt for a *de facto* admission of guilt through settlement simply because that's cheaper than paying the costs – attorney's fees, travel, etc. – required to defend themselves in court. The approach that pervades Judge Howell's decisions reflects a reversal of traditional presumptions, a "guilty of infringement until proven innocent" mindset that absolutely horrifies me.

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Some More Observations About Copyright, Content Distribution And Technological Innovation

By Kevin M. Goldberg
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In the last couple of *Memos to Clients* I've suggested that changes in the video delivery landscape around us demand a good, hard look at the various laws which govern transmission and, especially, retransmission of audiovisual content usually seen on television. It's fair to say that, while I don't advocate any particular approach, I support change that brings the various laws in this area into line with the viewing habits of an increasing number of television watchers.

But that would entail a herculean effort involving potential changes to the regulations of two major government agencies: the FCC and the Copyright Office. The FCC would be looking, or re-looking, at such things as the definition of an MVPD as well as rules governing must carry, retransmission consent, fin/syn and program exclusivity. The Copyright Office would have to examine its regs covering cable and satellite compulsory licenses. Changes there and elsewhere would have to be justified in light of actual evidence that the media delivery landscape is changing. (I'm sold on this, but – if you can believe this – the Administrative Procedure Act requires more than my personal stamp of approval.)

So that's why I'm happy to see signs of serious inquiry on two fronts.

One such sign is the FCC's "Further Notice of Inquiry in the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming" (*FNOI*), released on April 21. On its face, this is a pretty mundane request by the FCC for information relating to competition in the video marketplace. In fact, it's the Commission's 14th annual review since Congress first directed the FCC to conduct such reviews back in the 1992 Cable Act.

But if you're paying attention, you'll realize that 2011 - 1992 ≠ 14. That's because the *FNOI* relates to the **2007** proceeding. Why the holdup? Turns out the Commission has reviewed the "way in which it uses data" for reports like this, and it has concluded that the data previously submitted are "insufficient to produce an adequate report" – so the Commission is now asking for more data.

But what's interesting here is that, in making that request, the Commission notes the recently "increased availability of video programming over the Internet, made available by online video distributors ('OVDs')". And, more importantly, the Commission specifically requests data on OVD-related data "in light of the growing importance of online video distribution to consumers" (apparently for the first time). So the Commission is trying to play a little catch-up in terms of assessing competition in the video market in light of the rise in OVDs.

In other words, the FCC sees OVDs as a significant separate element in the video distribution process, and wants to ascertain their effect on that marketplace. According to the Commission, "for most consumers [OVDs] are not a substitute for MVPD service today, but rather an additional method for viewing video programming". Perhaps OVDs aren't big enough to warrant regulatory change, but we seem headed in that direction – at least the FCC is now standing up and taking notice.

I see this recognition of the rising importance of OVDs as more significant than any substantive information likely to be elicited in response to the nearly 200 separate questions posed in the *FNOI*. Comments in response to the *FNOI* are due by ***June 8, 2011***; reply comments are due by ***July 8***.

> *The FCC sees online video distributors as a significant separate element in the video distribution process.*

Meanwhile, over at the Copyright Office, here's a quick update on that Office's investigation of the future of video delivery, *i.e.*, the inquiry into the continued need for the cable and satellite compulsory licenses. Comments were due on April 17, reply comments a month later. I've had a chance to review the initial comments received from 17 parties ranging from the NAB to outcast cable wannabe ivi, Inc. to the "Canadian Claimants Group".

Here's what stands out.

Most commenters from all sectors – including cable provider AT&T, program provider NPR, a group of rural MVPDs, Dish Network, a group of "Devotional Claimants", the NCTA, the Independent Film and Television Alliance, the TVMLC, Verizon, PBS, APTS and WGBH – opposed repeal of the compulsory licenses. A common concern: direct licensing or collective licensing alternatives would be too expensive and burdensome to provide a diversity of programming to the public.

The NAB urged retention of the compulsory licenses enabling *local* carriage of stations. But it suggested terminating those allowing carriage of distant signals except for markets with unserved households or a shortage of signals, or in the case of nationally distributed superstations.

ivi, Inc., opposed the phasing out of the compulsory licenses because that would "disincentivize" folks outside

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Update from the white (open) spaces

And Microsoft Makes Ten

By Mitchell Lazarus
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The FCC spent calendar year 2010 studying applications from nine companies that want to be wireless TV Band Device (TVBD) database administrators. The successful applicants will coordinate devices, when they become available, that operate in TV "white space" frequencies.

Some of the nine applicants, like Google and Comsearch, have enormous expertise in large databases, while some of the others do not.

Last January the FCC, rather than pick winners and losers, simply approved all nine companies that applied. (We reported on that decision in the February, 2011 *Memo to Clients*.)

But then in April, Microsoft announced that it, too, wants to be a database administrator. Never mind that Microsoft first shared this realization 15 months after the application deadline, and three months after the FCC's decision naming the other nine administrators. Never mind the FCC's insistence on deadlines in other contexts. (Try sending in your FCC license renewal 15 months after it was due.) Microsoft for some reason gets a pass, not to mention full consideration of its application: the Commission has invited comments on Microsoft's proposal. "We intend to consider designating Microsoft as a TV bands database administrator," says the FCC's public notice. After all, it continues, Microsoft representatives attended both of the FCC's database administrator workshops. With a track record like that, why should deadlines matter?

Omitted from the public notice, although possibly a factor in the FCC's thinking, is that Microsoft, along with a hardware company, demonstrated a TVBD system at the National Association of Broadcasters show in April. The set-up included Microsoft's prototype white-space database software, which sounds impressive. But the actual operations involved exactly one base station, one client station, and one pretend signal entitled to protection – a far cry from an actual working system in the real world.

Also omitted from the public notice, but probably not a factor in the FCC's thinking, is Microsoft's own observation that becoming a database administrator would "enable it to assist its customers in bringing many white spaces applications to market quickly and efficiently." So what's good for Microsoft is good for . . . um, Microsoft.

We have no doubt that Microsoft's qualifications equal or exceed those of at least some of the nine companies selected earlier. Not obvious, though, is that Microsoft's qualifications are so overwhelming as to justify re-opening the application process after more than a year. Hey, if it's that easy, we might put in an application ourselves, and make some extra money at home in our spare time. And maybe Microsoft can help us with that long-overdue FCC license renewal.

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the TV industry from developing new distribution technologies, because "there is no way to monetize that technology is to sell or license it [*sic*] to the gatekeepers of content that have every reason to keep their legacy distribution systems in place." ivi, Inc. seeks extension of the compulsory licenses to online video distributors – no surprise there.

Dish Network recommended transitioning to a single compulsory license with "bright line rules for the carriage of digital broadcast TV signals applicable to cable and satellite, as well as online video distributors."

The Canadian Claimants Group cautioned that elimination of the compulsory licenses would likely result in the inability to retransmit an entire broadcast signal.

"Program Suppliers", including the MPAA and other producers, went entirely in the other direction, claiming that compulsory licenses harm copyright owners. They advocated a combination of licensing approaches (*e.g.*, direct, collective, or sublicensing). The Commissioner of Baseball agreed, urging that "any system replacing the statutory licenses replicate[ ] as closely as possible the marketplace-based system that has provided, and continues to provide, the public with a vast array of Baseball telecasts on terms and conditions that all affected parties have considered to be fair and reasonable."

Some entities, including rural MVPDs, called for reform of the retransmission consent process. Others, such as the NCTA, Dish Network, DirecTV, and Verizon noted that repeal of the compulsory licenses would *require* reform of the FCC's rules.

BMI and ASCAP, as one might guess, viewed collective licenses as striking a proper balance between free market and regulatory approaches.

We'll keep you posted as developments warrant.

Takin' care of bidness

Closing Gavel Comes Down On Auction 91

By R. J. Quianzon
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[***WARNING!*** *While Auction 91 has closed, strict anti-collusion rules remain in effect for several more weeks. Parties who were involved in any way in the auction should refrain from discussing any aspect of the auction with any other parties who were involved in it.*]

Going once, going twice, SOLD! It's official. After two weeks of bidding, the FCC brought down the gavel on Auction 91. The 144 FM construction permits (well, most of the 144) on the block attracted $10.5 million in successful bids overall – although the Commission will net less than that because of "new entrant" bidding credits available to some of the winning bidders. The total proceeds likely to be realized from the auction should be in the range of $8.5 million. The auction wrapped up on May 11, eleven bidding days after the opening round. A total of 66 different bidders ended up winners.

The next major deadline in the auction process: June 7, 2011, when down payments from the successful bidders will be due. Final payments will be due on June 21, and long-form Form 301 applications are due by June 30. (The prohibition against communications among bidders will be lifted as of 6:01 p.m. on June 7, *i.e.*, after the down payment deadline has passed.)

Only one permit – in Lawrence Park, Pennsylvania, on the outskirts of Erie – fetched more than a million dollars. It came in at a final net bid of $1,344,200. Generally, the relatively low bidding levels may reflect the state of the economy or possible concern about the risks of starting up new stations at this time. Of the 108 permits that were won, 21 of the permits had no bids other than on the first day and 34 permits sold with net bids of less than $10,000. Two permits, in Cedarville, CA, and Dickens, TX, sold for less than a thousand dollars.

By contrast, the FM auction four years ago saw the Treasury bank $21 million in auction proceeds from the sale of 111 permits. And a 2004 auction of 258 permits filled the government coffers with $148 million.

Of note, more than a dozen permits that went unsold from the auction two years ago finally sold this time around – presumably thanks to the fact that the FCC cut the opening bid by at least half for most of them. However, more than 20 permits have now been offered twice by the FCC and have attracted no bids at all. For example, Thomas, Oklahoma, went unsold in 2009, when it was listed for $50,000; the Commission slashed the price to $25,000 this year and there were still no takers. Overall, of the 144 permits that were put on the auction block, three dozen went unsold and may be recycled into the next auction.

We'll keep readers posted as the next FCC auction of FM permits arrives – but that probably won't be for another year or two.

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should have an engineer determine if the RF compliance worksheets included in the instructions to Form 303-S may be used to demonstrate compliance. These worksheets – which have not been significantly changed from those used in the last renewal cycle – are most useful for AM stations and single-antenna FM facilities. As has been the case in previous renewal cycles, if you can certify compliance based on the worksheets, then you can simply answer "yes" on the renewal and need not submit the worksheets to the Commission. (It would still be a good idea to retain a copy of the completed worksheets in your internal files in case of any later questions.)

Finally, when material changes have occurred and you can't use the worksheets to demonstrate compliance, you'll need to have a qualified engineer conduct a study (either through calculations or by taking measurements at the site) to confirm compliance. But there's still good news this year. In previous renewal cycles, the FCC would have required that a formal study be prepared and submitted as an exhibit to the renewal application. This year the FCC has determined that, in the interest of reducing paperwork burdens, such an exhibit will not be required (although, again, it would be a good idea to retain documentation from the engineer demonstrating compliance).

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So in case any troll-plaintiffs looking for a place to sue thousands of John Doe defendants missed Judge Howell's March order, she has now reinforced the message in spades: the U.S. District Court in D.C. will welcome your business. But let's hope that none of those cases go to trial, since the available courtrooms aren't set up to accommodate 5,000+ litigants at a time.

[One final note: I am aware of claims advanced elsewhere (and referenced by at least one person who commented on my blog post about Judge Howell's March decision) that the judge may hold a longstanding bias in favor of the copyright holders. I want to state emphatically that I do not endorse such claims and have seen no conclusive evidence to support them.]

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ness variation during content transitions on a channel (*e.g.*, TV program to commercial) or when changing channels.

If the dialnorm parameter is set properly, the transmitted signal (which includes the dialnorm metadata) instructs the AC-3 audio decoder in the consumer's home receiver to automatically adjust the volume to eliminate loudness spikes during content transitions such as commercial breaks.

So commercial TV stations and MVPDs will have to be able to insure that the dialnorm settings for their commercial content are set right. This can be done through loudness measurement devices and/or software, file based scaling devices, or real time loudness processing devices – as long as the chosen mechanism can measure loudness using the ITU-R BS.1770 algorithm. (The FCC observes in passing that it does *not* plan to provide any equipment authorization or verification system, although the FCC does solicit comments on the steps affected video providers may be required to take to confirm that their gear will do the trick.) The good news is that, if such providers do install proper equipment – and utilize and maintain that equipment, all "in a commercially reasonable manner" – they will enjoy a "safe harbor". That is, they will be deemed to be in compliance should any complaints about loud commercials roll in the door.

The equipment needed to control all this could cost anywhere from a few thousand bucks up to $20K.

The bad news is that the equipment needed to control all this could cost anywhere from a few thousand bucks up to $20K per device, depending on a number of factors.

Over and above this "safe harbor" approach, the Commission suggests that it might permit TV stations and MVPDs to demonstrate, in response to a complaint about loud commercials, that the dialnorm of the complained-of commercial did in fact match the algorithm-generated perceived loudness value for that commercial.

The issue of who is in fact responsible for loud commercials raises some thorny questions. The CALM Act explicitly places that burden on the TV licensees and MVPDs whose programming is received by the consumer. But, as we all know, those licensees and MVPDs rely on a variety of others to produce the programming that they transmit. In addition to their own productions, TV stations get their programming from networks, syndicators and other program producers. MVPDs similarly get theirs from the same sources, and from TV licensees. Mindful of that fact of video life, the Commission suggests that TV licensees and MVPDs may want to include contractual provisions (including indemnification clauses) in their programming contracts. That would not completely relieve the licensee/MVPD of responsibility – since the statute expressly puts them on the hook for it – but such a contractual approach might help demonstrate compliance with the ATSC A/85 RP.

The *NPRM* is dense with technical information. All licensees and MVPDs who might be affected by it should be sure to review the *NPRM* in detail with their engineering consultants to make sure that you have a handle on the nitty-gritty. Other questions posed by the Commission include:

- Since the CALM Act is addressed only to loud "commercials", how should that word be defined? For example, does it include station programming promotional announcements? How about political advertising?
- Also in light of the "commercial" focus of the Act, should noncommercial TV licensees be exempt from the loudness rule? (The Commission suggests that noncommercial TV licensees will "largely" ***not*** be affected by any of this because, by definition, noncommercial stations are prohibited from broadcasting "commercials".)
- How should the term "commercially reasonable" be defined when it comes to installation, utilization and maintenance of the equipment relied on to claim "safe haven" status?

Note also that the ATSC A/85 RP – that is, the recommended practice that forms the core of the proposed rule change – is itself a work in progress. ATSC continues to review and refine its various recommendations. The A/85 RP was first adopted in 2009, but was most recently revised in May, 2011. Since the CALM Act requires incorporation of the ATSC A/85 RP into the rules, the Commission understands that Congress intends the rules to be updated as required to reflect any future revisions of the RP.

Looking down the road, the Commission also solicits comments on how the complaint process should work. The current thinking is that complainants would file online (or by fax or letter), clearly indicating: (a) the complainant's contact information; (b) the name/call sign of the broadcast station or the name/type of MVPD against whom the complaint is directed; (c) the date/time of the loud commercial complained of; (d) the channel/network involved; (e) the name of the TV program during which the incident occurred; (f) the name of the commercial advertiser or product involved; and (g) a "description of the loud commercial problem". The Commission would then conclude whether "a possible violation of our rules" has occurred, although the *NPRM* doesn't let on how that determination might be reached. Complaints will be forwarded to the targeted station or MVPD for appropriate response.

Since compliance with the loudness requirements will likely involve some not-insubstantial costs, the Commission (at Congress's direction) is also looking into financial hardship waivers. The *NPRM* proposes that any station or MVPD asserting such hardship be required to provide, at least 180 days prior to the effective date of the rules: (a) evidence of its financial condition; (b) a cost estimate for the equipment necessary to assure compliance; (c) a detailed explanation of why postponement of compliance is warranted; and (d) an estimate of how long it will take to comply. The Commission is also open to considering a "streamlined financial hardship waiver approach" for small market broadcast stations and

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The earth may have moved for some, but apparently not for the FCC.

SBE Calls On FCC To Examine Its NADs

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In the 1980's, geographers around the globe began to realize that the North Pole was fictional. Not the one where Santa Claus lives, but the one that represents one end of an axis around which the Earth rotates. The one where all the longitude lines on a map should intersect, and the lines of latitude converge. It turned out *this* North Pole was not quite where we had put it. Meaning, from a cartographical standpoint, that geographic coordinates did not accurately reflect physical reality.

This revelation came about because, as we sent an increasing number of satellites into orbit above the Earth, they stubbornly insisted on circling around a center of mass several hundred feet away from the north-south axis conventionally relied on by geographers. Even then, we might not care, except that satellites used for GPS navigation and surveying provided latitude and longitude based on the true center of the Earth, which differed from the coordinates marked on people's maps.

Geographers, being orderly people by nature, found the discrepancies troubling. Conceding the point to the satellites, they duly set aside the old coordinate system, North American Datum 1927 (NAD27), in favor of North American Datum 1983 (NAD83), which better reflects the actual center of the Earth's mass. True, this caused the coordinates of landmarks across much of the country to change overnight, but that is a small price to pay for consistency.

So how ironic that the FCC, which regulates many kinds of satellites, *still* conducts certain business – specifically, CDBS, its broadcast licensing database – using NAD27. For comparison, the FAA converted to NAD83 19 years ago, the FCC's wireless licensing system, 12 years ago. The need for the change is a no-brainer – the Media Bureau apparently just hasn't gotten around to it.

Perpetuating the sense that this is the issue time left behind, a Society of Broadcast Engineers petition for rulemaking surfaced recently in the Commission's docketing system. The petition is dated August 10, 2007 (yes, SBE has a "stamped" copy with that date), but is marked in the FCC's records as having been received April 6, 2011. The petition has not yet been docketed or assigned a rulemaking number. And given the history of this issue, we're not counting on further developments anytime soon. Change in this area happens only by degrees.

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small MVPD systems.

The comment and reply comment deadlines have not yet been set; they will be 30 days and 45 days, respectively, after the *NPRM* is published in the Federal Register. (Check on our blog for updates.) Don't expect any extensions of the deadlines: the CALM Act mandates that the new rules be adopted within one year of the Act's enactment, which means that the Commission will have to wrap up this proceeding by early December, a scant six months from now. Once the new rules are adopted, they will have to take effect within a year, *i.e.*, by early December, 2012.

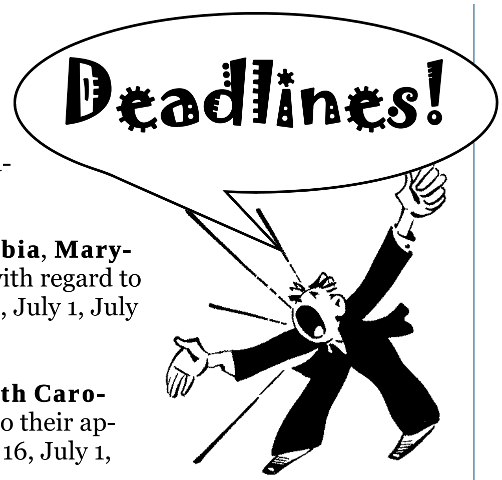
While all the nifty, whizbang technology on the table here – ATSC A/85 RP, Dolby AC-3, ITU-R BS.1770 algorithms, etc. – may promise blessed relief from the scourge of loud commercials, there is reason for skepticism. Unlike "volume", which is an objective, readily measurable characteristic, "loudness" is not an objective feature that is easily susceptible to measurement. Rather, it's the subjective effect that occurs when sound reaches an ear. That's why the ATSC had to rely on algorithms – essentially, a model or estimate based on the results of group studies – to come up with the dialnorm factor on which the ATSC A/85 RP depends.

But the vast majority of TV viewers are in all likelihood blissfully unaware of the algorithms and other technology, and those viewers will certainly not undertake any objective measurements on their own. Rather, to identify "loud" commercials, we can reasonably expect most viewers to use a variation of Potter Stewart's hard-core pornography test: they will know it when they hear it . . . or, rather, when they *think* they hear it.

So while the new technology may provide TV stations and MVPDs a defense against claims of loudness, it's a near certainty (to this observer, at least) that complaints will continue to roll in. Indeed, the extensive publicity likely to accompany the adoption and effectiveness of "loud commercial" rules can't help but increase the expectations of the public, creating the impression that "loud commercials" – however each individual viewer may define "loud commercials" – have been legislated away. We can thus probably expect a substantial increase in complaints. That in turn would chew up the time of FCC staffers and TV/MVPD personnel. And while some complaints may in fact identify actual violations of the rules, we will not be surprised if the vast majority of complainants end up being told that, contrary to their heart-felt belief, the commercial(s) of which they complained were not, in fact, "loud".

Still, it's probably worth the effort. With DTV technology the FCC has tools not previously available to it to try to address the problem of loud commercials. Let's see if those tools can get the job done. But let's not be surprised if, once the new rules are in place, we all find ourselves not much better off than we are now on the "loud commercial" front.

June 1, 2011



License Renewal Applications - *Radio* stations located in the **District of Columbia**, **Maryland**, **Virginia**, and **West Virginia** must file their license renewal applications. These applications must be accompanied by FCC Form 396, the Broadcast EEO Program Report, regardless of the number of full-time employees.

Post-Filing Announcements - *Radio* stations located in the **District of Columbia**, **Maryland**, **Virginia**, and **West Virginia** must begin their post-filing announcements with regard to their license renewal applications. These announcements must continue on June 16, July 1, July 16, August 1, and August 16.

License Renewal Pre-Filing Announcements - *Radio* stations located in **North Carolina** and **South Carolina** must begin their pre-filing announcements with regard to their applications for renewal of license. These announcements must be continued on June 16, July 1, and July 16.

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**, **Nevada**, **New Mexico**, **Ohio**, **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.

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

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

July 10, 2011

Children's Television Programming Reports - Analog and Digital - For all *commercial television* and *Class A television* stations, the second quarter 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. Please note that the FCC now requires the use of FRN's and passwords in order to file the reports. We suggest that you have that information handy before you start the process.

Commercial Compliance Certifications - For all *commercial television* and *Class A television* stations, a certification of compliance with the limits on commercials during programming for children ages 12 and under, or other evidence to substantiate compliance with those limits, must be 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.

August 1, 2011

License Renewal Applications - *Radio* stations located in **North Carolina** and **South Carolina** must file their license renewal applications. These applications must be accompanied by FCC Form 396, the Broadcast EEO Program Report, regardless of the number of full-time employees.

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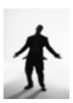
Copyrighted works protected here include audio-only works (musical works and sound recordings), audiovisual works (motion pictures, television programs, etc.), and computer programs. *So if the bill is enacted, anyone engaged in webcasting without a license would appear to be subject to criminal penalties.* While we still believe the focus is firmly on the illegal streaming of audiovisual content (like movies, live sporting events, other television programs), it is clear that the law could be used against anyone who is webcasting without the required licenses. One more reason to come into compliance with the statutory license applicable to webcasting.

This bill has some serious muscle behind it. All three original co-sponsors are members of the Senate Judiciary Committee, which has jurisdiction over I/P-related legislation. The Chairman of that Committee, Patrick Leahy (D-VT), has expressed support for vigorous enforcement of copyright infringement (including re-introducing a bill to allow websites engaged in repeated and egregious offenses to be shut down entirely). It's also supported by some serious lobbying interests in the U.S. Chamber of Commerce, RIAA, MPAA, Independent Film and Television Association, Directors Guild of America, International Alliance of Theatrical Stage Employees, Screen Actors Guild, American Federation of Television and Radio Artists, National Association of Theater Owners, and, if that's not scary enough: the Ultimate Fighting Championship (so, oppose at your own risk).

So all in all, we'd say this will get some attention and movement.

Bottom line: it is clearly "game on" with regard to any unauthorized uses of copyrighted content. All broadcasters should be certain they are in compliance with ASCAP, BMI, SESAC and SoundExchange (the last relating to the online streaming or "webcasting" of music) and that they fully understand the extremely complex nature of copyright law as it applies to the performance, reproduction or other uses of others' content. Of course, we are here to help you learn all about it.



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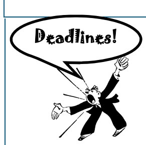
met . . . ***if*** the Commission did in fact notify Congress sometime before March 22 (*i.e.*, 90 days prior to June 20). The FCC may have done so, but the most recent Federal Register notice doesn't specifically confirm that.

Ruh-roh. Closer perusal reveals that, to the contrary, the notice says that the Commish "will send a copy of th[e] Order in a report to be sent to Congress . . . pursuant to the Congressional Review Act." Hmmm. Does that mean that the Commission has not yet let Congress in on the new fees, or does it just mean that the FCC has to send Congress a second report reminding them of the first report that may or may not already have been sent? (When it comes to sending reports to Congress, you really can't send too many.)

For now, it's probably best to assume that the new fees will take effect on June 20. If you have any applications that you're getting ready to file, you might save a few bucks if you can get them on file by that date. But, based on what happened back in 2009, you might want to check on our blog for any changes in the effective date.



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Post-Filing Announcements - *Radio* stations located in **North Carolina** and **South Carolina** must begin their post-filing announcements with regard to their license renewal applications. These announcements must continue on August 16, September 1, September 16, October 1, and October 16.

License Renewal Pre-Filing Announcements - *Radio* stations located in **Florida**, **Puerto Rico**, and the **Virgin Islands** must begin their pre-filing announcements with regard to their applications for renewal of license. These announcements must be continued on August 16, September 1, and September 16.

EEO Public File Reports - All *radio* and *television* stations *with five (5) or more full-time employees* located in **California**, **Illinois**, **North Carolina**, **South Carolina**, and **Wisconsin** 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.

Noncommercial Television Ownership Reports - All *noncommercial television* stations located in **Illinois** and **Wisconsin** must file a biennial Ownership Report (FCC Form 323-E). All reports must be filed electronically.

Noncommercial Radio Ownership Reports - All *noncommercial radio* stations located in **California**, **North Carolina**, and **South Carolina** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323-E.

The Chill Is On For TV Channel Changes

By Davina Sashkin
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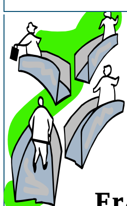
For more than a year – since the FCC first started making noises about possibly "re-purposing" their spectrum as part of the National Broadband Plan – television broadcasters have been living under an ominous sense of impending doom . . . or, if not "doom", at least, major disruption.

That ominous sense just got more ominous.

In a terse public notice, the Media Bureau has announced a freeze on "the acceptance of rulemaking petitions to change television channels", effective immediately (*i.e.*, as of May 31, 2011). The purpose of the freeze is to "permit the Commission to evaluate its reallocation and repacking proposals and their impact on the Post-Transition Table of DTV Allotments". The Bureau also points out that licensees have been able to submit channel change petitions since May, 2008 (when the last pre-DTV transition freeze was lifted), so it figures that everybody's had plenty of time to determine whether they might prefer a different channel.

The freeze could indicate that the Commission is already narrowing down its re-purposing options; alternatively, it might mean merely that the Commission hopes to minimize any complications that would arise from a continually changing DTV Table of Allotments. Whatever may be the case, if you're a full-power TV licensee, it looks like the channel you happen to be on now is the channel you're going to be on for the foreseeable future. Presumably, the Commission will eventually decide how it can shuffle spectrum around to squeeze 120 MHz or so out of the TV band. In that event, assuming that Congress goes along with things, you may find yourself moved around in what's left of the TV band. (Rulemaking petitions that were already on file with the Commission's Secretary as of May 31 will continue to be processed, but no others. So if you are hoping to change and were lucky enough to get your proposal on file before May 31, congrats.)



FHH - On the Job, On the Go

It's all **Franks**, all the time.

Frank Jazzo and **Frank Montero** attended the Annual Dinner of the Maryland/DC/Delaware Broadcasters Association in Annapolis, Maryland, on May 19.

Frank M had just returned from speaking at the Puerto Rico Broadcasters Association in Rincon, and on June 1 he'll attend the SNL Kagan TV and Radio Finance Summit in New York City.

Meanwhile, on June 11, **Frank J** will be off to the Land of Enchantment, where he will lead the "FCC Issues and DC Update" session at the Annual Convention of the New Mexico Broadcasters Association in Albuquerque.

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And even if the Alliance's reading were supported by the statute, its proposal still raises a host of practical problems that the Alliance doesn't even acknowledge, much less attempt to resolve. For example, precisely how would regulatory treatment of "auxiliary secondary services" differ from treatment of non-auxiliary secondary services?

And how would the Commission be expected to assess whether any particular programming was sufficiently "local" to avoid demotion to "auxiliary" status – any First Amendment problems there? How about the definition of "origination" for purposes of the proposal? Ordinarily, origination refers to the fact that the programming is not being transmitted, seamlessly and simultaneously, as it arrives from some other source – but what if a "satellator" operator were to record programming delivered by satellite and then replay the recording the following day. Would that constitute "origination"? (Our guess is that this isn't what the Alliance had in mind, but its petition doesn't delve into such niceties.)

And if translators are allowed to air commercial programming, would LPFM's be permitted to do the same?

Since the Commission is already facing the tough task of adjusting its rules to the terms of the LCRA, the arrival of the Alliance petition is probably not a welcome development, since the petition advances seriously complicating concepts without suggesting solutions. Of course, the Commission is under no obligation to address the petition – witness the fact that the Commission has for more than five years already ignored a proposal that the public file rule be eliminated – but the LPFM lobby obviously has historically managed to get itself heard, so it might not be easy to ignore the Alliance petition. Suffice it to say, though, that the petition is not likely to speed up the ultimate resolution of the translator/LPFM face-off.

For the time being, though, the Commission has not yet given the proposal a file number or opened even a preliminary opportunity to comment on it. For updates, check back on www.CommLawBlog.com.