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Memorandum to Clients

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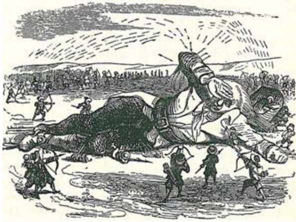

Translate this!

FCC Adopts Process to Clear Longstanding LPFM/FM Translator Logjam

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In 2003 the Commission opened its doors to new FM translator applicants – and more than 13,000 applications walked in. Now, nearly a decade later, some 6,500 of those applications are still pending. But never fear. With some Congressional prodding (in the Local Community Radio Act (LCRA)), the FCC has knuckled down and devised a complex system for processing the remaining translator applications while assuring that translators will ***not*** gobble up all the available spectrum to the exclusion of new low power FM (LPFM) applicants. That system, first proposed last summer, has now been officially adopted in a Fourth Report and Order and Third Order on Reconsideration (*4th R&O*).

Congress insisted in the LCRA that the LPFM service be treated as "equal in status" to FM translators and boosters. Congress was less clear as to what, precisely, it meant by the phrase "equal in status". Sorting that out was left to the Commission. The first 14 or so pages of the *4th R&O* are devoted to identifying the "broad interpretive principles" underlying the LCRA. Feel free to read through them if you're interested. For our money, your time would be better spent on pages 14-25, particularly starting on page 19. That's where the Commission explains its "revised translator application processing and dismissal policies" – *i.e.*, how it's going to cull grantable translator applications without shutting out LPFM wannabes.

It's not necessarily pretty, and it certainly isn't easy, but the Commission's system seems to do the trick, preserving theoretical opportunities for future LPFMs while still allowing relatively prompt grant of more than 1,000 (by the Commission's estimate) new translators from the applications filed in 2003.

If you've got one or more translator applications pending from 2003, pay attention. You'll be having to do some homework, probably in the not too distant future.

Inside this issue . . .

Aereo vs. The Broadcasters 2
Political Broadcasting 2012: Things Change 3
More Steps Toward TV Band Clearing 3
SSAs and JSAs - Some Unwritten Rules 4
White House Proposes Approach to Privacy Protection On-line 6
Royalty Battle Royal: SiriusXM vs. Sound Exchange 8
Deadlines 14
"Specialty Station" List Updated 16

Processing Pending Translator Applications

Here's how the newly-adopted process is going to work.

Market Definition – "Spectrum Limited" vs. "Spectrum Available"

As previewed in last summer's Notice of Proposed Rulemaking, the Commission has studied the availability of LPFM opportunities in the top 150 Arbitron markets (and six additional markets where more than four translator applications are pending). It did this by examining, for each of those markets, a thirty-minute latitude by thirty-minute longitude grid laid out over the center-city coordinates. The grid consists of 961 points (*i.e.*, 31x31), and for each point the Commission analyzed the availability of all 100 FM channels for LPFM use.

To be deemed available for such use, a channel at any particular point in the grid had to fully satisfy co-channel, first- and second-adjacent channel LPFM spacing requirements with respect to all outstanding authorizations *and* pending applications (including pending translator apps).

From the grid analysis the Commission determined how many LPFM availabilities exist in each of the studied markets. ("Availabilities" in this sense include both vacant channels *and* channels currently used by LPFM stations.) Armed with those determinations, the Commission then made an initial rough cut, dividing the studied markets into two groups: the "spectrum limited" markets (initially re-

(Continued on page 12)

Another day, another way to move video to the Internet
. . . and another set of lawsuits

Aereo vs. The Broadcasters

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Welcome to the latest bout in the Alternate Video Delivery System Smackdown Series. In this corner, the upstart challenger, Aereo (formerly known as Bamboom Labs, Inc.); in that corner, pretty much every major broadcast network.

Aereo is the latest innovator seeking to bring video content from one source (in Aereo's case, over-the-air broadcasting) to subscribers in some alternate fashion – a fashion that ideally makes it attractive enough to cause consumers to fork over $12/month to Aereo. Aereo plans to deliver a full (or at least nearly full) array of over-the-air broadcast programming to you through the Internet. That, of course, means that you would be able to access that programming through whatever Internet-accessible device you might choose – tablet, smartphone, desktop, big screen TV in your living room, etc. The programming could be streamed as it is being broadcast, or it could be accessed on a delayed basis, just like shows you might otherwise save on a DVR.

And that's Aereo's angle: as Aereo sees things, its service "enables consumers to access broadcast television via a remote antenna and DVR". Actually, make that "cloud DVR", a term Aereo slips into its on-line response to the two lawsuits brought against it by the major TV networks.

What exactly is a "cloud DVR"? It's a quasi-imaginary device – actually, a combination of devices – that affords the user the ability to access streamed or recorded content from broadcast stations through the Internet. A crucial element of the technology is a teeny-weeny antenna – about the size of a dime (*see* illustration, above, taken from the Aereo website) – that Aereo uses to receive OTA broadcasts. When you subscribe to Aereo, you are assigned one such antenna – it's yours and (supposedly) nobody else's. It's hooked to "massive amounts of storage and super-fast Internet connections". You are then given an "elegant interface" with which to "control your antenna". You can pick a channel to watch or you can tell it to record for later viewing.

So it's just like sitting in your living room, fiddling with your cable remote, right?

Not really, at least according to a cadre of broadcasters who have claimed, in two separate suits, that Aereo's system infringes on their copyrights by illegally reproducing and publicly performing copyrighted programs. (We've posted links to copies of the complaints on www.CommLawBlog.com.) The broadcasters also argue that Aereo's operation would violate New York unfair competition law. Their theory is that Aereo is commercially exploiting the programming and the broadcast infrastructure without authorization in a way that "undermines [the broadcasters'] substantial creative and financial investment in their audiovisual works" as well as the broadcasters' "efforts and labor". (If we may paraphrase that latter claim, it seems to us to be something like: "Look, there's a system in place that allows broadcasters to be paid by cable and satellite systems in exchange for carriage of their signals. It's existed for many, many years. You, Aereo, are unilaterally threatening that system".)

As the broadcasters see things, once Aereo's system gets up and running (launch was scheduled for March 14), it'll be engaged in the "retransmission" of OTA broadcast signals. Under the copyright laws, of course, the "retransmitter" ordinarily needs to get permission from the copyright owner of the "retransmitted" material before any "retransmission" can lawfully occur. Aereo doesn't have such permission, so it's infringing – hence the lawsuits.

Hold on there, says Aereo. Aereo doesn't "retransmit" the signal in a way that violates the law. Rather, they're simply a company that rents antennas to subscribers. Those antennas pick up a broadcast signal within the local area; the fact that the antenna doesn't happen to be in the subscriber's home isn't legally significant. I think everyone would agree that, at least up to this point in the analysis, what Aereo has done is completely legal.

But Aereo's service doesn't just deliver the OTA signals from an antenna to a TV set. It makes them available on the Internet. Does that constitute a direct retransmission of content that was lawfully received at each individual antenna? Or does it just make it easier for consumers to do what they are otherwise entitled to do anyway?

(Continued on page 10)

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Political Broadcasting 2012: Things Change

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We all know that the 2012 election season is in full swing, and has been for some time. But that doesn't mean that the playing field for political advertising is static. To the contrary, in early March a federal court in Texas provided a reminder of why it is very important for all broadcasters to pay attention to developments that may affect elections in their service areas.

As a result of the 2010 Census, a number of states are still dancing at the Redistricting Disco, redrawing the boundaries of their Congressional districts. In Texas, that led to a lengthy court battle. The latest development: a federal court in San Antonio rescheduled the state's primary elections, moving them back nearly two months, from April 3 to May 29, with runoff elections, if necessary, on July 31. (The elections had already been pushed back from their original date of March 6.) The court also re-opened the candidate filing window for several extra days.

Under the FCC's political broadcasting rules, candidates for federal office are entitled to lowest-unit-charge (LUC) rates during a window of 45 days before a primary or primary runoff. So Texas broadcasters who might have thought that their LUC period had already been set had another think coming. The court's decision established a new 45-day window (starting April 14) in which the LUC requirements would apply, and it terminated the LUC window that had been started based on the April 3 date. So not only will broadcasters have to extend LUC rates for several weeks beyond their original expectation, but they will also have to deal with political advertising contracts entered into for the previous LUC period. And for a further potential complication, the re-opening of the candidate filing window meant possible changes in the pool of qualified candidates.

While the Texas developments will obviously be felt most directly by stations in Texas, those developments still serve as a strong reminder to stations everywhere to stay on top of their local and national political scenes. As long as the political landscape remains unsettled, changes in that landscape can have a significant impact on broadcasters' obligations under the political advertising rules.

[Editor's note: Many thanks to our friends at the Texas Association of Broadcasters for alerting us to this development.]

The dominoes continue to fall

More Steps Toward TV Band Clearing

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The thinning of the ranks of Class A TV stations continues. We reported last month that the FCC had started to propose the downgrading of a number of Class A television stations to LPTV status, presumably to make room for the almighty broadband to take over TV spectrum. The stations targeted in the first round of that effort had (a) failed to file Children's TV Reports and (b) failed to respond to FCC's inquiries about the whereabouts of those reports. (The FCC later fined a number of other stations which had also failed to file kidvid reports; they escaped the dreaded downgrading because they had at least responded to the FCC's inquiries.) Another 16 Class A's now face the prospect of being demoted to LPTV status.

Like the stations we've already reported on, the latest batch of targeted Class A's got onto the FCC's radar by not filing Children's TV Reports. In response to the FCC inquiry about those missing reports, each of the three licensees (one holding 13 licenses, another two, and a third one) acknowledged their respective failures to file. Each also acknowledged that their stations had operated, at most, only sporadically over the last several years. Two blamed the economy for the extended darkness; one claimed that its non-operation – its two stations had operated a total of less than four months in the last five years – arose from a "need to locate permanent transmitter sites". Two of the three licensees' responses also indicated that their stations no longer had main studios (or public files located at their main studios).

In order to qualify for Class A status, a licensee must maintain a main studio and broadcast a minimum of 18 hours per day, with an average of at least three hours weekly of locally-produced programming and three hours of children's programming. From the responses described above, the Commission concluded that none of the 16 stations still qualified to be Class A – accordingly, they're looking to be downgraded.

The FCC suggests that Class A stations who find themselves temporarily unable to meet the minimum regulatory requirements for Class A status may, in some circumstances, be eligible for special temporary authority to operate at variance from those requirements. But such STA would be only temporary, and would not cover extended time periods of noncompliance, particularly when the reason for the STA is financial distress. The Commission is particularly skeptical about stations that close their main studios and/or de-construct their transmission facilities. The result of this strict approach, of course, is to impose the greatest hardship on the most vulnerable.

The other side of the argument is that no one is proposing to take away licenses; rather, all that's involved here is a status downgrade (from Class A to LPTV), which still allows the stations to resume operation. Whether there is a difference between taking away the license and taking away only Class A status remains to be seen after we know more about the prospects of space remaining for LPTV stations after implementation of the FCC's plan to truncate the TV spectrum by 10-20 channels.

Reading between the unwritten lines

SSAs and JSAs - Some Unwritten Rules

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Shared Services Agreements (SSAs) and Joint Sales Agreements (JSAs). To some, they're a godsend, sustaining stations that would otherwise be dead-and-gone. To others, they're an anti-diversity scourge, a disingenuous device reflecting all that is wrong with Big Media Consolidation. One thing everybody can agree on, though: as a matter of regulation, SSAs and JSAs are not subject to specific definitions or easily identified parameters. While lots of folks recognize the acronyms and wax eloquent about the concepts underlying SSAs and JSAs, the FCC's rules themselves are silent about their precise metes and bounds.

If you're a newcomer to the world of SSAs and JSAs and would like some background, check back to our *Memo to Clients* article on that topic from last November. (You can also find that article on our blog at www.CommLawBlog.com.) Quick recap: SSA/JSA arrangements usually involve two separate TV licensees in the same market. While common ownership of the two stations is prohibited by the FCC's rules, the two licensees wish to cooperate with one another to increase the efficiencies of their operations. This is usually accomplished by one of the licensees (let's call it the "Services Provider") agreeing to provide a range of operational services to the other (the "Services Recipient").

The staff's touchstone consists of three basic elements of station operation: programming, financing and personnel.

The FCC's staff has been aware of – and has tacitly blessed – these arrangements for years, ***but only if*** the particular terms of the SSA/JSA arrangements don't cross certain boundaries. Unfortunately, those "certain boundaries" have not been generally publicized. Oh sure, there have been a very small handful of high profile cases – for instance, in Hawaii last fall, or in Corpus Christi two years ago – that have shed some official light on things. But, apart from those, the allowable parameters for SSAs and JSAs have been disclosed primarily during private conversations with the FCC's staff when they are evaluating a proposed SSA/JSA arrangement in the context of an assignment of FCC licenses from one party to another. (In 2004, the FCC did open a formal rulemaking proceeding to consider whether JSAs should be treated as attributable interests. While that proceeding is technically still open, it has gone nowhere in eight years and shows no current signs of life.)

Which is why we figured it might be a good idea to share some of what we have learned from having been in on a number of conversations with the staff.

The following is based on our experiences with the Video Division in a number of deals which included SSA/JSA components. Important caveat: Since a number of the Division's (not to mention the Commission's) policies aren't written down anywhere, they can change from one day to the next and from one deal to the next. That, obviously, is not an ideal circumstance for anybody who might be trying to structure a deal to comply with whatever the applicable standards might be. So if you're in that particular boat, understand that the following reflects policies and guidelines that have been used by the FCC's staff in the past and that could be used in the future – but there's no guarantee that the staff won't perceive in your particular deal some reason to change things up along the way without telling anybody (including you) in advance.

The staff's touchstone in dealing with SSAs and JSAs (as well as with other questions of broadcast ownership attribution) consists of three basic elements of station operation: programming, financing and personnel. The primary goal is to assure that each independent licensee can and does exercise control with respect to each of those elements.

As to programming, the Commission's rules *do* specify that an entity providing more than 15% of the total weekly programming to a station is deemed to have a cognizable interest in that station. Since parties to an SSA generally want to avoid the creation of any cognizable interests, the 15% limit affords important guidance. SSAs often provide that the Services Provider will be responsible for the news gathering and newscast program production of the Services Recipient. In such cases the parties must be careful to keep the total length of all provided news programming under the 15% threshold (*i.e.*, no more than 25 hours in a 24-hour/7-day broadcast week).

Beyond the 15% limit specified in the rules, though, other programming-related considerations come into play as far as the processing staff is concerned. For example, the staff has insisted that each station licensee must retain control over the entertainment programming aired on its station. If the Services Recipient's station is a network affiliate, the affiliation agreement must be directly between the Services Recipient and the network. The Services Provider can***not*** negotiate either the network affiliation or any syndicated programming agreements on behalf of the Services Recipient. The Services Recipient must also have the right to reject any advertising sold by the Services Provider for broadcast on the station.

(Continued on page 5)

(Continued from page 4)

When it comes to finances, each station's licensee must own or control certain minimal assets necessary to run the station, such as the transmitter and access to a tower. For processing purposes, we understand the staff's position is that the value of these assets owned/controlled by the licensee must be at least 20% of the value of all of the station's assets. (Such equipment may be owned or leased.) That means that the Services Provider cannot own or control more than 80% of the asset value of the Services Recipient's station. Additionally, direct loans to the Services Recipient from the Services Provider must not exceed 33% of the combined equity and debt of the station, according to the Commission's Equity Debt Plus rule. Note, though, that the Services Provider ***may*** guaranty lease payments and loans to the licensee made by banks and other unrelated financing sources.

Under a typical JSA, advertising sales for both of the contracting parties' stations are provided by the sales staff of the Services Provider's station. Video Division staff members have advised that no more than 30% of the revenue collected from such sales may be retained by the Services Provider. (That's consistent with the Media Bureau's published decision in the Hawaii case mentioned above.) That policy arises from the apparent belief that if the Services Recipient retains 70% of the station's advertising revenue, it will have sufficient economic incentive to control programming on its station. This 30/70 split between the Services Provider and the Services Recipient has been a consistent hallmark of staff-approved JSA arrangements for TV stations over the last eight years. The 30/70 split relates only to advertising revenues; the parties' arrangements could, for instance, include an SSA that provides for payments from the Services Recipient to the Services Provider that would have the net effect of reducing the latter's overall revenues to significantly below 70% of advertising sales.

The good news is that the Video Division staff has been willing to provide applicants with helpful guidance

Finally, regarding personnel matters, the staff has indicated that, under an SSA arrangement, a Services Recipient must keep at least two full-time employees on its payroll. In the staff's view, that's the minimum number necessary for the station to effectively control its own programming and financing. One of those two employees must be a manager with full editorial discretion in carrying out the Services Recipient's policies, including the authority to accept or reject programming provided by the Services Provider. The other employee may be a staff-level person. The Services Recipient must be able to hire and fire its employees at the station and pay their salaries without interference from the other party to the SSA.

Video Division staff policy limits the duration of JSA/SSA arrangements to the length of time of a station license – eight years – although, oddly, the terms of the agreements and the terms of the license do ***not*** need to run concurrently. In other words, an SSA/JSA arrangement can begin at any time during a station's license term, so long as the arrangement doesn't last longer than eight years, even if that means the arrangement will span portions of two separate license terms. The staff has also indicated that automatic renewals of SSAs and JSAs for additional eight-year periods are permitted, so long as both parties have the right to opt out at the end of each term.

Most SSA/JSA arrangements also include an option for the Services Provider to acquire the Services Recipient's license. While some doubt existed several years ago as to the acceptability of such options, more recently the staff has indicated that it does not have a problem with them. That makes sense because, historically, the mere possibility that a station *might eventually* be acquired has not constituted an attributable interest in that station for purposes of the FCC's multiple ownership rules. However, the staff has indicated that, in such arrangements, the option price must be ***neither*** a fixed amount ***nor*** an amount that decreases during the life of the option if the station does well and the licensee benefits from cash flow over a predicted amount. Such option pricing methods have been deemed to be contrary to the FCC's goal of ensuring that a licensee has the economic incentive to control its station's programming. Option prices that are based upon multiples of cash flow or that increase over time have been approved by the staff.

Over the past decade the FCC has faced pressure from public interest groups concerned about consolidation of television news reporting, and from cable companies who think that SSA/JSA arrangements give broadcast TV stations too much leverage in negotiating retransmission consent agreements. In spite of those pressures, the Video Division has continued to approve license assignments or transfers which include SSA/JSA arrangements, so long as such arrangements are consistent with the guidelines described above.

Parties looking to enter into SSA/JSA arrangements should exercise caution. The staff's ad hoc approach to SSA/JSA arrangements, usually implemented through informal conversations, has not resulted in a substantial body of written precedent – the Hawaii and Corpus Christi cases mentioned above, and a small handful of others, are pretty much it. While those cases do provide some helpful guidance in some areas, in others the staff remains able to modify or even reverse policies without prior notice. The good news is that the Video Division staff has been willing to provide applicants with helpful guidance during the staff's routine review process. As a result, applicants have a chance to get the staff's read on their proposed arrangements – and make any adjustments that might be necessary to get their application granted. That is certainly a preferable option.

Whose information is it, anyway?

White House Proposes Approach to Privacy Protection On-line

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Hoping to shape the development of national – and possible international – consensus on the privacy protections to which on-line consumers should be entitled, the Obama Administration has issued a report on "Consumer Data Privacy in a Networked World" in which it lays out a "blueprint for privacy in the information age." A central component of the report is a proposed "Consumer Privacy Bill of Rights". That "bill of rights" reflects a set of principles which are, at this point, merely aspirational, with no independent legal force. The White House is hoping to change that on at least two fronts.

First, it is calling on Congress to pass laws that would impose the "bill of rights" on commercial sectors not currently subject to federal data privacy laws. And second – presumably because it recognizes that Congressional action is far from a sure thing – the Administration is calling on a wide range of "stakeholders" to develop their own "codes of conduct" effectively implementing the "bill of rights". The idea is that such codes, once publicly and affirmatively adopted by companies subject to Federal Trade Commission (FTC) regulation, could be legally enforced by the FTC. The stakeholders the White House is targeting include companies, privacy and consumer advocates, "international partners", state attorneys general, criminal and civil law enforcement representatives and academics.

The process of developing broad privacy standards has now been started.

This approach appears to have the support of major on-line companies such as Google and Yahoo. Some consumer advocates remain wary about the process and concerned that rigorous enforceable protections may not be achieved.

At this point, it's impossible to reliably predict the chances that the "bill of rights" will ultimately be adopted – whether by Congress or by a significant number of the commercial "stakeholders" identified by the White House. Still, the process of developing broad privacy standards has now been started, and all companies that do business on the Internet should be aware not only of the proposed "rights" (and the burdens that they could impose), but also of the process by which any such "rights" are likely to be developed and implemented.

What Rights? – Just what "rights" are on the table?

The White House's "bill of rights" is intended to provide a "baseline of clear protections for consumers and greater certainty for companies." It is based on longstanding, globally recognized, Fair Information Practice Principles (FIPPs), and bears a striking similarity to the European Union's influential Data Protection Directive. Under the Administration's proposals, consumers would be entitled to the following, while affected companies would be expected to respond as indicated:

Individual Control – Consumers would get the right to exercise control over what personal data companies collect from them and how they use it. Companies would be expected to enable consumer choice over use of their personal data by providing easy-to-use mechanisms reflecting the "scale, scope and sensitivity" of the data being collected.

Transparency – Consumers: the right to easily understandable and accessible information about privacy and security practices. Companies: provide clear descriptions of what personal data they collect, why they need the data, how they will use it, when they will delete or de-identify it, and whether and for what purposes they will share the data with third parties.

Respect for Context – Consumers: the right to expect that companies will collect, use, and disclose personal data in ways that are consistent with the context in which consumers provide the data. Companies: "heightened measures of Transparency and Individual Choice" would be required if, after collecting data, a company were to decide to use the data for purposes inconsistent with the original context under which it was collected.

Security – Consumers: the right to secure and responsible handling of personal data. Companies: assess their data collection and protection practices, and maintain reasonable safeguards to control risks of loss, unauthorized access, and improper disclosure.

Access and Accuracy – Consumers: the right to access and correct personal data in usable formats, in a manner that is appropriate to the sensitivity of the data and the risk of adverse consequences to consumers if the data is inaccurate. Companies: use reasonable measures to ensure that they maintain accurate personal data.

Focused Collection – Consumers: the right to reasonable limits on the personal data that companies collect and retain. Companies: collect only as much personal data as they need, consistent with the Respect for Context right.

Accountability – Consumers: the right to have personal data handled by companies with appropriate measures in place to assure they adhere to the Consumer Privacy

(Continued on page 7)

(Continued from page 6)

Bill of Rights. Companies: accountability to enforcement authorities and consumers for adhering to these principles.

These concepts are obviously broad and vague. But that appears to be purposeful, since the "bill of rights" as envisioned by the White House is intended to serve merely as a basic framework for protections in the myriad commercial areas not already subject to more specific federal privacy regulation (*e.g.*, healthcare, financial services, education, telecommunications.)

Implementation – As it stands now, the "bill of rights" is little more than a wish list, a set of desirable goals the Administration would like the commercial world to embrace. Turning the "rights" into enforceable codes of conduct will not be simple. The White House proposes to do that through an "open, transparent, multistakeholder" process. The stakeholders would include "international partners" in the process. The goal there is presumably to assure that any U.S. codes of conduct would qualify for international "safe harbor" standards, thus facilitating international trade for U.S. companies.

The job of soliciting input from all of the stakeholders has been given to the Department of Commerce's National Telecommunications and Information Administration (NTIA). While Commerce has previously waded into privacy policy, the FTC has as well. The choice of NTIA as the locus of the process may be an effort to encourage on-line industry participants to participate. Also, since the White House appears to contemplate that the FTC would be the agency with primary enforcement authority relative to any codes of conduct that get developed, the Administration may feel it more appropriate to leave the development to a separate agency. Several consumer groups have already expressed concerns, though, that one or more stakeholders may attempt to impose "unilateral solutions" on consumers. Those groups have proposed their own process principles.

The "bill of rights" is now little more than a wish list; turning it into enforceable codes of conduct will not be simple.

Notwithstanding the involvement of NTIA, or the FTC, in the development phase of any codes of conduct, the Administration sees such codes as being primarily *private* initiatives that "can provide the flexibility, speed, and decentralization necessary to address Internet policy challenges." As models, the White House is looking at such non-governmental organizations as the Internet Engineering Task Force and the Internet Corporation for Assigned Names and Numbers (ICANN) which are responsible for important Internet-related technical standards.

Is This Enforceable? – Um, no. As matters now stand, the components of the Administration's "bill of rights" are ***not*** enforceable. But there are at least two ways in which they might become enforceable, directly or otherwise.

First, as noted above, the White House hopes that the stakeholder discussions it is initiating will lead to the adoption of specific codes of conduct to which companies will publicly commit themselves. Such commitment to compliance could provide the FTC the hook necessary to enable it to bring enforcement actions against companies whose conduct falls short of their commitment to the code they have embraced. (This would be similar to the FTC's current practice, under its authority to prevent deceptive trade practices, of bringing enforcement actions based on a company's violation of its own website privacy statements.)

Along the same lines, private codes of conduct might also serve as a measure of the reasonable standard of conduct applicable to parties engaged in on-line activities involving data collection. For instance, plaintiffs in defamation cases often seek to use the Code of Ethics of the Society of Professional Journalists to establish that a defendant acted negligently because he or she failed to strictly adhere to that Code. The consumer privacy code of conduct envisioned by the White House could provide a similar yardstick for treatment of personal information collected online.

Second, the White House Report urges Congress to pass legislation adopting the proposed "Consumer Privacy Bill of Rights", but with more specific terms that would be worked out between the White House and Congress during the drafting stage.

As the White House sees it, that legislation would provide a number of enforcement mechanisms. First, the FTC would be given the authority to (a) review any private codes of conduct that companies might adopt and (b) effectively grant those companies forbearance from enforcement under the statutory provisions *provided that* the companies commit to adhere, and do in fact adhere, to their private codes. Such FTC review would be subject to a number of limitations (*e.g.*, require public comment, complete agency review within 180 days, etc.). Importantly, such private codes would have to reflect the "consensus of all participants in the multistakeholder process".

The "safe harbor" approach – *i.e.*, forbearance from compliance with a statutory "bill of rights" – would theoretically encourage companies to devise their own codes of conduct, subject to the FTC review process. (While the White House Report does not address the possibility expressly, it appears at least possible that a company that adopts a code not reviewed and approved by the FTC might still also be subject to FTC enforcement for violating that code, under the FTC's existing Title 5 authority to prevent deceptive trade practices.)

Second, the FTC would be given authority to directly enforce each element of the statutory "bill of rights".

So would state attorneys general (at least as long as they coordinate their enforcement actions with the FTC). But the ability of individual states to provide their own separate privacy protections would be limited. In the hope of establishing nationally uniform privacy rules, the White

(Continued on page 11)

The Swami weighs in

Royalty Battle Royal: SiriusXM vs. Sound Exchange

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In some confrontations, it's tough to say who to root for. Godzilla vs. Mothra, for instance. Or Duke vs. UNC. Or Liverpool vs. Manchester City. (For the record, I'm going with (1) Godzilla, (2) UNC and (3) a draw with a number of red cards and several non-career threatening injuries thrown in for good measure.)

And now we have SiriusXM vs. SoundExchange.

SiriusXM – the monopolistic satellite radio provider that many radio broadcasters view as an archenemy – has sued SoundExchange – the monopolistic digital music licensing agency that many radio broadcasters view as an archenemy. SiriusXM's claim is that SoundExchange (along with a co-defendant, the American Association of Independent Music (A2IM)) has engaged in antitrust violations and tortious interference with prospective economic advantage.

(The notion that SiriusXM, an entity created by the merger of the only two satellite radio providers, would complain that somebody else is violating the antitrust laws is rich with irony. But I digress.)

> *The notion that one monopoly would complain that another monopoly is violating the antitrust laws is rich with irony.*

It's still way too early for me, the Swami, to try to predict how this suit might eventually end up. But I don't think it's too early to imagine who the overall winners and losers might be as this litigation plays out. We'll get to that in a minute.

Before then, some background on *SiriusXM v. SoundExchange*.

First, why might folks not like SiriusXM and SoundExchange?

SiriusXM is the spawn of Sirius and XM Radio, the two original satellite radio operators. When they merged to form SiriusXM, many felt the FCC too readily acceded to their promises to refrain from anticompetitive business practices, promises that, also to many, rang hollow and seemed to lack conviction.

And SoundExchange has long been viewed as less than sympathetic, particularly because of the arduous record-keeping and reporting requirements it imposes on webcasters. And then there are the seemingly ever-increasing royalties it sucks out of webcasters and the less than transparent manner in which it appears to run its business. (On a personal note, I don't think SoundExchange deserves a bad reputation. I've found many of the folks there to be more than helpful and willing to work with broadcasters making a good faith effort to comply with the requirements of the statutory copyright license.)

Second, about that lawsuit.

Webcasters are required to pay copyright royalties for music they transmit. The "easy" way to do that is to send the money to SoundExchange, which serves as the agent of the copyright holders (much like ASCAP, BMI and SESAC do on the broadcast side). The royalty rates SoundExchange charges are set by the Copyright Royalty Board (CRB) periodically.

But motivated parties can sidestep SoundExchange by going straight to the copyright holders to negotiate separate licenses for each piece of music to be transmitted. That approach can be very advantageous. Direct deals can lead to more favorable royalty rates than would be available through the CRB ratemaking process. In its most recent rate ruling, the CRB ordered SiriusXM to pay 8% of gross revenues, and in the next CRB go-round SoundExchange is reportedly ready to ask for an increase up to 13%; by contrast, direct licensing could have tied down a royalty rate in the 5%-7% range.

Being able to negotiate a bunch of direct deals at a substantially lower rate could also be useful in future CRB ratemakings. Such lower rate deals would provide empirical proof of what the actual market for webcasting rights would bear, the standard the CRB is supposed to use in setting rates. A significant rate reduction across the board through CRB ratemaking would be huge for SiriusXM, which reportedly spent $200 million in royalties in 2011.

Furthermore, direct licensing has practical benefits. The two sides can agree on their own reporting procedures (broadcasters always complain that the standard CRB-mandated, SoundExchange-enforced paperwork regimen is too onerous). They can waive various stringent conditions (such as limitations on the number of songs from one artist within a given time period). Economies of scale can be created across multiple platforms that also allow for better marketing (think interactivity and social media, for example).

A primary downside of direct licensing: it tends to be less convenient to achieve, requiring lots of leg work followed by lots of separate, possibly difficult, negotiations which may or may not result in deals.

(Continued on page 9)

(Continued from page 8)

Apparently, SiriusXM tried its best to enter into direct licenses. It says it entered into 80 of them, but claims to have been shut out of many, many more. Figuring that its lack of success was not just a matter of bad luck, SiriusXM filed suit in the U.S. District Court for the Southern District of New York. It alleged that SoundExchange and A2IM ,"acting in concert with one another and with their individual recording company members, have erected an industry-wide conspiracy to boycott and tortiously interfere with Sirius XM's efforts to secure through the workings of a competitive market copyright rights critical to the conduct of its business."

Specifically, SiriusXM claims that SoundExchange, A2IM and others coerced record companies not to do business directly with SiriusXM. The coercion supposedly involved "implicit and explicit threats to enforce compliance" as well as efforts to "misle[a]d record companies as to their economic interests and even encourage[ ] some record companies to terminate license agreements they had already concluded with SiriusXM".

According to SiriusXM, a conspiracy involving SoundExchange, A2IM and others was designed to ensure that webcasting royalties would have to be set by CRB decision, and that the CRB decision would have to be based on essentially speculative testimony. No direct licenses, no negotiated settlement and no real evidence of what actual market participants actually want.

The beauty of this lawsuit from the broadcasters' perspective: if SiriusXM wins, broadcasters reap the benefits without any effort.

In filing its lawsuit, SiriusXM did not need to prove its case in its entirety. Rather, it just needed to advance enough factual claims that, if proven at trial, would establish its entitlement to the relief it's seeking. In its complaint, SiriusXM cites various communications from the defendants – mailings to their members, public statements, etc. – all allegedly designed to spread the word loud and clear that

> direct licensing is harmful to the Defendant's scheme to establish and maintain super-competitive royalty rates. Hold the line and don't sign up [for direct licensing with SiriusXM].

And sure enough, SiriusXM quotes a bunch of such communications, all of which seem to support its claims. (We expect to have a link to SiriusXM's complaint posted at www.CommLawBlog.com, so you can see for yourself what it's alleging.)

SiriusXM also alleges that several artists and music labels refused to enter into licenses with SiriusXM because those artists and labels were supposedly scared that (a) SoundExchange would reduce the royalties to which they were entitled and (b) they would end up as pariahs in the music industry, blackballed from board memberships or other leadership positions.

Whether or not SiriusXM will be able to prove all its allegations to the satisfaction of a trier of fact in a court of law remains to be seen.

Still, we can speculate about how all this might affect some key players not directly involved in the suit.

First, those we'll call "winners":

Broadcasters. Broadcasters don't have a dog in this fight, per se. In fact, that's the beauty of this lawsuit from the broadcasters' perspective. If SiriusXM wins, broadcasters will reap the benefits without any effort.

What benefits? The possible dismantling of SoundExchange, or the imposition of some limiting consent decree against SoundExchange, or the forced introduction of a competitor receiving agent. A SiriusXM win would certainly help establish actual market values that would serve as a "willing buyer/willing seller" standard in future SiriusXM ratemaking proceedings. Although such numbers would technically have no direct bearing on the broadcasters' next CRB ratemaking proceeding (*i.e.*, Webcasting IV, due to begin in 2014 to set rates for 2016-2020), those numbers would provide important concrete data – possibly the only such data – regarding the value of a digitally transmitted sound recording. Moving further out toward the edges, there's also the simple hope that a SiriusXM victory might embolden more smaller, so-called "independent" labels to license their copyrighted material directly to radio stations as well as SiriusXM.

This would be especially important if the broadcasters' own worst case scenario – enactment of the Performance Rights Act – were to occur. We've thankfully heard little about this legislation for a couple of years, but imagine if (a) it were too pass and (b) SoundExchange were given the right to administer those royalties as well. Broadcasters would then be in virtually the same position SiriusXM is in right now: paying royalties on two fronts and completely bound by the rules and procedures set by the CRB and SoundExchange. In this scenario, any relaxation of the SoundExchange grip that SiriusXM might achieve through its lawsuit would ultimately benefit broadcasters.

SiriusXM. If nothing else, SiriusXM gets some street cred from the broadcasters. SiriusXM is taking up this fight with SoundExchange on its own. By contrast, when broadcasters took on SoundExchange and the Webcasting II decision, they did so en masse, with the bulk of the broadcasting industry marching in lock step.

But more than that, SiriusXM made the right play. Not necessarily the winning play – we won't know that for a while – but the right play. Litigation is expensive, but not as expensive as the $200 million in royalties that SiriusXM claims to have paid last year. Add in the fact that a victory would not only reduce that expense, but also afford SiriusXM more flexibility in future negotiations and

(Continued on page 10)

(Continued from page 9)

the ability to innovate.

And even if it loses, SiriusXM is likely to be able to add a few more direct licenses to the 80 it already has (out of 500 or so that it sought). That should give it a little more bargaining power in future ratemaking proceedings by fully demonstrating the value of a sound recording under the "willing buyer/willing seller" standard applicable to satellite radio. And regardless of whether that pans out, well, as one commentator (The Motley Fool) put it: "SiriusXM is part of a legal complaint where it really doesn't have much to lose beyond legal fees. If its complaint doesn't hold up, SiriusXM is back to where it is now. If it has merit, SiriusXM should be able to strike better licensing terms with labels that value the promotional power of being broadcast to the provider's 21.9 million subscribers."

Smaller Independent Recording Artists. Unlike major artists represented by major labels, these artists are more likely to be at the mercy of the bigger players. SiriusXM's lawsuit, successful or not, is likely to give these artists and their labels a more prominent voice. There's also a little leverage that might lead to a chance to work out the deals they really want, deals that aren't just about money but about creating future opportunities for themselves.

Royalty Logic. You've probably never heard of this company. It's the scrappy underdog to SoundExchange, a wannabe designated receiving agent that has repeatedly been turned away by the CRB. Much like BMI got its start after ASCAP encountered legal troubles, could Royalty Logic position itself as the answer to SoundExchange's anti-competitive behavior – a ready-made competitor?

And now the "losers":

SoundExchange. SoundExchange may well win this lawsuit, but I doubt that will happen quickly or inexpensively. At a minimum, I predict that the lawsuit will survive a motion to dismiss. To be sure, the evidence alleged by SiriusXM in support of the alleged conspiracy is largely circumstantial. But the Federal Rules of Civil Procedure say that a court, when considering a motion to dismiss, must view all factual claims in SiriusXM's favor. I think there's enough in SiriusXM's complaint to get it past a motion to dismiss and into the discovery phase. Once it gets that far, any number of possible resolutions would be available, most favorable (at least in some ways) to SiriusXM and unfavorable to SoundExchange.

Furthermore, where SiriusXM has little to lose because its situation can't get worse, SoundExchange has everything to lose, because its situation can't get much better than it is right now, at least in terms of market share.

The CRB. The CRB is a bigger part of the practical problems here than it is the solution to those problems. From allowing SoundExchange to exist without competition to siding with SoundExchange on virtually every contested fact in the 2007 Webcasting II decision (and many other ratemaking proceedings), the CRB may have created the environment that allowed questionable, if not illegal, activity to flourish. It's legal authority and constitutionality has already been questioned. This might be enough to rethink the entire regime.

We won't know how the litigation will shake out for some time. But the ultimate result in the case may be beside the point. The mere initiation of the case may represent an early tremor signaling the onset of a seismic event, an event that would likely, one way or another, fundamentally affect all the players. Check back on our blog for updates.

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That, of course, is the $20 million dollar question for Aereo ($20 million being the approximate level of financing it's rounded up).

The problem is that there are two lines of precedent potentially at work here – and they lead to different results.

On the one hand, you have the Betamax/Cablevision model. Old-timers will recall the 1984 Betamax case, in which the Supreme Court concluded that use of a VCR by individual consumers for the purpose of "time-shifting" the viewing of programming did ***not*** constitute copyright infringement. (All you kids, "VCR" stands for "videocassette recorder" – ask your parents.)

That theory was expanded somewhat in 2008, when the U.S. Court of Appeals for the Second Circuit concluded that Cablevision's "remote storage" DVR system similarly did not infringe on copyrights. Under that system, Cablevision subscribers no longer had a separate VCR or DVR recording unit in their homes; instead, Cablevision took care of the recording – at the subscriber's request – within its own system. The subscriber could then access the recorded programming by using its remote control device, just as if the subscriber was using a set-top recording unit. The Second Circuit held that this did not constitute infringing retransmission. The court focused in particular on the fact that each playback transmission went to a "single subscriber using a unique copy produced by that subscriber" – and, therefore, such transmissions were not made "to the public", an essential element of "retransmission".

On the other hand, you have the ivi TV and FilmOn.com cases. Those involved companies claiming that they were entitled to retransmit OTA broadcast signals to subscribers over the Internet. As our readers should recall, that claim ran into a brick wall – actually, a couple of brick walls. At least two courts weren't willing to buy into the notion that an on-line operation should be entitled to compulsory carriage rights under the copyright laws.

(Continued on page 11)

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House recommends that state privacy laws be preempted to the extent that they are inconsistent with whatever "bill of rights" Congress may enact. And companies that adopt FTC-approved private codes of conduct would be exempt from enforcement activities based on state privacy laws. The Administration Report does suggest that states could enact their own privacy laws, but only so long as they "not disrupt the broader uniformity the Report seeks in consumer data privacy protections." State officials are not likely to be happy with the proposed federal preemption of their existing privacy laws.

While it may be politically necessary for the Administration to suggest joint federal/state enforcement of federal privacy requirements, the result could become a confusing and dangerous quagmire for consumers, and negate the regulatory certainty that companies seek.

What's Next? – The process the White House hopes will ultimately lead to enforceable private codes of conduct has started. The NTIA called for comments on the "substantive consumer data privacy issues that warrant the development of legally enforceable codes of conduct, as well as procedures to foster the development of these codes." Comments were initially due by ***March 26, 2012***.) The NTIA is seeking input on a wide range of threshold issues, including privacy issues associated with mobile apps, cloud computing services, and on-line services targeted to children. The NTIA also asks numerous questions regarding process, including how the term "consensus" should be defined.

With regard to the prospects for legislation, it's probably best not to hold your breath. While some Senators and Representatives have publicly concurred that legislation to protect on-line consumers is a good idea, let's not forget that a number of privacy bills have been sitting on the Hill for years already with no action. Given that, a betting man would not stake much on seeing such legislation any time soon.

Of course, it's impossible to predict what impact, if any, the White House proposal will ultimately have. Time alone will tell.

What we do know is that the Obama Administration has clearly embraced the issue of on-line privacy and is seeking to position itself as a champion of the on-line consumer. In view of recent, highly public, privacy flaps involving a number of the major on-line players (*e.g.*, Apple, Google), that may be a smart move, particularly with a presidential election fast approaching. But note also that the White House proposal constitutes yet another effort by the Administration to try to assert some measure of federal control over Internet-related conduct. Such efforts might ordinarily alienate many on-line companies – as have the FCC's net neutrality initiatives. But the White House's proposed approach to privacy protection does include the notion of "private" codes of conduct. That notion arguably gives companies some opportunity to take control of their own fates (if you don't focus too closely on the "consensus" obligation the White House Report would impose), which might deflect some opposition.

In any case, the White House is trying to set the tone, and possibly establish some preliminary parameters, of the debate about on-line privacy protections. We won't know whether that effort is going to be successful for some time. Check back on www.CommLawBlog.com for updates – we'll post further news there as developments warrant.

(Continued from page 10)

Aereo is probably planning to rely on the reasoning in the Cablevision case: Aereo is, after all, providing its service to one subscriber at a time through one antenna at a time. As a result, so the argument goes, any transmission of programming that occurs is not "to the public", but rather to the individual subscriber. No copyright infringement there, right?

But what of the fact that each retransmission occurs over the Internet, providing access to the programming not just in the comfort of the subscriber's living room, but *anywhere*? The Cablevision case did not involve that Internet component; the ivi TV and FilmOn.com cases did. Does that make a difference? Should it?

Which brings us back to the $20 million question. I really have no clue how this is likely to end up, and I will be as interested as anyone to see how the courts will react. Interestingly, the broadcasters have sued Aereo in the U.S. District Court for the Southern District of New York, the court which dealt Filmon.com and ivi TV major setbacks. Bad news for Aereo? Maybe, maybe not: decisions from that court get appealed to the Second Circuit, source of the Cablevision decision.

Should we read something, then, into the fact that Aereo is launching in the New York market first? Perhaps, because if Aereo can convince either the District Court or, failing that, the Second Circuit court that it is like Cablevision, it should win. But what about the planned launches elsewhere? I can see further lawsuits, one in each city until a "circuit split" is created on this issue. From there, it could be on to the Supreme Court, source of the Betamax case. There may be some method to Aereo's madness. This could get interesting.

But, even if the Supreme Court doesn't resolve the issue, I know one thing and I'm going to sound like a broken record saying it (Problem understanding that metaphor? Ask your parents, again): there needs to be a significant overhaul of all copyright laws, or at least some form of compulsory license to allow on-line transmission of broadcast programming so that the many innovators who actually want to save broadcast television programming can do just that.

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ferred to as "dismiss all" markets) and the "spectrum available" markets (initially known as "process all" markets). The former consisted of markets where the number of LPFM availabilities fell below a certain "floor". For Markets 1-20, the floor is eight channels; for Markets 21-50, it's seven; for Markets 51-100, it's six; and for the rest of the studied markets, it's five. (FYI – The floor numbers were based on a "rough approximation of the number of noncommercial educational stations in the top 150 markets", according to the Commission.)

The rough cut was then further refined. All markets initially designated as "spectrum available" were re-analyzed to identify markets in which the population is centrally concentrated. This was done by laying a 21x21 grid (rather than the original 31x31) over the market and checking the population within that 21x21 grid. If the 21x21 grid population amounted to 75% or more of the population in the 31x31 grid, then the relevant "floor" for that market was determined by reference to availabilities only within the 21x21 grid, rather than the 31x31 grid. That exercise moved some of the markets from the original "spectrum available" column over to the "spectrum limited" side of the ledger. (The rationale for this additional step is that LPFMs may be best suited for urban communities, and use of the wider 31x31 grid might not provide an accurate assessment of spectrum availability in the actual population center.)

Using the results of that further analysis – along with up-to-date BIA information – the Commission devised its final lists of "spectrum available" and "spectrum limited" markets.

The Culling Process

Now let's look at the pending translator applications.

As a threshold matter, the Commission has adopted, in the *4th R&O,* two separate caps on pending translator applicants. First, there's a nationwide limit of 50 applications (from the 2003 filing window) per applicant. Second, each applicant may prosecute only one application in each of the 156 markets analyzed by the Commission. So if you're among the pending applicants and you have more than 50 applications and/or more than one application per market, you will need to decide which of your horses you want to keep riding. The Commission will issue a public notice alerting applicants when and how applicants in that situation will have to advise the FCC which applications they plan to stick with – but be alert: much of the procedural spade work on this has been started already (including the Paperwork Reduction Act process), so things could happen quickly. While some analytical tools have already been made available to help run preclusion studies, word is that more such tools will be released soon. (Anyone who has to worry about tossing applications overboard should be careful ***NOT*** to consult with other applicants in making the decision about which apps to toss: as indicated below, the anti-collusion rules are still in effect.)

Once that initial winnowing process has been completed, all remaining applications in "spectrum available" markets will be processed, starting with any singletons and moving through the remainder of the mutually exclusive (MX) groups. MX applicants will be given an opportunity (probably no more than 90 days) to work out their mutual exclusivity by amendment or settlement – after which, it's on to the auctions. Of course, amendments cannot preclude any LPFM availability identified in the grid studies. Amendments will be processed first-come/first-served, but unamended applications will enjoy cut-off protection against amendments filed during the settlement window.

As far as applications in "spectrum limited" markets go, there's good news and bad news. The good news is that, contrary to the FCC's original proposal last summer, all translator applications in "spectrum limited" markets will ***not*** be automatically dismissed.

*Anyone who has to worry about tossing applications overboard should be careful **NOT** to consult with other applicants: the anti-collusion rules are still in effect.)*

The bad news is that, to avoid dismissal, such applicants will have to demonstrate that they don't cause any "preclusive impact" on protected LPFM channel/point combinations. There'll be one opportunity to amend pending proposals to avoid such "preclusive impact". It's theoretically possible that some translator applications in some "spectrum limited" markets could squeeze themselves through the LPFM screen the Commission has established. For that reason, the elimination of the initially-proposed automatic universal dismissal is good, especially for proposals outside any market grid. (In-grid proposals, however, are less likely to make the cut.)

And there's more bad news for any translator applicant proposing facilities outside the 31x31 grid in one of the Top 50 "spectrum limited" markets. If that's you, you will also have to make a "Top 50 Market Preclusion Showing", *i.e.*, a demonstration that either:

(a) no LPFM station could be licensed at the translator's proposed transmitter site or,

(b) if an LPFM station could be licensed at the site, an additional channel remains available for a future LPFM station at the same site.

Good luck with that.

A couple more tips on dealing with markets and grids.

First, deciding what's a "protected LPFM channel/point combination" will vary, depending on whether you're in a "spectrum limited" or "spectrum available" market.

For "spectrum available" markets, an LPFM channel/point

(Continued on page 13)

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combination is entitled to protection only if an LPFM station at that site would meet all spacing requirements, *including* full spacing to *all pending* translator applications on co-channel, first- and second-adjacent channels. A pending translator application automatically meets that standard since, by definition, the hypothetical LPFM would have to be fully spaced to the pending application already. But note that, if the translator application is amended, all bets are off as far as the amendment goes: the amendment would have to demonstrate adequate spacing to all LPFM channel/point combinations.

For "spectrum limited" markets, on the other hand, the calculation (for both channel/point and Top 50 Market Preclusion studies) will "assume the dismissal of all translator applications in the market". Also, neither of those calculations will take into account either (a) second-adjacent spacings to authorized stations or pending applications or (b) I.F. spacing requirements. In other words, the Commission is assuming that all LPFM applicants would be able to qualify for waiver of the second-adjacent spacing requirement, and it apparently doesn't care about potential I.F. short-spacing.

Second, bear in mind that the grid for any particular market may be smaller than the market itself. LPFM opportunities that might exist outside the grid are ***not*** entitled to protection in either "spectrum limited" or "spectrum available" markets. So a translator application in any "spectrum available" market or any "spectrum limited" market below the Top 50 will be grantable if it specifies a site which meets the minimum LPFM-translator spacings. (And don't forget that translator applicants in the Top 50 "spectrum limited" markets must also make that pesky preclusion showing.)

The 4th R&O strikes a blow for the AM industry by expanding the universe of FM translators eligible to rebroadcast AM signals.

Other Matters

AM on FM Translators – The *4th R&O* strikes a blow for the AM industry by expanding the universe of FM translators eligible to rebroadcast AM signals. In 2009, when such cross-service rebroadcasting was first permitted, the Commission limited eligibility for AM rebroadcasts to FM translators *already authorized* as of May 1, 2009. That meant that the 1,000 or so new translators which the Commission expects to grant out of the still-pending vintage 2003 applications would not have been available for AMers. The *4th R&O*, recognizing that the cross-service option has been a "very successful deregulatory policy", takes care of the problem by specifying that rebroadcast of AM stations will be permitted on any translator the initial application for which was pending as of May 1, 2009.

Since there haven't been any new FM translator windows since May, 2009, that revised date limitation encompasses all currently existing and applied-for translators. As a practical matter, that may be all the translators there are likely to be for the foreseeable future. The Commission has committed to opening a new LPFM window before any further translator filing opportunities arise. The effect that that LPFM window will have on possible future translator opportunities isn't clear. While a tsunami of LoPo applications could clog things up a lot, the flexibility of the translator rules may still afford plenty of opportunities down the line. We'll just have to wait and see.

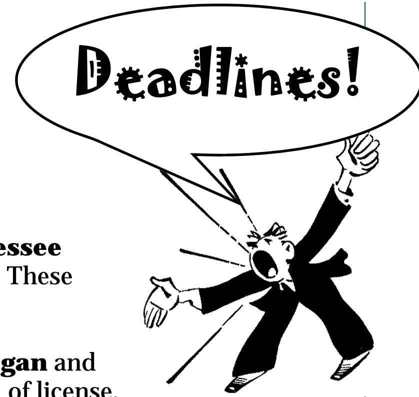
Freezes on New and Mod Translator Grants – Since 2005 there has been a freeze on grants of any of the 2003 translator applications, and since last year there has been a freeze on the filing of any translator "move-in" applications (other than relocations within the same "Spectrum Limited" market). Those freezes appear now to have been lifted. The *4th R&O* expressly lifts the freeze on acting on any of the 2003 applications. It seems also to indicate that the move-in freeze is similarly lifted, although the *4th R&O* is not as clear and unequivocal on that point as one might like. (Look for a clarifying notice on this, and possibly other aspects of the *4th R&O*, at some point down the line.)

Heads up, though. New move-in and mod applications that would bring a translator into a "spectrum limited" market will have to demonstrate that they will have no "preclusive impact" on protected LPFM channel/point combinations.

Anti-collusion Prohibitions Still in Effect – Translator applicants from the Class of 2003 should be aware that they are ***still*** subject to the anti-collusion rules, and will remain so at least through the process of identifying which applications they will continue to prosecute notwithstanding the application caps described above. As we have frequently cautioned prospective auction participants, those anti-collusion rules are strict, not necessarily intuitively obvious, and often unforgiving. Before discussing your plans and strategies with any third parties, you would be well advised to check those rules over to be sure that you're not digging yourself into an unfortunate hole.

The Commission (and, in particular, the folks in the Audio Division) have completed a truly herculean task here. Sorting out the conflicting interests of translator and LPFM proponents was difficult enough, but doing so against the backdrop of 6,500 or so long-pending translator applications screaming for attention and Congressional direction that provided little useful, er, direction makes the accomplishment even more impressive. The way is now clear for the processing of a significant number of those translator applications. While it seems fairly obvious that few new translators will be authorized in the middle of major markets, that shouldn't surprise anybody: the translator service was, after all, not designed for major markets.

Again, if you have one or more translator applications pending, you should be sure to get with your consulting engineer and start looking closely at the information from the FCC's grids. It's likely that you'll be needing to make some decisions in the not-too-distant future, and the more time you give yourself to figure out your best move(s), the better off you'll be when the time comes to make those moves.



April 1, 2012

License Renewal Applications - *Radio* stations located in **Indiana**, **Kentucky**, and **Tennessee** 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 **Indiana**, **Kentucky**, and **Tennessee** must begin their post-filing announcements with regard to their license renewal applications. These announcements must continue on April 16, May 1, May 16, June 1, and June 16.

Radio License Renewal Pre-Filing Announcements - *Radio* stations located in **Michigan** and **Ohio** must begin their pre-filing announcements with regard to their applications for renewal of license. These announcements must be continued on April 16, May 1, and May 16.

Television License Renewal Pre-filing Announcements - *Television* stations located in **Maryland**, the **District of Columbia**, **Virginia**, and **West Virginia** must begin their pre-filing announcements with regard to their applications for renewal of license. These announcements must be continued on April 16, May 1, and May 16.

EEO Public File Reports - All *radio* and *television* stations *with five (5) or more full-time employees* 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.

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

April 10, 2012

Children's Television Programming Reports - Analog and Digital - For all *commercial television* and *Class A television stations*, the first 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 during the past quarter must be placed in the station's local public inspection file. The list should include a brief narrative describing the issues covered and the programs which provided the coverage, with information concerning the time, date, duration, and title of each program.

April 17, 2012

Quadriennial Review of FCC Ownership Rules - Reply comments are due in this proceeding, MB Docket 09-182, by the extended deadline.

June 1, 2012

Radio License Renewal Applications - *Radio* stations located in **Michigan** and **Ohio** must file their license renewal

(Continued on page 15)

(Continued from page 14)

applications. These applications must be accompanied by FCC Form 396, the Broadcast EEO Program Report, regardless of the number of full-time employees.

Television License Renewal Applications - *Television* 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.

Radio Post-Filing Announcements - *Radio* stations located in **Michigan** and **Ohio** 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.

Television Post-Filing Announcements - *Television* 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.

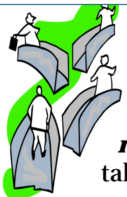
Radio License Renewal Pre-Filing Announcements - *Radio* stations located in **Illinois** and **Wisconsin** must begin their pre-filing announcements with regard to their applications for renewal of license. These announcements must be continued on June 16, July 1, and July 16.

Television License Renewal Pre-filing Announcements - *Television* 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 the **Arizona**, **District of Columbia**, **Idaho**, **Maryland**, **Michigan**, **Nevada**, **New Mexico**, **Ohio**, **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.

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



FHH - On the Job, On the Go

Heading for the NAB? What a coincidence – so are we!! We, in this case, being none other than **Kevin Goldberg**, **Frank Jazzo**, **Scott Johnson**, **Harry Martin**, **Michelle McClure**, **Davina Sashkin**, **Peter Tannenwald**, **Kathleen Victory** and **Howard Weiss.** With so many of us there, it'll be hard ***not*** to run into at least some of us. But if you want to want to fill in your dance-card now and not leave it to chance, take note:

Frank will be moderating a panel during the ABA's "Representing Your Local Broadcaster" legal seminar on April 15. That'll be at the Encore Hotel in Vegas.

On April 16 **Peter** will be speaking on the LPTV panel. (That's at 7:00 p.m. at the Hilton.)

On April 17, you've got two opportunities. From 10:30-11:45 a.m., **Kevin** will be moderating (and presenting) on a panel entitled: "Legal and Safe, but Sociable" (which describes Kevin to a T). That will let out just in time for you to catch **Davina**, who will be a panelist at the Broadcast Education Association "Current Issues in Law and Policy" session from noon-1:15pm.

Arrival/Departure dates for the crew are: **Kevin** (4/14-17); **Frank** (ditto); **Scott** (4/14-18); **Michelle** (ditto); **Harry** (4/15-17); **Davina** (4/13-17); **Peter** (ditto); **Kathleen** (4/14-17); **Howard** (4/14-16).

But, hey, the NAB and Vegas aren't the only game in town.

On April 4, **Kevin** will be making a presentation at the joint conference of the American Society of News Editors and the

(Continued on page 16)

Copyright Office: We have a list . . .

"Specialty Station" List Updated

By Peter Tannenwald
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As we reported last November, the U.S. Copyright Office (CO) was then in the process of updating its list of "specialty stations". Those are stations that, when carried on cable systems as "distant signals", trigger lower royalty burdens for the cable operator than other "distant" stations do. (Check out our earlier article, which is available at www.CommLawBlog.com, for a more detailed explanation of how that works.)

The CO has now completed its updating process. In a Federal Register notice, it has announced that all stations that had claimed to be "specialty stations" will be included in its official listing. This should not come as much of a surprise, since the CO has long accepted self-certifications from stations looking to get on the list. Think of it as a kind of honor system.

That didn't stop the Motion Picture Association of America (MPAA) from objecting to several of the proposed additions to the list. MPAA's members receive distributions from the copyright royalty pool generated by (among other things) distant signal royalty payments. So MPAA's members benefit more from distant signal carriage charged at full copyright rate than they do from carriage at the discounted "specialty station" rate. In its objections, MPAA urged that the CO both can and should wade into – and independently resolve – disputes concerning "specialty station" status. Needless to say, MPAA also argued that some of the claims of "specialty" status were just self-serving noise.

Sorry, the CO has now ruled – we stand by the position we've always taken, which is that we don't have any legal authority to resolve disputes of that kind. We will maintain our self-certification honor system. Here's our new specialty station list, which includes all the stations whose status was contested.

What happens now? That will be up to each cable system when the time comes for it to fill out its routine Statement of Account and tender its royalty payments. If a cable system thinks that a distant signal doesn't qualify as a specialty station, the system should pay the higher rate. If it thinks that the station does qualify, it should pay the lower specialty station rate. If MPAA or anyone else disagrees with the position any cable system takes, they have to challenge the Statement of Account filed by each such system, and a CO License Examiner will have to resolve the dispute.

What are the chances that the challenge might be successful? Hard to say, but get this: according to the CO, the examiners

> will look at these stations [*i.e.*, ones whose "specialty station" status has been challenged] in the same way they have done in the past. That is, if a cable operator claims specialty station status for a contested station on the list, the examiner will inform the operator by letter that a particular party objects to the "specialty station characterization." See 54 FR 38461, 38464 (September 18, 1989). The cable operator may then file an amended Statement of Account and recalculate royalties, if the operator so chooses.

Call us crazy, but that deck doesn't look like it's stacked in favor of any challenger. And while, sure, any operator might voluntarily "choose" to recalculate its royalties upward, we're guessing that most, if not all, probably won't.

Of course, the FCC could get the CO and its License Examiners off the hook by jumping back into the business of officially identifying "specialty stations". But the Commission took itself out of that particular line of work more than 30 years ago, and it probably isn't inclined to get back into it in 2012. After all, "specialty stations" don't involve "broadband", do they?

FHH - On the Job, On the Go

(Continued from page 15)

Newspaper Association of America in Washington. His topic: "Cops, Conventions and Encampments: When journalism and police actions collide, what do you and your reporters do?"

From May 3-5, **Frank Montero** will be attending and speaking at the Puerto Rico Broadcasters convention in San Juan.

On May 15-16, **Mitchell Lazarus** will speak to the National Spectrum Management Association. According to the NSMA website, his topic will be "FCC Equipment Certification/Verification/Declaration of Conformity: What They Are & What Needs Work".

And if you're a listener to American Public Media's *Marketplace* shows, you already know that, on March 14, our own **Kevin Goldberg** was interviewed about Aereo's bid to bring OTA TV to your mobile device. (Check it out at http://www.marketplace.org/topics/tech/aereo-may-never-get-chance-revolutionize-tv.) You can read **Kevin**'s take on Aereo on Page 2 of this issue – but if you'd been following the Swami on www.CommLawBlog (like you should have been, and like APM obviously was), you'd already be on top of that. Meanwhile, obviously a Renaissance kind of guy, Kevin was also quoted – about litigation concerning global warming, if you can believe that – in the *Washington Post*. When both the Internet *and* the Main Stream Media hold a guy out as an expert, well, shucks, who are we to disagree? Yo, Kevin, of course you're an expert, but to us, you'll always (well, at least for *this* month) be our *Media Darling of the Month!*