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Copyright Office kicks off far-ranging inquiry

The Future of Music Licensing?

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Congress could not have foreseen all of today's technologies and the myriad ways consumers and others engage with creative works in the digital environment. Perhaps nowhere has the landscape been as significantly altered as in the realm of music.

With that observation nestled in the opening paragraph of a Notice of Inquiry (*NOI*), the Copyright Office (CO) has kicked off a wide-ranging evaluation of "the effectiveness of existing methods of licensing music". The CO's study could eventually have a dramatic impact on the uses and distribution of recorded music in all areas of American business and culture.

The CO's statement quoted above is certainly accurate (although similar technological changes have transformed the delivery of video programming, too). Think about the changes in recorded music since 1976, when Congress last overhauled the Copyright Act. Where we had vinyl discs (33-1/3 LPs, 45s and maybe even 78s) in 1976, we've since run through eight-tracks, cassettes and CDs. And now we can obtain recorded music digitally from Internet streaming and MP3s. Where we once received music via broadcast radio, we now have satellite and Internet radio.

Inside this issue . . .

Despite these wholesale changes, the process of licensing recorded music has remained largely static for decades. That's why many music industry participants – including songwriters, recording artists, broadcasters and Internet radio services – agree that revision of the process is long overdue.

Music licensing is complex. It includes multiple separate and distinct components that may not be immediately apparent to the casual observer. Anyone even tangentially interested in the CO's study should read the CO's *NOI* at least for background purposes. Before we look at the questions the CO has posed, let's review the various components of music licensing.

We start with the basic notion of "copyright". When you create a work – write a song, paint a picture, etc. – you automatically obtain a copyright in that work. The Copyright Act grants copyright holders the exclusive rights to, among others, reproduce and publicly perform their works. So if anybody else wants to reproduce or publicly perform the work you created, he or she has to get your permission. When you grant such permission, you are said to be "licensing" your work.

When it comes to recorded music, two separate and distinct copyrights are generally in play: the copyright in the song itself (usually referred to as the "Musical Work"), and a separate copyright in any recorded performance (the "Sound Recording") of the song. These separate copyrights may be – and quite often are – held by different owners: copyright in the Musical Work is initially held by the person(s) who wrote the song, and copyright in any Sound Recording of the song is initially held by the person(s) who perform in the recording. Each of these types of copyright is subject to its own licensing processes.

My standard illustration of the different copyrights involved in recorded music: Consider the song "Yesterday". Since Lennon and McCartney were credited as the composers, they hold the copyright to the Musical Work, *i.e.*, the musical notes and words that comprise the song itself. (Actual ownership of the copyright has been sold at least a couple of times since the song was written; for purposes of our example, we'll still call the Musical Work copyright holder Lennon/McCartney.) Once the song was composed, anybody who wanted to record it or otherwise perform it publicly had to get a license to do so from Lennon/McCartney.

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Alerta! Avertissement? Uyanık! 警报!

Non-English EAS? The FCC Wants to Hear From You!

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The FCC is thinking about further tweaking its broadcast Emergency Alert System (EAS) to ensure non-English speaking audience members access to emergency information.

The proposal is an offshoot of a more comprehensive set of proposals submitted by the Minority Media and Telecommunications Council (MMTC) and several other public interest groups back in 2005. (Yes, that's 2005 – nearly a decade ago. More on that below.) Last December, some MMTC reps met with folks at the Commission to try to move things along. In the course of that meeting MMTC emphasized that it believes that broadcasters should be required to "work together", along with "state and market counterparts", to identify each party's "responsibility based on likely contingencies". Accountability – which MMTC characterized as "awareness of the plan/responsibilities" – would be "encouraged" by requiring broadcasters to "certify or explain their role in such a plan" in their renewal applications.

In an *ex parte* memo describing the December meeting, MMTC explained that its plan

> could include a designated hitter approach to identify which stations would step in to broadcast multilingual information if the original non-English speaking station was knocked off air in the wake of a disaster. . . . One market plan might spell out the procedures by which non-English broadcasters can get physical access to another station's facilities to alert the non-English speaking community – e.g. where to pick up the key to the station, who has access to the microphones, how often multilingual information will be aired, and what constitutes best efforts to contact the non-English broadcasters during and after an emergency if personnel are unable to travel to the designated hitter station.

(We left out a footnote; you can read the whole thing at the link above.)

Now the Commission has invited everybody's thoughts on the "designated hitter" approach.

While the FCC doesn't expressly indicate that it's inclined to embrace the approach, it sure doesn't reject it out of hand. *Au contraire*, the questions posed in the public notice reflect an interest in kicking the tires and looking under the hood.

It wants to know whether any such "designated hitter" programs are already in place and, if so, how they're working. And if such a program were to be mandated by the FCC, what provisions would be appropriate: Should it be applied only in states which already have at least one licensed station that serves particular non-English speaking audiences, or rather when a state has a non-English speaking population of a certain size (and if the latter, what size population should trigger it)? Or maybe it should apply only in states that are "more susceptible to certain types of events, such as hurricanes, tornadoes or earthquakes". Obviously, there are plenty of options here.

The Commission acknowledges that broadcasters have in the past expressed concern that a foreign language EAS requirement along these lines would force them to hire folks fluent in one or more foreign languages. In response, the FCC points to MMTC's suggestion that the "designated hitter" stations could "simply allow access to the employees of the downed non-English station", who would then be responsible for the non-English announcements.

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Crash course

The Potential Problem of "Name Collision" and What ICANN is Doing About It

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As ICANN moves closer to authorizing a host of new generic Top Level Domains (gTLDs, or, if you want to be hip, "New G's"), concern has been expressed about the possible impact that at least some of those new gTLDs could have on at least some corporate network operators and Internet users. While ICANN believes it unlikely that significant numbers of such operators/users will be affected, it is proceeding cautiously.

The potential problem? "Name collision".

What is "name collision"? In ICANN's words,

> A name collision occurs when an attempt to resolve a name that is used in a private name space (e.g., under a non-delegated Top Level Domain, or a short, unqualified name) results in a [Domain Name System (DNS)] query to the public DNS.

Companies with internal networks and addressing schemes need to be aware of the risks of name collision.

As ICANN consultants have described the problem, "Name collision creates ambiguity and instability, because apparently identical strings name different things in different contexts". In their view, the consequences range from mere "user confusion" to far more dire possibilities, including "application failures, denial of service, or serious breaches of security".

In more pedestrian terms, name collision can occur when a private network – say, a company's internal email system – has been set up to interpret a particular term (or, in ICANN parlance, a "string", like ".mail") as referring to addresses strictly within that internal system. But if that particular term also happens to be a gTLD used across the Internet – like ".com", ".edu", ".org" or other familiar gTLD strings – then the address of email intended to be limited to the company's internal system could be misread and the email instead routed to the broader Internet (*i.e.*, the public DNS).

Obviously, that could have serious legal and/or economic consequences for the sender, especially if personal, confidential or proprietary financial information were to be misrouted and revealed to unintended recipients.

The problem of name collision is not new. ICANN has known of it for years and has taken steps to reduce its potential impact. As a result, no major catastrophes have occurred (as far as we know).

But concern has been rekindled with the raft of proposed new gTLDs currently under consideration at ICANN.

Those proposals include hundreds of strings such as .guru, .health, .sport, .cloud, .bank, and .music. More troublesome are the proposed strings .mail, .corp and .home, terms which are already used in many internal email addressing schemes in larger companies. Designation of any of those three strings as gTLDs would substantially increase the possibility – indeed, likelihood – that internal email will be misrouted to the DNS instead of remaining on a company's internal network.

To get out in front of the problem, ICANN commissioned an independent report to identify possible ways of mitigating the potential risks of domain name collisions. The Report, released in late February, concludes that the risk of collisions is manageable for most, but not necessarily all, new gTLDs through the implementation of safeguards and the development of an emergency response mechanism by ICANN.

However, because the use of .corp, .home and .mail is so widespread in internal networks, the Report recommends that those three strings be permanently reserved for internal use.

With respect to other proposed gTLDs currently in the pipeline, the Report recommends that a mandatory 120-day controlled interruption period be imposed beginning immediately after the delegation of each new gTLD. During that period, the prevalence of collisions involving each new gTLD can be evaluated and remedial measures, to avoid harm to networks and users, can be developed. At the same time, ICANN will establish procedures to identify collision events that pose a "clear and present danger to human life" and take corrective actions to suspend problematic addresses and ensure the compliance of new gTLD registries with such actions.

Companies with internal networks and addressing schemes need to be aware of the risks of name collision, monitor for problems, and be prepared to address them if they arise. Should you find problems within your internal network as new gTLDs are released, feel free to contact us for assistance and outreach to ICANN.

Note that ICANN is accepting comments on the February Report. Anyone so inclined may submit comments by ***April 21, 2014***.

Cooperative arrangements among TV licensees on the ropes?

JSAs and SSAs: DOA?

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With Chairman Wheeler having already announced that he plans to impose serious restrictions on joint sales agreements (JSAs) and shared services arrangements (SSAs) between separately-owned TV stations in a given market – and a vote on those plans expected at the Commission's March 31 meeting (check next month's *Memo to Clients* for a report), the Media Bureau has released a Public Notice providing some "guidance" on how the Bureau will analyze pending and future applications proposing sharing arrangements (check out our posts from 2011 and 2012 for a general introduction to TV JSAs and SSAs).

The Notice, which drew sharp criticism from Republican Commissioners Michael O'Rielly and Ajit Pai, suggested that the Bureau would apply enhanced scrutiny to any assignment and transfer applications that include sharing arrangements, particularly where those agreements also involve a financial interest (such as an option for one party to buy the other's station). While the Bureau promised to continue to review applications on a case-by-case basis, the Notice clarified that each applicant will be required to provide documentation that "fully" describes the proposed transaction. The Bureau will review that documentation to determine whether the parties' arrangements provide one of the parties (usually the licensee providing services) with excessive "influence" over the other.

Bureau focus: Do cooperative arrangements provide one of the parties with excessive "influence" over the other.

Under its general "public interest" authority, the Bureau will now review all of the circumstances of a proposed sale with a focus on several specific economic issues. The Bureau will seek to ensure that the proposed licensee continues to bear a significant amount of the economic risk – and reap a significant part of any reward – in running the station and in increasing its long-term economic value. In particular, the Bureau will carefully review situations where: both parties to the sharing arrangement utilize a common financial institution; or the services provider guarantees a loan; or it otherwise appears that a loan is not being made as part of an arms-length transaction. Any arrangements that involve the sale of license and non-license assets to different parties will also be scrutinized to ensure that the prices offered to each party represent fair market value of the licenses involved.

The Bureau's notice is just the latest in a rash of recent developments regarding sharing arrangements. Earlier in March, word leaked out of Wheeler's plan to (a) circulate an order making the majority of JSAs attributable under the Commission's multiple ownership rules and (b) request comment on whether to apply additional scrutiny to SSAs (and other cooperative arrangements between broadcasters), including potentially through enhanced disclosure or attribution. Reports indicated that the proposed order would also prohibit joint retransmission consent negotiations between multiple broadcasters in a market.

Those rumors appeared to be confirmed when the Commission released the proposed Tentative Agenda for its March 31 meeting. The agenda includes Commission consideration (as part of its Quadrennial Review of its ownership rules) of both an order that would make JSAs attributable and a Notice of Proposed Rulemaking that would "define and require the disclosure of" certain other sharing arrangements. In a separate agenda item, the Commission will also consider an order that would modify its retransmission consent rules (presumably directed to prohibiting joint negotiations) and a Notice of Proposed Rulemaking proposing elimination of the network non-duplication and syndicated exclusivity rules.

To make matters even more interesting, at the same time, the House Communications and Technology Subcommittee held a hearing on a draft bill to renew the Satellite Television Extension and Localism Act (STELA). The draft bill contains a provision that would prevent the FCC from attributing JSAs until it completes its long-pending Quadrennial Ownership Review. The bill would also prohibit joint retransmission consent negotiations by separately-owned television stations and would eliminate the FCC rule that prohibits a cable operator from dropping a broadcast station during a sweeps period. Although the NAB, NCTA, and satellite television operators have all expressed some support for the draft bill, opinions on both the bill and the Commission's proposed Orders remain sharply divided, largely along partisan lines.

Speaking of partisan lines, both Republican FCC Commissioners spoke out sharply against the proposed

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September 1, 2015 deadline looms

Appeal Clock Starts for Class A and LPTV Digital Construction Deadlines

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While the transition of full-power TV stations from analog to digital occurred nearly five years ago, the DTV transition for Class A and LPTV stations is still far from complete. In 2011 the FCC set deadlines for the construction of digital Class A and LPTV stations and the termination of all LPTV operation on Channels 52 and above. (We reported on all this back in the July, 2011 *Memo to Clients*; you can read our post about it on CommLawBlog.) And as we reported last September, the Commission denied reconsideration of that decision.

For unexplained reasons, the order denying reconsideration was not published in the Federal Register . . . until now. Its publication there on March 6 starts the 60-day clock for seeking judicial review of the deadline rules. In other words, ***May 5, 2014*** is the last day for getting to the courthouse.

The FCC's refusal to extend the construction deadlines until 2015 has been a particularly sore point.

For anyone who might (understandably) have lost track of this proceeding in the five months or so since the FCC last formally addressed it, here's what's on the table.

The FCC has established a uniform deadline of September 1, 2015, for constructing digital flash cut or companion channel LPTV stations; but the FCC declined to extend the construction period for new LPTV stations, which remains three years after the date of grant. All analog and digital LPTV stations on Channels 52 and above ("out-of-core") had to move to a channel in the 2-51 range ("in-core") by December 31, 2011, or else go off the air. Finally, the FCC clarified that LPTV stations on Channel 6 (82-88 MHz), which have secondary status, must not cause interference to FM radio stations. (FM stations operate on channels starting at 88.1 MHz, immediately adjacent to TV Channel 6.) The FCC didn't mention how conflicts between Class A stations, which are primary spectrum users, and FM radio stations would be resolved.

The FCC's refusal to extend the construction deadlines for all new digital LPTV stations until 2015 has been a particularly sore point with many permittees, especially since FCC Chairman Tom Wheeler announced that the incentive auction sale of TV spectrum will not likely occur until 2015. Many permittees have already sought extensions of their construction deadlines, pointing out the obvious: permittees can't be expected to be able to make intelligent investment decisions without knowing how many and which channels will remain available after the incentive auction, so they need a construction deadline that falls well beyond the auction conclusion.

Will anyone ask an appeals court to force the FCC to give LPTV permittees more time to build? Will licensees who lost their licenses because they could not find in-core channels in time claim that their stations were stolen from them by the government? Stay tuned to CommLawBlog for further developments.

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FCC rules up for discussion at the March 31 meeting and (as noted above) the Bureau's Public Notice. In separate statements Commissioner O'Rielly and Commissioner Pai criticized both the substance of the Notice and the manner in which it was released. Both expressed strong displeasure that the Media Bureau had, by Public Notice, apparently adopted policy changes that should have been voted on by the full Commission. Both find this particularly problematic, and somewhat surprising, when an order addressing those very issues is already scheduled for a vote at a Commission meeting.

On the other side, House Democrats, including Representatives Henry Waxman (D-CA) and Anna Eshoo (D-CA) at Wednesday's Subcommittee hearing expressed support for Wheeler's plan and opposition to the proposed House bill that would delay any change to attribution of JSAs.

At this point, one has to wonder how these controversies will be resolved and, with the ultimate fate of any changes up in the air, how extensive both the long and short-term impacts of these proposals will be on broadcasters and the television industry. But, as we wait to see what transpires, one thing seems certain: the Public Notice at the least indicates that any broadcaster with a pending or potential deal involving a sharing arrangement should be prepared for intense scrutiny from the Media Bureau and potentially significant delay in processing. Follow CommLawBlog for further details and the latest updates as this situation develops.

Gone but not forgotten, or forgotten but not gone?

R.I.P.: Critical Information Needs Study

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The FCC's Multi-Market Study of Critical Information Needs, known to many simply as the Critical Information Needs (or "CIN") Study, is dead. On February 28, a Commission spokesperson announced tersely that the agency "will not move forward" with the *CIN Study*. No official cause of death was given, but it appeared that the study was unable to survive the firestorm of negative reaction it had attracted in recent weeks. A previously announced test-run of the study set for Columbia, South Carolina has presumably been canceled.

The CIN Study's Origins

The *CIN Study* had been in development, largely unnoticed, for two years. To a number of regular Commission observers its origins are something of a mystery.

> *The CIN Study was designed to delve deeply into the editorial process and judgments of broadcasters.*

The study first emerged publicly in early February, 2012, when the FCC's Office of Communications Business Opportunities (OCBO) issued a Request for Quotation (RFQ) for a "Barrier Study" (also described as a "Review of the Literature Regarding Critical Information Needs of the American Public"). How long the concept of such a study had been percolating within the Commission up to that point is not clear.

In both the RFQ and a related public notice, OCBO cited Section 257 of the Communications Act as the basis for the study. Section 257 requires the Commission to report periodically to Congress about possible elimination of "regulatory barriers" and "statutory barriers" to market entry in telecom and related businesses. It makes no reference at all to broadcasting, as opposed to "telecommunications services" and "information services", so its applicability to broadcasting is open to question. The statute's repeated and focused references to "barriers", regulatory or statutory, presumably led to OCBO's own characterization of the initial project as a "Barrier Study".

Despite Section 257's narrow focus on identifying and removing governmental barriers, OCBO saw things differently. In the RFQ OCBO characterized the Study's purpose as:

> advanc[ing] the goal of diversity, including the promotion of greater women and minority participation in media, the diversity of views available to local communities, the diversity of sources in local markets, and the diversity of critical information needs of the American public, including women and minorities.

In other words, rather than simply address the possible elimination of any existing barriers – as Section 257 directs – OCBO apparently concluded that Section 257 also authorizes the Commission to affirmatively "advance" interests that might have suffered from barriers, whether or not any barriers in fact exist.

The RFQ was directed primarily to academics who could perform a "literature review", *i.e.*, "a summary and discussion of published research, analysis, and information". It is thus not surprising that the general public may not have paid much attention to the RFQ or the literature review it contemplated.

Within six months a USC-led team of researchers produced a 134-page report surveying more than 800 sources of "available data and literature from the past two decades". Noticeably lacking from the survey was any discussion of specific regulatory or statutory barriers, *i.e.*, the subject specifically mentioned in Section 257.

After the announcement of the delivery of the final literature review in July, 2012 (and a related presentation at the FCC), public silence descended over the *CIN Study*. But things were happening in the background.

OCBO contracted – apparently sometime between July and September, 2012 – with Social Solutions International, Inc. (SSI), a "research and evaluation firm",

> to design a research model that would provide the Commission with a tool for understanding access to and barriers in providing critical information needs in diverse American communities.

SSI's work was intended to "build on" the USC literature review, which was not available until July, 2012. By mid-September, 2012, SSI had already signed on *and* convened a "subject matter expert conference". As far as we can tell, no public notice of that conference was given before or after it happened. Nevertheless, from the "discussion and insights garnered" at the conference, SSI developed a "Research Design" that constitutes the now-departed *CIN Study*. The SSI contract and its resulting "Research Design" were first disclosed in a May 24, 2013

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OCBO public notice.

[A brief aside on a certain Washington practice: Oftentimes, when a government agency has an announcement that it doesn't want to highlight, release of the announcement is withheld until late on a Friday afternoon, the theory being that public attention will be dramatically reduced because any news coverage of the announcement will be limited to the little-noticed Saturday press. By the following workweek, intervening events will have eclipsed the late-Friday announcement. We mention this because May 24, 2013 was a Friday – in fact, it was the Friday of Memorial Day weekend. Was OCBO's release orchestrated to take advantage of the three-day weekend? We don't know.]

OCBO's notice invited comment on SSI's "Research Design". A total of three comments were filed, which suggests that OCBO's notice was sufficiently under the radar to minimize input. (To its credit, the NAB filed comments questioning whether the Study was consistent with the First Amendment.)

Following the May, 2013 public notice, the *CIN Study* again disappeared from public view, only to pop up again with the November 1 announcement that the study was going for a test drive in South Carolina. At that point the Study's vital signs looked strong.

Beyond Section 257 and the First Amendment?

By its own terms the *CIN Study* was designed, among other things, to delve deeply into the editorial process and judgments of broadcasters. SSI sought to:

> ascertain the process by which stories are selected, station priorities (for content, production quality, and populations served), perceived station bias, perceived percent of news dedicate to each of the eight [Critical Information Needs identified elsewhere in the Study], and perceived responsiveness to underserved populations.

Questions to be posed to station officials such as "General Managers, News Directors, Editors, etc." included:

- ? What is the news philosophy of the station?
- ? How much does community input influence news coverage decisions?
- ? Who decides which stories are covered?
- ? How much influence do reporters and anchors have in deciding which stories to cover?

The *CIN Study* also called for review and "coding" of radio and TV newscasts from stations in the test markets. Recordings of newscasts were to be provided to "coders" who would analyze and chart their content both quantitatively (*e.g.*, time of broadcast, length of segment) and qualitatively (*e.g.*, was the subject "soft news" or "hard news"?). The coders would also have to address the nitty-gritty content of each story by evaluating "the frame of the coverage of the CIN", *i.e.*, whether "the coverage is framed to suggest who/what was responsible for the condition and who/what might be responsible for any action".

Such dramatic intrusions into basic questions of editorial judgment were obviously far afield of the focus of Section 257, the supposed impetus for the study. They also pose serious, and obvious, First Amendment concerns.

Questions began to be raised after the November announcement of the planned Columbia test run. For example, on December 10, 2013 the House Committee on Energy and Commerce sent a sharply-worded letter to the Commission inquiring how Section 257 might be seen to authorize an FCC investigation of "editorial discretion and the content [that the news media] choose[ ] to produce". The Committee expressed concern that the FCC was attempting to reinstitute something akin to the long-departed Fairness Doctrine.

> *Such dramatic intrusions into basic questions of editorial judgment were obviously far afield of the focus of Section 257.*

Closer to home, on February 10 Commissioner Pai – also raising the specter of the Fairness Doctrine – lambasted the Study in an op-ed piece in the *Wall Street Journal*.

In a February 14 letter finally responding to the Energy and Commerce Committee's query of two months earlier, Chairman Wheeler attempted both to defend the FCC's extraordinarily broad reading of Section 257 and to disclaim any inappropriate effort to regulate speech. But ultimately he acknowledged that increased public scrutiny of the *CIN Study*'s design had "surfaced a number of issues" and that "modification [of the Study] may be necessary".

From there the *CIN Study*'s vitals went into rapid decline.

On February 21, an FCC spokesperson offered an interpretation of Wheeler's February 14 letter that went considerably farther than Wheeler's own language. According to the spokesperson, in Wheeler's view certain "survey questions in the study . . . overstepped the bounds of what is required" and those questions would be removed – a far cry from Wheeler's more limited concession a week earlier that "modification may be necessary". The prospect of some *CIN Study* remained, although the spokesperson assured that any redesigned study "will not seek participation from or include questions for media owners, news directors or reporters" – again, considerably farther than Wheeler's letter had gone.

That did not quiet the storm. The House Energy and Commerce Committee announced that it was prepared

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How will it be done, and how much will it cost?

TV Repacking:
Widelity's Price List, and Itinerary, for the Road Ahead

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The incentive auction and related spectrum repacking are coming. If you're a TV licensee and you've avoided thinking about what might happen to you when the repacking happens, it's time to get off the dime. The repacking is approaching. You will need to be ready when it arrives.

To remind us all of that fact, the Commission has released a report providing a reasonably clear, if unpleasant, glimpse of the practical tasks the TV industry has to look forward to.

The Commission hired Widelity, Inc., a communications consulting firm, last September to give the agency, and the TV industry, a better idea of the steps that licensees will need to take, and the expenses they're likely to face, in carrying out the coming spectrum repacking. The report is the result of Widelity's efforts. (If you're fuzzy on the whole repacking idea, take a look at our CommLawBlog series on the incentive auction, particularly this post and this post.)

As many as 70% of the nation's towers do not comply with the most recent structural standard.

The short version of the bad news: the per station repacking process is likely to cost anywhere from the mid-six figures (in uncomplicated TV markets) to eight figures in the largest urban areas. It's likely to drag on for at least the better part of a year in even the simplest case and could stretch out for several years in others (and those estimates all assume – unrealistically – that no glitches crop up). And it's likely to be subject to a wide variety of practical problems.

Sure, Congress has authorized the FCC to use $1.75 billion from incentive auction proceeds to reimburse broadcasters' (and MVPDs') reasonable repacking-related costs – but which costs will be deemed "reasonable" remains to be seen. The Widelity report is a first step toward identifying reasonable costs. Widelity interviewed relevant broadcast TV industry players who will have to deal with the literal nuts and bolts of the post-auction TV channel relocations. It also took a look at comments filed by interested parties.

The last 25 pages of the report consist of a "Catalog of Potential Expenses and Estimated Costs" with dollar ranges for most of the identified expenses and costs. Caution: the seemingly comprehensive "catalog" punts on some costs (*e.g.*, obtaining approvals from local government authorities) for which Widelity couldn't come up with general, industry-wide estimates. TV licensees expecting to find themselves repacked should take a close look at the Widelity's catalog (including its cost estimates for the various listed items) and be prepared to let the FCC know of any problems they see there.

Before it gets to the nitty-gritty catalog, though, Widelity reviews the lay of the land that will confront broadcasters when the repacking process begins. And it's not pretty.

That's because, thanks to the DTV transition a mere five years ago, important resources may be lacking. The channel changes necessitated by the repacking will require many stations to buy new transmitters and antennas. But manufacturers of both have reduced their operations because of an understandable drop in demand following the DTV transition (not to mention the years-long recession). While Widelity reports that equipment manufacturers expect to be able to meet demand resulting from the repacking, it expresses concern about that ability if the demand is "bunched". In other words, if everybody orders their new gear at the same time, we can all expect delivery delays.

Of course, it's far from certain that a station's existing tower will be able to accommodate a replacement antenna without some modification. That means that structural engineers experienced with broadcast towers will have to be figured into the process, and their numbers are "limited", according to Widelity. Further, they won't be able to start their analysis of any particular station until that station knows what antenna its repacked facilities will require.

Since many TV towers are already decades old and relevant standards have been tightened since they were constructed, Widelity expects that a lot of towers will require structural reinforcement, if not complete replacement. (Widelity reports that industry sources estimate that as many as 70% of the nation's towers do not comply with the most recent structural standard.) That determination will require careful study of each existing tower's specs, a process that will be slowed considerably if documentation about the tower's original construction isn't available.

And once the tower has been prepped and the new equipment arrives, the equipment will have to be installed. When antennas have to replaced, tower riggers will be necessary. But according to Widelity, there are no more than 14 tower crews nationwide – and possibly as few as five – "capable of working on complex and tall towers", *i.e.*, the types of towers used by many TV stations. The situation is slightly better for smaller, non-complex towers – *e.g.*, single sticks less than 400 feet tall: Widelity estimates that there may be as few as 40 crews compe-

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tent for work on such towers. Helicopters for antenna installation are also in short supply, and their availability in forest fire season is drastically reduced.

In all, Widelity identifies nine elements in the channel repacking process that post-auction stations will experience, beginning with pre-planning (which is complicated by the fact that the new channel assignment won't be known until the auction is over), and ending with installation of new antennas and transmitters. At the same time, Widelity describes 16 issues that "are a cause of concern for a smooth post-repacking transition process". When the potential problems outnumber the incremental steps to be taken, you can easily anticipate a rough road ahead.

The report does provide a useful overview of each of the nine steps in the repacking process, as well as examples of "decision modeling" (accompanied by some elaborate flow charts) and sample "case studies".

The Widelity report is, without question, a must-read for every U.S. TV licensee (other, perhaps, than those who have already decided that, come incentive auction time, they'll be exiting the industry). For those committed to keep operating, it provides a roadmap to guide you through the process. And its detailed description of what's in store may be sufficiently discouraging to cause some folks who are on the fence to opt against remaining a broadcaster.

The report, however, is only a partial picture. While Widelity can list anticipated costs, it cannot guarantee that the FCC will agree that Widelity's prices are "reasonable", or that all of the listed items are compensable. And Widelity can't reliably estimate a wide range of considerations, such as the cost and time necessary to secure local zoning approvals or environmental clearances, or the ability of some licensees (noncommercial educational institutions in particular) to insure funding, or the development of some form of intra-industry "equipment swap" arrangement that might reduce costs and ease the load on manufacturers, or the ability of the U.S. to reach agreement on spectrum matters with Mexico and Canada. Nor can Widelity say for sure how the FCC will deal with the fact that, while Congress has specified that reimbursements must be paid within three years of the end of the auction, Widelity's optimistic best case time-line indicates that some, perhaps many, licensees will not have completed their relocation efforts by then.

Still, the report offers an unvarnished look at the road ahead as best as that road can be discerned just now.TV licensees giving any thought at all to the inevitable post-auction repacking process should read it carefully and take it very seriously.

The FCC has solicited public reaction to the Widelity report. Comments and reply comments may be filed electronically by going to this FCC webpage and uploading them in Proceeding Number 12-268. Comments are due by ***April 21, 2014***; replies are due on ***May 6***.

[*Author's aside*: We also recommend the impressive photographs of various towers that Widelity has included in Appendix A to its report. They aptly illustrate the complexity of various installations and the effect that Mother Nature can have on them. (Image 8, in particular, artfully shows the famous Mt. Sutro tower poking through a cloud cover). For attorneys who don't often get to see TV hardware up close and personal, Widelity's photos offer a helpful and welcome perspective.]

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to "pursue legislative solutions to take [the *CIN Study*] off the books". Bowing to the pressure, on February 28 the Commission removed the study from life support with the terse advisory that the agency would "not move forward" with the study.

Postmortem

What lessons may be learned from this episode?

First, it's important to remain vigilant to even the most seemingly inconsequential agency activities. Here, for example, an obscure RFQ relative to an academic survey of literature was easily overlooked in the hustle and bustle of other, more immediately pressing regulatory concerns. But that survey, as it turns out, was just Phase One of what appears to have been a carefully orchestrated plan to advance an agenda involving extensive – and, many would argue, wholly inappropriate – governmental intrusion into editorial activities plainly protected by the First Amendment from precisely such intrusions.

Second, we should all recognize that the FCC does not necessarily share everybody else's views about the limits imposed on it by the Constitution or the Communications Act. How else to explain the Commission's seeming insensitivity to the fact that governmental questioning of editorial decisions and evaluation of editorial judgments runs counter to basic First Amendment notions?

And third, it's important to keep an eye out for FCC announcements released late on Fridays.

It appears for now that the *CIN Study* has shuffled off this mortal coil. Whether it has left surviving kin ready to take its place in some form remains to be seen.

[*Author's Note: Credit where credit is due. My colleague Jon Markman provided significant research and drafting assistance on this piece. His contributions are much appreciated.*]

(Continued from page 1)

According to the Guinness Book of World Records in 2006, "Yesterday" is the most covered song in popular music history. When each different recording of the song was made – whether by the Beatles, or Ray Charles, or Placido Domingo, or any of the 2,000+ others who have reportedly recorded it – the artist responsible for each of the recordings automatically acquired a separate copyright in his/her/their particular Sound Recording of the song. Anybody interested in reproducing or publicly performing any particular version (or Sound Recording) of "Yesterday" thus must obtain a license not only from Lennon/McCartney (for the Musical Work rights), but also separately from the holder of the copyright in the particular Sound Recording.

Let's say you want to record your own version of "Yesterday", or perform the song live on the radio or in a concert, or make copies of others' recorded versions available for download. You will need to obtain licenses to do so. The nature of the licenses, the way you go about obtaining them, and how much you'll pay depend on what you want to use, how you want to use it, and where you want to use it. That's where the complexities arise. The licensing process may involve up to three different sections of the Copyright Act and possibly a non-statutory blanket license administered by one of the well-know Performing Rights Organizations (ASCAP, BMI and SESAC).

The licensing process may involve up to three different sections of the Copyright Act .

Some of the main variations include those discussed in the CO's NOI:

Reproduction/Distribution of Musical Works: If you want to make and distribute your own recorded copy of a song – by, *e.g.*, recording yourself singing it or copying somebody else's version – primarily for private use, you'll need to get a license from the holder of the Musical Work copyright. The right to make and distribute recordings of Musical Works is often referred to as the "mechanical" right. The mechanical right is governed by Section 115 of the Copyright Act.

The bad news is that mechanical rights in Musical Works are licensed on a song-by-song basis, which creates a considerable administrative hassle for folks interested in offering a library of downloads. (Many Musical Works copyright holders have designated the Harry Fox Agency as their agent for such licensing – so would-be users of Musical Works generally need only contact the Fox Agency.)

The good news is that, under Section 115, once a Musical Work has been legally distributed to the public once, ***anybody*** can obtain a license to make and distribute copies. The terms and costs for a Section 115 license are determined by the Copyright Royalty Board (CRB) based on four general statutory factors set out in Section 801(d) of the Act: (1) the availability of creative works to the public; (2) the economic return to the owners and users of Musical Works; (3) the respective contributions of owners and users in making works available; and (4) the industry impact of the rates.

That good news is not for everybody, though. If you want to synchronize Musical Works for use in audiovisual media (television shows or films) or advertising, or for "sampling", you'll have to get a license directly from the copyright owner.

Public Performance of Musical Works*:* Let's say you want to do something more than simply record and distribute a song. Maybe you want to sing it in a concert or broadcast it on your radio station or stream it on the Internet – in other words, "publicly perform" the Musical Work. No statutory license covers such public performance. Instead, that right is usually obtained through blanket licenses administered by ASCAP, BMI and SESAC. Such licenses are available to terrestrial broadcasters, satellite and Internet radio services, on-demand services, music streaming services, bars, restaurants, other commercial establishments – even companies who want to provide "music-on-hold" on their phone systems.

The absence of a statutory license doesn't mean the absence of legal controls. ASCAP and BMI are overseen by courts through an antitrust consent decree dating back to 1941. (Our readers know that the Radio Music Licensing Committee is seeking to have similar judicial constraints imposed on SESAC as well.) A prospective licensee unable to agree on a royalty rate with ASCAP or BMI can seek determination of a reasonable fee in federal court. These consent decrees haven't been revised in over a decade, although they have been the subject of occasional litigation.

Reproduction/Distribution of Sound Recordings. The copyright owner of the Sound Recording (as distinct from the underlying Musical Work) has an exclusive right to make and distribute mechanical reproductions of the recording, BUT as far as federal copyright law is concerned, that right extends only to Sound Recordings made *after* February 14, 1972. (All states except Vermont provide some protection for Sound Recordings made prior to that date.) There is, however, no governmentally-mandated mechanism (*e.g.*, a mandatory license similar to that accorded to Musical Works) governing the licensing of reproduction/distribution of Sound Recordings. Rather, such licenses must be negotiated directly with the Sound Recording copyright holder (typically the record company). Since the extent of statutory rights held by any such holder depends on when the particular Sound Recording was made, the precise rates and terms that may apply to each such license can vary significantly. In any event, unlike the situation with Musical Works, the licensing of Sound Recordings takes places largely without governmental supervision.

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Public Performance of Sound Recordings. There's a dichotomy here as well, but it's media-based rather than calendar-based. Broadcasters are currently under no obligation to get a license from the Sound Recording copyright holder in order to broadcast (*i.e.*, publicly perform) a Sound Recording. Not so on the digital side. Those engaged in satellite radio, subscription services and non-interactive webcasting (streaming) are required by Sections 112 and 114 of the Copyright Act to obtain a license for the transmission (*i.e.*, public performance) of a Sound Recording. The rates set by those sections vary: rates for satellite radio and music subscription services are set by the CRB according to the four factors found in Section 801(d); rates for non-interactive webcasters are also set by the CRB, but are based instead on a "willing buyer/willing seller" standard.

(With respect to the broadcaster exemption from Sound Recording performance licensing, we note that the CO is on record as supporting the elimination of that exemption. According to the CO, only a handful of countries provide such an exemption; in addition to the U.S., they include China, North Korea and Iran. And, again according to the CO, the exemption deprives U.S. artists of millions in royalties internationally because most foreign countries that do provide for Sound Recording performance rights require reciprocity before they'll pay out to artists from another country.)

With this crazy-quilt jumble of licensing considerations, a comprehensive study might be a good thing, right?

So you've got all that, right? And bear in mind that many of the licensing scenarios described above are not mutually exclusive. In order to obtain all the rights necessary to broadcast a Sound Recording of a Musical Work, and simultaneously stream that same Sound Recording, you would be subject to multiple different statutory and non-statutory licensing obligations with rates determined by statutorily-mandated considerations, private companies subject to judicial oversight, and the unregulated miracle of the marketplace.

Given that crazy-quilt jumble of licensing considerations, many might agree that a comprehensive study of the situation by the most expert government office should be a good thing, right?

Maybe, maybe not.

Historically, the CO has tended to favor the interests of copyright owners over the interests of people using copyright works. Because of that, my guess is that the CO's eventual conclusions will likely be unfavorable for broadcasters, who tend to fall in the latter category.

And the CO's conclusions adverse to broadcasters could be bad news in the not-too-long run. As the very first sentence of the CO's *NOI* observes, "Congress is currently engaged in a comprehensive review of the U.S. Copyright Act". Congress has already demonstrated a preference for copyright holders: in the Digital Performance Right in Sound Recordings Act of 1995, it spawned SoundExchange and the obligation of webcasters to pay for publicly performing Sound Recordings. A copyright-owner-friendly report from the CO could give Congress even greater impetus to continue to move in that direction.

The various questions posed in the *NOI* suggest that the CO's study may indeed be a set up for a possible push for copyright owner-friendly legislation. Sure, Congress has considered various changes in recent years – the Songwriter Equity Act, the Performance Rights Act, the Internet Radio Freedom Act – but it has yet to take action. Could the CO be building a record for legislation that addresses all of these topics?

The *NOI* certainly covers all this ground. It poses 24 questions ranging across seven general areas. Those areas, and some of the questions asked, include:

Musical works. Is the statutory license for the reproduction/distribution of Musical Works necessary? Is it effective? Same questions about both the process and standards used in Section 115 royalty ratesetting. Would establishment of a blanket license, as opposed to song-by-song coverage, benefit the music industry? With respect to Musical Works performance rights, is the current system – with ASCAP and BMI operating under the constraints of judicially-imposed consent decrees – effective? Given "modern market conditions and legal developments", is that system still necessary?

Sound Recordings. Is the Section 112/Section 114 statutory licensing process effective? How about the royalty and ratesetting process and standards for Section 114 licensing? Should federal copyright protection be extended to pre-1972 Sound Recordings? Has the distinction between interactive and non-interactive services been adequately defined?

Platform Parity. Do the multiple ratesetting standards – standards that vary across different music delivery platforms – make any sense? How do the platform-based differences affect music licensing?

Changes in Music Licensing Processes. How prevalent is direct licensing by Musical Work owners – as opposed to licensing through Performing Rights Organizations like ASCAP and BMI? How does direct licensing affect the music marketplace? Could the government encourage alternative licensing models (such as "micro-licensing platforms") and if so, how and for what uses? What technological innovations have been or are being developed to make the licensing process more effective? Would the marketplace benefit by modifying the scope of existing licenses?

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Effective date TBD

Pursestrings 2014: New Application Fees Announced

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If you're planning on filing any applications in the near future, you can save yourself a few bucks by getting them on file sooner rather than later. That's because the FCC's schedule of application fees has just been given its semi-regular overhaul, resulting in an ***across-the-board uptick of about 8%***. (That supposedly reflects the net change in the Consumer Price Index for all Urban Consumers since the last increase, a formula specified by Congress in Section 158 of the Communications Act.)

The Act gives the FCC no latitude when it comes to fee application cost-of-living adjustments: they're supposed to be done every two years. Since the last increase took effect in 2011, the Commission's running a bit late this time around, but who's keeping track?

The good news is that, while the 2014 fee hikes have been announced, they won't become effective for at least a few months. The precise effective date is, well, not all that precise just now. Historically, this is where the fun begins. Long-time CommLawBlog readers may remember our original "Pursestrings" series of posts, starting in September, 2008, and stretching out until mid-May, 2009. (Short version: Despite adoption of a new fee schedule in September, 2008, with an anticipated effective date of January 1, 2009 or thereabouts, that date was missed, and then several later announced effective dates passed as well. The fees announced in September, 2008, finally kicked in for real in May, 2009.) Things worked a bit more smoothly in 2011, the last time the fee schedule was hiked, but you never can tell.

According to this year's announcement, the effective date of the new rates will be 30 days after the order is published in the Federal Register. Perhaps so, but Section 158(b) of the Communications Act requires that the Commission notify Congress of application fee adjustments "not later than 90 days before the effective date". So the FCC's going to have to let Congress know about the new fees, and then wait 90 days. It will also have to publish a notice in the Federal Register 30 days before they can take effect.

Bottom line: you've probably got another three, maybe four, months to take advantage of the current lower fees. We'll keep our eyes open for further Federal Register notices and report on them in future posts on CommLawBlog.

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Revenues and Investment. Here the CO is looking for input on the overall financial fairness produced by the music licensing process. How have marketplace developments affected the income of composers, songwriters and recording artists? Are revenues from the performance and sale of music "fairly divided" between creators and distributors? How are decisions made by creators, publishers, distributors and labels, including new talent development, affected by music licensing issues? How does licensing affect the ability to invest in new distribution models?

Data Standards. To "facilitate" the licensing process, could the federal government encourage the use of universal standards for identifying Musical Works and Sound Recordings?

Other Issues. Are there any data or economic studies that measure the effect of technological or other developments on the marketplace, including "the revenues attributable to the consumption of music in different formats and through different distribution channels, and the income earned by copyright owners".

Beyond those, of course, there is the ever popular catch-all question, *i.e.*, "Is there anything else that might help us?"

Comments in response to any or all of these questions are due by ***May 16, 2014***. They can be submitted electronically at this CO website. Limits: Comments should be submitted as a single file no bigger than six megabytes in either searchable PDF, MS-Word, WordPerfect, Rich Text Format or ASCII. Once comments have been received, the CO will convene one or more "public meetings" to address the various issues on the table.

We expect that major broadcasting companies – the NAB, possibly some state associations, maybe some major broadcasting companies – will be filing comments in this proceeding. But the right to comment isn't limited to the big boys. We're confident that the CO will benefit from hearing from the broadest possible spectrum of interested parties, regardless of their size.

We hear smaller broadcasters all the time venting about the music licensing process: from "we simply can't take on another royalty obligation" to "the process of figuring out all our royalty calculations and reporting obligations is burdensome and time consuming" to "we'd like to start podcasting" (which requires a special "mechanical" license). The *NOI* provides an excellent, and possibly productive, opportunity to share the same sentiments with the CO.

FHH - On the Job, On the Go

In case you missed it last month, here's the scoop on FHH at NAB (Vegas, April 5-10): Both **Franks** (**Jazzo** and **Montero**), **Kevin Goldberg**, **Dan Kirkpatrick**, **Michelle McClure**, **Davina Sashkin**, **Peter Tannenwald** and **Kathleen Victory** are all packing up and heading out to the show. Featured speakers: **Kevin**, who will appear on a panel entitled "Copyright & the Internet: What's Going On" at the Representing Your Local Broadcaster confab on Sunday afternoon; **Davina**, who will be on a Broadcast Education Association panel titled "Spectrum Auction – Dollars, Decisions and Dilemmas" on Tuesday; **Dan**, who is slated (also on Tuesday) to appear on a panel titled "Following the Rules: The Essentials of Coloring Within the FCC Regulatory Lines"; and **Peter**, who's scheduled for two appearances behind the mic, first presenting a wrap-up after a one-hour interview with Media Bureau Chief Bill Lake (on Monday), and then expounding on TV retransmission consent as a member of a BEA panel (on Tuesday).

If you ask them nicely, you may be able to score yourself some CommLawBlog sunglasses . . .

Look for **Frank M** to be all over Vegas, because he's also planning to attend the RAIN Summit West conference there on April 6.

Before heading out to the NAB, **Frank M** – who, by the way, has just been added as a commentator in TV and Radio Business Report (you may know them as "*TVBR*" and "*RBR*") – gave a presentation (hosted by Heights Analytics LLC) on "Television JSAs/SSAs, Retransmission Negotiations & a Preview of the March 31st FCC Vote".

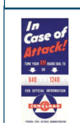
When he gets back from Vegas, **Frank J** will be participating in the Government Relations Panel (along with the NAB's Kelly Cole and Jane Mago (invited)), at the Maryland/DC/Delaware Broadcasters Association Annual Convention on April 22 in Baltimore.

Mitchell Lazarus will address the TCB Council (the folks who handle FCC equipment approvals) on April 10 in Baltimore, on the topic "Testing Newly-Approved Technologies: Challenges and Solutions".

On April 16, **Kevin G** and **Harry Cole** will present a webinar recapping the Aereo case to date and looking ahead to what we can all expect in the Supreme Court the following week. (Interested in sitting in on the webinar? We'll be posting registration details at CommLawBlog the first week of April.)

Meanwhile, over in Singapore, **Kathie Kleiman** has been hobbing and nobbing at a "huge" (her word, and we believe her) ICANN meeting. Her tip to those who want to sound cool: Don't be saying "new generic top level domains" – that's yesterday's news. Instead, do what the ICANN Hip and Happening do and just go with "New G's". Trust us on this.

And finally, let's hear it for **Tom Dougherty** and **Kevin**, both of whom got good ink (or at least its digital equivalent) this month. **Tom** was quoted in a Law360 piece on the prospects for the Sprint/T-Mobile deal. (Law360 is a LexisNexis subscription news service "designed for competitive intelligence".) And **Kevin**'s name showed up in front of some quotes on the website of The Guardian. He was opining about the First Amendment implications of the prosecution of an activist-journalist for allegedly posting a link to certain hacked materials. After a couple of slow months, look what we've got: two – count 'em, two – *Media Darlings of the Month*!



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It's more than a little surprising that the Commission might be interested in such an unorthodox approach. When, after all, was the last time that the FCC suggested that a licensee might want to leave the keys to the station under the welcome mat (or in that fake rock out in the parking lot) so that some non-station announcers can take over for a while?

Of course, assuring that ***everybody*** gets the word in the event of an emergency is an extremely important task. Desperate times may call for desperate measures.

In any event, the FCC wants to know what you think. You can upload comments electronically at the FCC's ECFS online filing site, using Proceeding Number 04-296. Comments are due by April 28, 2014; reply comments by May 12.

Before we sign off on this, though, we are constrained to observe that this proceeding was opened in 2004 – 10 years ago – and that MMTC's original proposals were filed in 2005, shortly after Hurricane Katrina caused havoc along the Gulf Coast. MMTC has been dogged in its efforts to get the Commission to take action. Its December, 2013 meeting with the Commission's staff was but the latest example of that doggedness.

In its latest public notice inviting comments, the FCC says that it's looking to "refresh the record" in the 10-year-old docket. But "refreshing" wouldn't be necessary if the Commission had, at some point in the last decade, taken action. We understand that the FCC has a lot on its plate and all, but really, 10 years to resolve a matter of obvious public safety?

Ideally, however this proceeding gets resolved, it will get resolved soon, and without the need for any further refreshing.

"Good day" to the Sunshine Act?

Good Day Sunshine: "The Federal Communications Commission Process Reform Act of 2014"

By Rob Schill
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[*Editor's Note*: The House recently passed H.R. 3675, the Federal Communications Commission Process Reform Act of 2014. If passed by the Senate and signed by the President, this bill would require the FCC to set certain deadlines and time limits for some of its activities, and also prepare some extra routine reports and the like. We'd go into greater detail on these nitty-gritty points if the bill were likely to get through the Senate, but the smart money currently says that that's not going to happen, so we won't bother our readers with unnecessary information. If the smart money turns out to have been wrong, for sure we'll be reporting on the final bill.

One aspect of the House bill did attract our attention: a provision that would permit FCC Commissioners to meet in nonpublic sessions to discuss business. The long-standing Government in the Government in the Sunshine Act (the Sunshine Act) would ordinarily prohibit such closed-door meetings, but the House is nevertheless apparently OK with letting the FCC bar the doors and shutter the windows. A nearly identical proposal was introduced in 2013. Our colleague, Kevin Goldberg, wrote – somewhat disparagingly – about it back in the February, 2013 *Memo to Clients*. In the interest of fairness and balance, this time around we're offering a different take on the matter from our colleague, Rob Schill.]

Is it conducive to "good government" to create an exception to the Sunshine Act?

The Federal Communications Commission Process Reform Act of 2014 (the 2014 Reform Act) raises the same essential question my friend and colleague Kevin Goldberg addressed last year: Is it conducive to "good government" to create an exception to the Sunshine Act that would allow more than two commissioners to meet privately when a few key transparency safeguards are included? Kevin and I reach different answers to that question.

The 2014 Reform Act seeks the happy medium between the competing needs of openness and administrative efficiency. The bill looks to provide for transparency and accountability while acknowledging the reality that the FCC often does not move at a pace consistent with the changing technology world it is tasked to oversee. The fact that the bill has bipartisan Congressional support, as well as the support of FCC members and industry representatives, suggests that perhaps Congress is onto something here.

As with last year's version that Kevin reviewed, this year's bill would allow more than two commissioners to meet privately to discuss Commission business. The Sunshine Act currently forbids private meetings including three or more commissioners. Where there's a will, there's a way, though, so it's not surprising that over the years a number of workarounds have been developed to circumvent the strict letter of the law: shuttle diplomacy among commissioners' offices, communications through staff members, etc.

Many at the Commission, and on the Hill, have felt that such tip-toeing around the Sunshine Act unnecessarily slows down the Commission's ability to get about its business. Accordingly, the 2014 Reform Act would allow a bipartisan majority of commissioners to hold a meeting closed to the public, provided that:

- Commissioners may not vote or otherwise take agency action in such private meetings;
- Each person present at such meetings must be a Commissioner or Commission employee, or a member of a joint board or conference established under section 410 or their staff;
- An attorney from the Commission's Office of General Counsel must be present;
- Within two days the Commission must publish a list of attendees with a summary of subject matter.

Whether or not this is the ideal manner for conducting business is certainly worthy of discussion. But first, let us compare the proposal to the status quo.

No reasonable observer believes the "open meetings"

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of today's FCC actually shed much light on how the Commission conducts business. There is little debate or discussion of substantive issues. Instead, we have Kabuki: The public hears a litany of thank you's to all the staff members who worked hard behind the scenes, after which the agency's decision – order, policy, proposal, what have you – is revealed to the assembled multitude, including all those quietly texting/tweeting/websurfing in the background.

The requirement of "open meetings" is presumably one of the Sunshine Act's crowning achievements. But if that Act was supposed to increase public knowledge of the regulatory process, or citizen awareness of and participation in that process, there's obviously a problem here: a brief glance at FCC "open meetings" plainly establishes that such meetings do nothing to advance those goals. To be sure, the commissioners and staff are following the letter of the law with their indirect debate, circulation of memos, staff contacts, etc., but the end result is doubtless far afield of what the Sunshine Act drafters had in mind.

Does requiring every meeting and negotiation to be convened in public truly encourage debate?

And, truth be told, it's possible that the all-style-no-substance Kabuki nature of the FCC's "open meetings" is a natural consequence of attempting to force out into the public domain conversations that should be kept "nonpublic" (let's not call them "private"). After all, does requiring every meeting and negotiation to be convened in public truly encourage debate, or does it merely lead to a series of performances by commissioners? For once there is an audience, you have theater.

Looking back, we can see that our nation was itself founded in the proverbial smoky backroom of the Constitutional Convention. The proceedings were kept from the public, according to George Mason, because there is "a material difference between the appearance of a subject in its first crude and undigested shape, and after it shall have been properly matured and arranged". Allowing the Commissioners the opportunity to meet to discuss matters (with the ray of sunshine of a publicly available summary) may get us closer to an effective process.

By sharp contrast, the existing system leaves a great deal of the internal agency discourse and deliberations to Commission staff, unelected, unappointed, often unknown to the general public. Not much "sunshine" there.

And what of the effects of the existing process on a healthy marketplace that supports growth and innovation? Can we honestly say that the odd dances commissioners must now perform encourage businesses and individuals to invest their next dollars in FCC-regulated concerns?

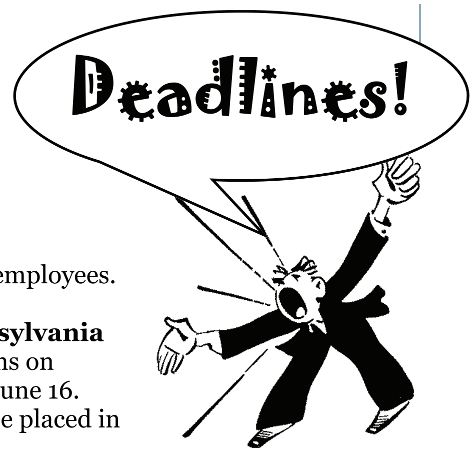
As a prime example, take the Internet economy, the wellspring of our economic growth, a sector continually giving birth to new business and innovation. Certainly Internet-centric investors must warily eye the Commission which is in turn eyeing their domain as the next subject of regulatory oversight and authority. In his article last year Kevin invoked a scene from "My Cousin Vinny". To my mind, a different scene from the same golden text illustrates the reaction of the Internet economy – here taking the role of Mona Lisa Vito – to the FCC's processes:

> You wanna know what I'm nervous about? I'll tell you what I'm nervous about! I am in the dark here with all this legal crap. I have no idea what's going on. . . . Meanwhile, . . . [m]y biological clock is TICKING LIKE THIS.

The last thing we should want to do is stymie innovation. But the slow and unsteady manner in which the FCC acts – largely as a result of Sunshine Act constraints – exacerbates uncertainty, thereby frustrating and discouraging innovators. Can't we all agree that our government should not be impeding our economy?

To reach the desired destination, sometimes it's necessary to tack back and forth between competing approaches. The Sunshine Act, a valued solution to prior years' threats to government openness, has brought us to today's reality: a bipartisan understanding that the Sunshine Act's noble experiment isn't working as intended. So perhaps it's time to announce "ready to come about" and move on a different tack.

The 2014 Process Reform Act's nonpublic collaborative discussions provision may not be the perfect endpoint in the search for good government – indeed, the perfect endpoint is probably an unattainable ideal. For now, though, and until future circumstances mandate another change of course, we should allow our public servants the opportunity to meet, to discuss, to decide nothing official and to do so under the warm and caring gaze of career attorneys.



April 1, 2014

Radio License Renewal Applications – *Radio* stations located in **Delaware** and **Pennsylvania** 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.

Television License Renewal Applications – *Television* stations located in **Texas** 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 **Delaware** and **Pennsylvania** must begin their post-filing announcements with regard to their license renewal applications on April 1. These announcements then must continue on April 16, May 1, May 16, June 1 and June 16. Once complete, a certification of broadcast, with a copy of the announcement's text, must be placed in the public file within seven days.

Television Post-Filing Announcements – *Television* and *Class A television* stations located in **Texas** must begin their post-filing announcements with regard to their license renewal applications on April 1. These announcements then must continue on April 16, May 1, May 16, June 1 and June 16. Please note that with the advent of the online public file, the prescribed text of the announcement has changed slightly from that used in prior renewal cycles. Also, once complete, a certification of broadcast, with a copy of the announcement's text, must be uploaded to the online public file within seven days.

Television License Renewal Pre-filing Announcements – *Television* and *Class A television* stations located in **Arizona**, **Idaho**, **New Mexico**, **Nevada** and **Wyoming** must begin their pre-filing announcements with regard to their applications for renewal of license on April 1. These announcements then must be continued on April 16, May 1 and May 16. Please note that, with the advent of the online public file, the prescribed text of the announcement has been changed slightly from that of previous renewal cycles.

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. TV stations must upload the reports to the online public file. 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, 2014

Children's Television Programming Reports – For all *commercial television* and *Class A television* stations, the first quarter 2014 reports on FCC Form 398 must be filed electronically with the Commission. These reports then should be automatically included in the online public inspection file, but we would recommend checking. Please note that the FCC requires the use of FRN's and passwords in either the preparation or filing of the reports. We suggest that you have that information at hand 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 uploaded to the public inspection file.

Website Compliance Information – *Television* and *Class A television* station licensees must upload and retain in their online 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.

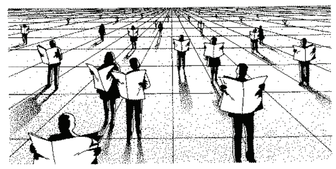
Issues/Programs Lists – For all *radio*, *television*, and *Class A television* stations, a listing of each station's most significant treatment of community issues during the past quarter must be placed in the station's public inspection file. Radio stations will continue to place hard copies in the file, while television and Class A television stations must upload them to the online 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.

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

Updates On The News

***This should get your attention* I —** Last November we reported on a Commission crack-down on the broadcast of EAS (or EAS-like) tones in non-emergency situations. Heads up: the Commission is still cracking down – not only on broadcasters, but also on cable networks.

If you don't believe us, just ask your friends at NBCUniversal, or Viacom, or ESPN. They are all looking down the wrong end of a Notice of Apparent Liability doling out a total of nearly $2 million in fines for the transmission of EAS attention signals in non-emergency situations. Q.E.D.



The circumstances here track last November's: a spot produced by an advertiser happened to contain EAS-like sounds. It didn't help that the spot also included images of terrorists and violence and visual text reading "THIS IS NOT A TEST" and "THIS IS NOT A DRILL". Sure, in the context of this particular ad – for the action-adventure flick "Olympus Has Fallen" – that kind of excitement might seem normal and to-be-expected, but everyone agreed that (a) the tones included in the spot either were EAS tones or sounded a lot like them and (b) there was no emergency. And that's all that matters.

According to what they told the FCC, Viacom's "Standards and Practices and Advertising Standards" reviewed and approved the spot; staff at the other nets similarly OK'd it. As a result, the spot ran on various cable networks owned by them for a couple of days before word started circulating through the broadcast and cable universe that this particular spot was bad news. Several days after the first telecast of the spot, the agency that had produced it notified everybody that they should stop running it, but by then it was too late for NBC, Viacom and ESPN. (All three companies have now locked, or are in the process of locking, the barn door by tightening up their internal review standards, but in this case the horse has already scampered off.)

All told, Viacom ran the spot a total of 108 times across seven of its networks; NBC was in for 38 (across seven nets, including several regional sports nets); ESPN showed it 13 times on three nets. (In cases where the network provided dual East Coast/West Coast feeds, inclusion of the spot in each separate feed counted as a separate transmission.) Bottom line: Viacom is getting whacked $1.12 million, NBCU is on the hook for $530,000, and ESPN is looking at $280,000. The size of the fines was based in part on the size of the networks' respective revenues – so that the penalties would be more likely to have some deterrent effect.

The bottom line: Don't broadcast EAS attention signal tones, or anything that might be confused with such tones, except in connection with an actual emergency or an authorized EAS test. As irresistible as the impulse to use EAS tones might on occasion be – since those tones are designed to get the audience's attention, an effect that advertisers, in particular, crave – it must be resisted.

***This should get your attention* II —**

> "The warning that I've received, you may take it with however many grains of salt you wish, is that the brown acid that is circulating around us is not specifically too good. It's suggested that you do stay away from that. Of course, it's your own trip, so be my guest, but please be advised that there is a warning on that one, OK?"

Readers of a certain age may recognize those as the words of Chip Monck from the stage at Woodstock. We feel kind of like Mr. Monck when we note the following.

The NAB passed along to us a report in NTS MediaOnline Today that the Southern California Broadcasters Association has advised *its* members that a new radio commercial for Kingsford Charcoal appears to include EAS (or at least EAS-like) tones the transmission of which could violate FCC rules. According to the report – which you are now getting, let's see, one, two, um, at best third-, maybe fourth-hand – Kingsford's ad agency is supposedly cutting a new spot for Southern California stations, but the original, questionable, spot may be circulating, and may possibly already be on-the-air, in other markets.

Ordinarily, we might leave this kind of heads-up to others. But in view of the FCC's recent aggressive enforcement of the prohibition against transmitting EAS tones in non-emergency situations – for a recent example, see the preceding item – we figure it makes sense to pass this one along.

So with the same caveats that accompanied the brown acid alert, please be advised that there's a warning on a Kingsford Charcoal radio spot, OK?