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The Supremes have spoken . . . now it's the Swami's turn.

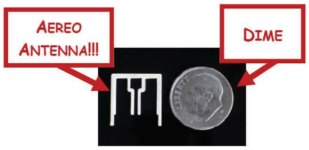

Image obtained from www.aereo.com

The Supreme Court's Aereo Decision: What It Says, What It Means

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[*Editor's Note: As we have reported on CommLawBlog.com, the Supreme Court has reversed the Second Circuit in the Aereo case, giving the TV broadcasting industry a major victory. Yes, that's the result that the Swami, Kevin Goldberg, had predicted. So we asked him to review the two opinions out of the Supremes – Justice Breyer's majority opinion and Justice Scalia's dissent – and let us know what he found. Here's his report – but note that we are dispensing with our routine summary of what Aereo is and how the case got to the Supremes. If you're just getting to the Aereo party now and don't know the background, check out our blog's extensive Aereo-related coverage at this link. And if you want to see Kevin talking about Aereo, check out his appearance on LXBN TV.*]

As I observed following the April 22 oral argument in *Aereo*, for the most part the Justices on the Supreme Court can't really be described as "tech savvy". Nothing in either the majority or the "dissenting" opinion changes that. (Why the quotes around "dissenting"? We'll look at that below.)

But the Justices' seeming unfamiliarity and general discomfort with New Technology may be a good thing. The Court appears to have taken care to limit its *Aereo* decision to areas with which it *is* familiar. And it also tried hard to make sure that its decision will not disrupt what it believes it knows about new media, such as cloud computing.

Let's take a look at Breyer's majority opinion (which was joined in by Chief Justice Roberts and Associate Justices Kennedy, Ginsburg, Sotomayor and Kagan), and then the dissent by Scalia (writing for himself and Justices Thomas and Alito). Then I'll field some questions that I've been frequently asked.

The Majority Opinion

Breyer's opinion is methodical. It focuses (as it should) on the narrow question of whether Aereo infringes the right to "publicly perform" copyrighted programs when it sells its subscribers "a technologically complex service that allows them to watch television programs over the Internet at about the same time as the programs are broadcast over the air". Under the Copyright Act, of course, the public performance right is held exclusively by the copyright holder – and everybody agreed that Aereo was *not* the copyright holder of any of the over-the-air programming it provided to subscribers.

He broke the issue into two questions: does Aereo "perform" the programs at all and, if it does, does it do so "publicly"?

With respect to the first question, it's clear that Aereo's system results in the "performance" – *i.e.*, the display – of copyrighted works. But who is doing the "performing", Aereo or its subscriber? Aereo's view is that it is merely an equipment supplier and that the subscriber, by individually deciding to avail herself of the equipment provided by Aereo, is the one who does all the "performing".

Needless to say, the language of the Copyright Act does not resolve the question. But in Breyer's view, a close look at the Act's legislative history does.

The 1976 Copyright Act was Congress's response to two Supreme Court decisions – *Fortnightly* and *Teleprompter*, from 1968 and 1974, respectively. In those cases the Court had held that cable television systems were *not* engaged in the "public performance" of broadcast programming: as it said in *Fortnightly*, "Broadcasters perform. Viewers do not perform. . . . [And a cable provider] falls on the viewer's side

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Inside this issue . . .

The spectrum squeeze is on

Wireless Microphone Users Face Worsening Spectrum Shortage

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Wireless microphone users are fighting for spectrum. Here is why – and what the FCC is doing about it.

Anyone who watches TV or attends live shows knows about wireless microphones: those black or silver things the performer holds, plus a lot more equipment backstage. Until recently, few people gave these devices much thought – not even the FCC. Not until the 2009 digital TV transition that transferred 108 MHz of TV spectrum to other uses.

Most wireless microphones operate in vacant TV channels. The old analog TV rules required certain TV stations to be spaced far apart – not just those on the same or adjacent channels, but also some that operated many channels apart. That left plenty of room for microphones. But digital TV stations can safely be squeezed more closely together. That made possible the 2009 TV spectrum repacking, which cut the numbers of empty channels and left microphone users scrambling for spectrum, especially in microphone-dense areas like the Broadway theater district, while manufacturers struggled to squeeze more microphones into less spectrum.

The FCC added a complication by allowing unlicensed "TV white space" (TVWS) data devices into most of the same vacant TV channels that wireless microphones use. Until the digital repacking there would have been room for both, but the subsequent shortage set off acrimonious disputes at the FCC.

There was another complication. Back then many wireless microphones operated illegally. FCC rules required a license, but limited license eligibility to certain narrow classes of users: broadcast stations and networks, TV and film producers, cable companies, and a very few others. Lots of other people used wireless microphones anyway, including Broadway theaters, outdoor concerts, churches, high-school performers, and – famously – the FCC's own meeting room.

Rather than enforce against the violators, the FCC instead took steps to make most of the violations go away. A 2010 order granted a blanket waiver allowing ***unlicensed*** use of wireless microphones up to 50 milliwatts – plenty for most churches and high-school auditoriums (and the FCC meeting room). Later in 2010, the FCC identified two vacant TV channels in each market for wireless microphone use, closed these to TVWS devices, and clarified how both licensed and unlicensed microphones users could temporarily lock out TVWS devices from other channels, if needed, to protect certain performances.

An uneasy truce prevailed – until the FCC proposed a second TV spectrum repacking.

This repacking comes about because the same 6 MHz TV channel that used to carry one analog program can now carry multiple digital programs simultaneously. The FCC plans an "incentive auction" that will invite broadcasters to accept cash for sharing a TV channel or, if they prefer, for leaving the business altogether. Spectrum thus freed up will be auctioned for wireless broadband use, with some of the proceeds earmarked to pay off cooperating broadcasters. The result: still fewer vacant channels for wireless microphones and TVWS devices.

The FCC's recent incentive auction order further divides up the ever-smaller pie:

- The two channels now reserved for wireless microphones will become one, shared between wireless microphones and TVWS devices.
- The new wireless broadband spectrum will include a "duplex gap" 11 MHz wide between base and mobile frequencies. The FCC will set aside 6 MHz of this for TVWS and 4 MHz for licensed wireless microphones, primarily for

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Throwing More Gas on the Music Licensing Fire

DOJ Opens Review of Music Licensing Consent Decrees

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In its never-ending push-and-pull relationship with the music industry over copyright royalties, the radio industry currently faces assaults on multiple fronts. While the creation of a "performance right" (or, as broadcasters view it, a "performance tax") appears to have been staved off for another year (according to the NAB), there are plenty of other threats headed the broadcasters' way.

For example, the radio industry is already subject to a performance right obligation requiring stations to pay recording artists, through SoundExchange, for the digital performance of sound recordings. That burden is almost certain to increase as a result of the "Webcasting IV" proceeding that will set new streaming rates for 2016 -2020. Also, the Copyright Office is looking at whether changes to all aspects of music licensing are warranted. And lurking just beyond the horizon we have the "Respect Act" recently introduced in Congress. That would require digital radio services (Pandora, Sirius XM and anyone engaged in webcasting, including broadcasters) to pay royalties for sound recordings created before February 15, 1972. Such recordings are currently covered by most state copyright laws but not by federal law.

The Consent Decrees are among the broadcasters' strongest protections against unreasonable rates and terms.

Now we can add another potential flashpoint: the Antitrust Division of the Department of Justice has initiated a review of the longstanding ASCAP and BMI Consent Decrees that mandate federal court oversight of the rates paid by radio broadcasters to ASCAP/BMI-repped songwriters/composers.

The Consent Decrees were entered into in 1941 after the two Performance Rights Organizations (PROs) were adjudged to have engaged in anticompetitive behavior. They provide that the terms and conditions (including the rate) of the license arrangements between broadcasters and ASCAP/BMI must be reviewed and approved by a judge of the U. S. District Court for the Southern District of New York. The Decrees are subject to periodic review and amendment by the Antitrust Division, though it's been more than a decade since the last such amendment (2001 for ASCAP, 1994 for BMI).

ASCAP, BMI and "other firms in the music industry" have apparently expressed concerns that the Consent Decrees should be updated in light of "changes in how music is delivered to and experienced by listeners." In response to those concerns, the Antitrust Division plans to explore whether modifications are in order and, if so, what modifications are called for. Specifically, it seeks comment on several questions:

- ? Do the Consent Decrees continue to serve important competitive purposes today? Are there provisions that are no longer necessary to protect competition? Are there provisions that are ineffective in protecting competition?
- ? What, if any, modifications to the Consent Decrees would enhance competition and efficiency?
- ? Do differences between the two Consent Decrees adversely affect competition?
- ? How easy or difficult is it to acquire in a useful format the contents of ASCAP's or BMI's repertory? How, if at all, does the current degree of repertory transparency impact competition? Are modifications of the transparency requirements in the Consent Decrees warranted, and if so, why?
- ? Should the Consent Decrees be modified to allow rights holders to permit ASCAP or BMI to license their performance rights to some music users but not others? If such partial or limited grants of licensing rights to ASCAP and BMI are allowed, should there be limits on how such grants are structured?
- ? Should the rate-making function currently performed by the rate court be changed to a system of mandatory arbitration? What procedures should be considered to expedite resolution of fee disputes? When should the payment of interim fees begin and how should they be set?
- ? Should the Consent Decrees be modified to permit rights holders to grant ASCAP and BMI rights in addition to "rights of public performance"?

So what's the big deal? After all, it *has* been a long time since the Consent Decrees were amended and there *have* been a lot of changes in the music industry in that time.

True and true. But the Consent Decrees are among the broadcasters' strongest protections against the imposition of unreasonable rates and terms by ASCAP and BMI. Yes, many broadcasters aren't entirely happy with their current rates (which, for the first time in recent memory are identical for ASCAP and BMI, set at 1.7% of Gross Revenue from Broadcasting, with some minor

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On player pianos and geofencing

New Technologies Once Again Blurring the Lines of Copyright Law

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[*Editor's Note: Shortly before the Supreme Court issued its* Aereo *ruling, the following article by Frank Montero appeared in Bloomberg BNA's Telecommunications Law Resource Center. The folks at Bloomberg BNA have kindly given us permission to reprint it here.*]

It seems like copyright law is always trying to catch up with new technology. That's not a new phenomenon. Take the player piano and the 1908 Supreme Court case of *White-Smith Music Publishing Co. v. Apollo Co.*, in which the high court ruled that manufacturers of music rolls for player pianos did not have to pay royalties to the composers.

The composers were understandably worried that the player piano – then a burgeoning new technology – would make sheet music (and, more importantly, the copyright royalties they earned from the sale of sheet music) obsolete. In response, Congress, in the Copyright Act of 1909, created the compulsory license, allowing anyone to copy a composer's work without permission as long as they paid a predetermined license fee.

New technology won't be denied.

The same scenario is playing out today: New technological developments are outstripping decades-old copyright law, forcing changes in the law, challenging old models, and blurring long-established lines. The traditional "silo" mentality that addressed TV, radio, publishing, recording, cable – and now, the Internet – as separate and distinct areas cabined off from one another is eroding. Record companies are battling radio broadcasters. TV broadcasters are battling cable and satellite companies. Internet audio streamers are battling publishers. Publishers are battling record labels. Internet video streamers are battling Internet service providers.

A principal source of these issues: the Copyright Act's definition of the "public performance" of copyrighted work.

The Copyright Act gives a copyright holder the exclusive right "to perform the copyrighted work publicly." In response to a couple Supreme Court decisions applying that provision to the then burgeoning new technology of cable television (shades of the player piano situation) Congress amended the Act in 1976. To ensure that cable retransmission of over-the-air television broadcasts were treated as "public performances," Congress expanded the definition of "[t]o perform . . . publicly." As a result, that definition now includes the transmission "to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times."

That provision underpins the right of TV broadcasters to negotiate retransmission consent agreements to receive payments from cable systems and other multichannel providers that distribute the station's programming to paying subscribers, a system that has worked reasonably well for more than 20 years.

But new technology won't be denied. In the past two years a venture called Aereo Inc. has challenged that model by retransmitting to subscribers TV programming without paying copyright royalties. Aereo's technology involves small individual broadcast antennas (one for each subscriber) which pick up free broadcast TV signals over the air.

Are Aereo's Streams "Public Performances"?

According to Aereo (and the U.S. Court of Appeals for the Second Circuit, which sided with Aereo in a challenge by TV broadcasters), the company is not engaging in a public performance of copyrighted material because it sends each of its subscribers an individualized transmission of a performance from a unique copy of each copyrighted program. As a result (so the argument goes), it is not transmitting performances "to the public." Rather, Aereo says that it is essentially renting its subscribers an "antenna farm" service that allows each subscriber to access a "private" performance much like they would if the antenna were on their roof and connected directly to their TV – only in this case, the antenna and the "roof" are off-site and owned by Aereo. (In an effort to bolster its claim – or maintain the illusion – that it is not a cable system, Aereo cuts off reception of its service beyond the perimeter within which a residential TV roof antenna could pick up over-the-air signals from TV stations.)

TV broadcasters, of course, disagree. In their view, Aereo is engaged in a public performance of copyrighted material just like any multichannel video programming distributor (MVPD) and, therefore, Aereo should pay copyright royalties like any MVPD, whether the statutory amount associated with must-carry carriage or a privately negotiated amount, as with retransmission consent deals.

Last month, the TV broadcasters and Aereo went head to head at the Supreme Court in *Am. Broad. Cos. v. Aereo*. Among the questions to be decided: Is Aereo a cable company essentially engaged in retransmission of copyrighted programming? Or it is really just an equipment supplier providing subscribers with the equivalent of a new-fangled antenna on each subscriber's "roof"? During oral argument, Chief Justice Roberts questioned the motives underlying the design of Aereo's system: "There's no reason for

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you to have 10,000 dime-sized antennas except to get around copyright laws. . ."

Meanwhile, radio broadcasters are waging their own battle over copyright royalties and Internet distribution. Although radio stations pay royalties to publishers and songwriters through ASCAP, BMI and SESAC licensing fees, they have long been exempt from having to pay performance royalties for over-the-air broadcasts of recorded music. The theory underlying the exemption: Record companies reap a benefit from having their recordings played over the airwaves.

The recording industry has been trying to reverse this in recent years by urging Congress to act on their behalf (shades of player pianos and cable TV), but the broadcasting lobby has been able to thwart those efforts. Still, radio stations are required to pay royalties to the recording industry for simulcasts they stream over the Internet. That's the result of the 1998 Digital Millennium Copyright Act (DCMA). Back in the 1990s, when Internet access was shifting from dial-up to broadband, the volume of video and audio content streamed on the Internet increased. In the DCMA, Congress adopted a digital performance royalty for sound recordings.

The goal is obvious: To take advantage of laws based on the traditional "silo" approach.

The DCMA exempted over-the-air broadcast transmissions from that royalty, and it also exempted retransmissions of over-the-air broadcast transmission within a 150-mile limit. While broadcasters argued that streaming their own signals over the Internet should not be subject to the DCMA's digital performance royalty, the Copyright Office disagreed.

But, again, technology won't be denied. A new technology known as Geofencing now makes it possible to geographically limit the reach of an Internet webcast to a particular geographic area – say, 150 miles. So a Virginia broadcaster has sued, claiming that by limiting its Internet stream to within 150 miles using Geofencing, it should not have to pay DCMA performance royalties for those Internet simulcasts. This argument, of course, has faint echoes of Aereo's deliberate efforts to artificially limit subscriber reception to an area equal to the reach of residential TV roof antennas (even though Aereo is accessible via Internet). In both cases, Internet distribution is being limited to reach audiences within an area comparable to a broadcast station's over-the-air signals.

The goal in both cases is obvious: To use new technology to fit into traditional industry "silos" and thereby take advantage of laws based on that "silo" approach. And there is a further intersection. If the Supreme Court were to hold that Aereo's use of small antennas to retransmit over-the-air signals over the Internet does not violate the copyright of TV broadcasters, then you could arguably use small antennas to receive and simulcast a radio station's over-the-air signal over an Internet stream (in an Aereo-like model) to listeners without having to pay royalties to the recording industry. Bye, bye 150-mile limit.

In short, Aereo is trying to blur the line with TV broadcasting and radio broadcasters are trying to blur the line with pure Internet content providers like Pandora.

Is Pandora a Broadcaster?

Meanwhile, Pandora wants to be treated like a broadcaster. Last year the pure play music provider purchased an FM radio station in South Dakota in order to blur the line with broadcasters for copyright purposes. Pandora currently pays royalties to composers and publishers to use songs for its service through license fees it pays to organizations like ASCAP and BMI. But similar online services offered by broadcasters, such as Clear Channel's iHeart Radio, pay lower ASCAP and BMI rates than Pandora. The difference between broadcasters and Pandora? Radio stations benefit from a January 2012 agreement between the Radio Music License Committee (which negotiates royalty rates for the radio industry) and ASCAP and BMI. So to bring itself under the terms of that agreement – and thereby relieve itself of considerable royalty obligations – Pandora bought a radio station and declared that it was now a radio broadcaster entitled to the benefits of the January 2012 agreement.

Finally, we come full circle to the licensing industries themselves. As mentioned earlier, radio stations currently pay copyright licensing fees to songwriters and publishing companies (primarily through payments to ASCAP, BMI and SESAC), but they are not required to pay recording companies (usually collected by SoundExchange) for over-the-air broadcasts of recorded performances.

Enter the Songwriter Equity Act recently introduced in the Senate, which aims to level the playing field between record labels and songwriters who claim they are not getting a fair piece of the pie. The legislation would broaden the pool of evidence that federal rate courts like the Copyright Royalty Board (CRB) could examine when setting songwriter compensation. The CRB would be able to set the fair market value of digital performance rates for composers. In so doing, it could also correct perceived inequities in the royalties received by songwriters and publishers on the one hand and artists and recording companies on the other.

The CRB would calculate fair market value when setting songwriter publishing rates on digital music services, in addition to four other considerations it already uses. For example, the CRB could consider the rates that are set between Sound Exchange (which collects royalties for recordings played over the Internet) and digital music service providers such as Pandora. Broadcasters are concerned because they fear that they will be stuck with the tab for correcting any inequities the CRB perceives between songwriters and artist rates.

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Good news for radio, VHF TV; UHF TV, not so much

2014 Reg Fees Proposed

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It happens every spring: the annual announcement of proposed regulatory fees that the FCC's regulatees will be called upon to shell out toward the end of summer. While the Notice of Proposed Rulemaking ("*NPRM*") laying out the proposed fees has in recent years tended to pop up in early May (or even April, back in 2010), the Commission is running a tad late this time around.

Never fear – the proposed 2014 reg fees are here!

While the final figures (usually adopted in July or early August, payable in late August or September) may vary here and there from the proposals, generally any changes will be minor. The issuance of this year's *NPRM* gives one and all an opportunity to comment on the proposals before they get etched in stone (although many may question the utility of trying to sway the Commission on the fee front).

There's some interesting news for both TV folks and radio folks in the FCC's proposals.

UHFs in the top 25 markets are set for an uptick of approximately 20% and, in the smallest markets, 30%.

TV-wise, the Commission has tossed out the differential treatment of VHF and UHF stations. (Technically, this decision was made last year, but the Commission promised not to put it into effect until 2014.) This year there will be one generic class of TV licensees – dubbed simply "Digital TV" – although the fees within that class will still be tiered according to market size. Licensees operating on channels south of 14 should be happy, unlike their confrères on 14 and up.

The "Digital TV" fees this year for VHF stations will drop at least 24% (for the smallest markets and construction permits); for the top 25 markets, the reduction will be nearly 50%. Because UHF stations have historically been subject to significantly lower reg fees than VHF's, this year's proposal won't be greeted as happily by UHF licensees: UHFs in the top 25 markets are set for an uptick of approximately 20% and, in the smallest markets, 30%.

But there is hope for those UHF folks: the Commission is also considering capping increases that are attributable to its general fee reforms. The increase in UHF fees would fall into that category. The Commission has previously used a 7.5% cap on reg fee increases, but is open to considering a higher figure (10% is the suggested alternative).

On the radio side, the big news is that the Commission does not appear to be proposing ***any*** changes from last year's fees.

We've prepared a handy table listing the proposed fees (and last year's TV fees, for comparison purposes) – you can check it out on the next page.

By the way, when the time comes to pay the fees, be prepared to do it electronically. That's another change that was adopted last year and set to take effect this year. It's in keeping with an overall governmental shift toward a "paperless Treasury": the Commission will not accept payments by check (not even cashier's checks!) or any accompanying hardcopy forms (*e.g.*, Form 159) in connection with reg fee payments.

In addition to the new fee schedule, the *NPRM* proposes a number of other changes to the reg fee landscape. Some involve highly arcane matters affecting the calculation of fees overall, such as the internal reallocation of FTEs (that would be "full time employees" to those unfamiliar with the Commission's FedSpeak) for purposes of figuring out how much it costs to regulate the various services. (Reg fees are intended to cover the costs of regulation, with each service bearing its pro rata share.) If you're into that kind of stuff, you'll have a good time reading the *NPRM*.

Other proposals are likely more accessible to the mainstream reader. For example, the Commission is thinking that AM expanded band stations should be subject to their own reg fees. Historically, such stations got a free ride because the Commission was trying to encourage AM licensees to embrace the expanded band by allowing them to operate two stations – an expanded band and a non-expanded band – for a period of time. Since the theory was that the licensee would have to pick one to keep and ditch the other,

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PROPOSED 2014 REGULATORY FEES
(FCC 14-88, released 6/13/14)

FEE CATEGORY	Final 2013 Fees (USD)	Proposed 2014 Fees (USD)	% Differential (Green = decrease from 2013; Red = increase over 2013)
TV VHF Commercial Stations			
Markets 1-10	86,075	44,875 (VHF/UHF)	-48%
Markets 11-25	78,975	42,300 (VHF/UHF)	-46%
Markets 26-50	42,775	27,100 (VHF/UHF)	-37%
Markets 51-100	22,475	15,675 (VHF/UHF)	-30%
Remaining Markets	6,250	4,775 (VHF/UHF)	-24%
Construction Permits	6,250	4,775 (VHF/UHF)	-24%
TV UHF Commercial Stations			
Markets 1-10	38,000	44,875 (VHF/UHF)	+18%
Markets 11-25	35,050	42,300 (VHF/UHF)	+21%
Markets 26-50	23,550	27,100 (VHF/UHF)	+15%
Markets 51-100	13,700	15,675 (VHF/UHF)	+13%
Remaining Markets	3,675	4,775 (VHF/UHF)	+30%
Construction Permits	3,675	4,775 (VHF/UHF)	+30%
Low Power TV, TV/FM Translators/Boosters	410	410	NC
Other			
Broadcast Auxiliary	10	10	NC
Earth Stations	275	245	-11%
Satellite Television Stations			
All Markets	1,525	1,550	+2%
Construction Permits	960	1,325	+38%

Commercial Radio Stations Proposed 2014 Regulatory Fees

Population Served	AM Class A	AM Class B	AM Class C	AM Class D	FM Classes A, B1 & C3	FM Classes B, C, C0, C1 & C2
< 25,000	775	645	590	670	750	925
25,001-75,000	1,550	1,300	900	1,000	1,500	1,625
75,001-150,000	2,325	1,625	1,200	1,675	2,050	3,000
150,001-500,000	3,475	2,750	1,800	2,025	3,175	3,925
500,001-1,200,000	5,025	4,225	3,000	3,375	5,050	5,775
1,200,001-3,000,000	7,750	6,500	4,500	5,400	8,250	9,250
> 3,000,000	9,300	7,800	5,700	6,750	10,500	12,025
AM Radio Construction Permits		590				
FM Radio Construction Permits		750				

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adjustments available), but trust me, it could be much worse. After all, Sirius XM pays 9.5% of revenue to SoundExchange in 2014, with the percentage of revenue set to rise to 11 percent by 2017.

More illustrative is the recent royalty fight between Pandora and ASCAP/BMI. That face-off was resolved by Judge Denise Cote of the Southern District of New York (the same judge currently overseeing the Consent Decrees). Pandora wanted a rate close to the 1.7% of gross revenues currently paid by broadcasters; ASCAP and BMI wanted something closer to 3%. Judge Cote settled on 1.85%. One can easily imagine what might happen if such judicial oversight isn't available to broadcaster in the future. Could they, too, be paying 3% to ASCAP and BMI before too long? This increase would make the proposed, long-dreaded, Performance Rights Act payments – especially those that would be imposed on "small broadcasters" – a mere pittance by comparison.

And it's not like individual broadcasters have any leverage against ASCAP or BMI. The industry as a whole does – and it's that industry-wide negotiating, ably led by the Radio Music License Committee (RMLC) under the umbrella of the Consent Decrees, that keeps the rates low. But I've seen way too many individual stations find themselves buckling under the superior weight of ASCAP or BMI on various issues (such as the interpretation or definition of individual terms in the licensing agreements in ways that have significant financial ramifications). Make no mistake about it: ASCAP and BMI are big corporations with significant money and resources to push small, medium and even larger broadcasters around.

But if you need any final convincing that broadcasters should be concerned, note what is happening with regard to the one PRO that isn't already under a consent decree: SESAC. As we have reported, SESAC is being sued by the RMLC for anticompetitive behavior. The RMLC is seeking the imposition of a Consent Decree on SESAC as well.

In other words, consent decrees continue to afford important protection for radio broadcasters. While the Antitrust Division's latest review doesn't mean the ASCAP and BMI Consent Decrees will be eliminated, it clearly opens the possibility that those decrees could be weakened, to the detriment of broadcasters.

If you doubt that, consider this: ASCAP quickly issued a statement welcoming the DOJ's review proceeding, indicating that it clearly believes things will improve for their songwriter clients. Look for ASCAP and BMI to proffer tales of woe regarding the sad financial state of the music industry. And there may indeed be hardships, but things are tough all over. Broadcasters wanting to give the DOJ a clear perspective of their industry – and their need for continued strong governmental protection to preserve small-and-getting-smaller profit margins – may want to consider filing comments with the DOJ by ***August 6, 2014***.

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covering breaking news events.

- Unlicensed wireless microphones may be permitted to use a guard band between 7 to 11 MHz wide that will separate TV from wireless operations, and possibly also channel 37 and additional guard bands around channel 37, at some locations. (Channel 37, used by radio astronomy at a limited number of sites and for medical telemetry, has never carried TV programming.) Rules for this operation have not yet been adopted.
- Wireless microphones will be allowed to operate in closer geographic proximity to a TV station using the same channel, so long as they stay at least 4 km from the station's predicted service contour – or even closer, if they coordinate with the TV station.
- The FCC has promised to improve the performance of the TVWS database, possibly allowing wireless microphone users to register events for protection on short notice. Details will follow in a later proceeding.

In a separate order, the FCC expanded licensing eligibility for wireless microphones, now to include venues and professional sound companies that routinely use 50 or more wireless microphones. A production company that provides its own audio services would qualify. The FCC's examples include indoor and outdoor seated facilities such as auditoriums, amphitheaters, arenas, stadiums, theaters, and houses of worship, as well as venues without fixed seating such as convention centers, conference locations, amusement parks, fairgrounds, entertainment complexes, athletic facilities, educational centers, and government locations. The venue does not have to own or operate the wireless microphones itself to qualify, but must routinely host large-scale productions that require 50 or more of these devices. A venue that includes multiple stages can count microphones by combining all stages at the same location.

Large productions typically use wireless microphone gear the audience does not see, including in-ear monitors for performers, "interruptible fold-back" for communicating with performers on air or on stage, and backstage intercoms – the iconic production person wearing a headset. All of these count toward the required minimum of 50. The FCC order also continues in force the waiver that allows unlicensed microphones to operate at 50 milliwatts or less, so that venues failing to make the minimum of 50 microphones still have the option of unlicensed use.

A later proceeding, not yet begun, will fill in a lot of the details. But even now, it is clear that users will have to replace equipment and adjust operations to work in a lot less spectrum than they had just a few years ago.

Brrrrrr!

The Freeze is On for LPTV/Class A/TV Translator Displacement Applications

By Davina Sashkin
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If you're an LPTV, Class A TV or TV translator licensee and you haven't gotten around to filing for displacement facilities (or, in the case of translators, digital replacement translator (DRT) facilities), we've got bad news for you: effective June 11, 2014, the Media Bureau put a freeze on such filings. While the abrupt announcement of an in-effect-immediately freeze is always a bit surprising, the reason underlying the freeze is not. It's necessary to ensure a static frequency landscape as the FCC gears up for the incentive auction.

Unlike many other freezes, this one is not expected to cause much disruption. That's because, given the fact that the television digital transition was largely completed nearly five years ago, the Bureau figures that "there should be little occasion for new DRT and displacement applications to be filed."

The freeze will remain in effect until after the incentive auction is completed. The Bureau will then announce a special filing window to be opened for existing DRT, LPTV, and TV translator stations displaced by the incentive auction-induced channel repacking.

This is not what you might call a Han Solo-in-carbonite freeze – there is a little wiggle room. During the freeze, LPTV and TV translators will be able to request a waiver to seek displacement if they can demonstrate that they are causing or receiving "new actual" interference to or from a full power television station. Here's what the Commission has to say about "new actual interference":

This is not what you might call a Han Solo-in-carbonite freeze.

By "new" interference, we mean interference that is a result of the initiation of new or modified service by a full power station during the freeze. To qualify for the waiver, the displacement applicant must demonstrate either actual interference within the noise limited contour of the full power station or actual interference to the displacement applicant's LPTV or TV translator station, either of which will result in the immediate loss of service to viewers, thus necessitating the grant of its application.

This waiver opportunity will ***not*** ordinarily extend to applications for new DRTs or Class A displacements. The need for such facilities has presumably already been identified and addressed.

The Bureau ***will*** continue to process DRT and displacement applications already on file prior to June 11. Also, during the freeze the Bureau will accept minor change applications and applications for digital flash cut and digital companion channels filed by existing LPTV and TV translator and Class A stations.

(Continued from page 6)
the Commission figured it shouldn't charge double. But by 2008 – yes, that would be six years ago – the FCC concluded that there was "no compelling reason" to continue that exemption. Compelling reason or no, the exemption has continued to date. But now the Commission appears to be serious about closing that loophole starting with FY 2014.

Another proposed change that everybody should be able to grasp: upping the "*de minimis*" level from $10 to a considerably higher number – $100, $500, $750, even $1,000 are all mentioned as possibilities. That means that, once the FCC has calculated the costs of regulation for each service, if a particular service's figure is less than the "*de minimis*" number, the Commission would not impose a reg fee. At $10, not too many services have historically enjoyed that exemption. That would change if the "*de minimis*" level is jacked up by a factor of 10 or more.

Along the same lines, the Commission is proposing to ditch entirely a number of reg fee categories that "account for such a small amount of regulatory fees." Those would include such things as Satellite TV, Satellite TV Construction Permits, Broadcast Auxiliaries, LPTV/Class A Television and FM Translators/Boosters, and CMRS Messaging (Paging).

There are various other changes proposed. If you think you might want to chip in your two cents' worth on the proposed fees or related matters covered in the *NPRM*, heads up – you don't have much time to work with. Comments on all of the proposals set out in the *NPRM* are due by ***July 7, 2014***; reply comments are due by ***July 14***. Again, the *NPRM* – and the fees described in it – are still only proposals. We won't know the final fees until sometime this summer, and we won't know the deadline for paying the fees until sometime later – although the fees are generally due in late August or early/mid-September. Check back with www.CommLawBlog.com for updates.

(Continued from page 1)

of the line." Essentially, those holdings in favor of cable operators were what Aereo was hoping *it* would get.

But Congress hadn't liked the Court's conclusion, so in 1976 it amended the Copyright Act to erase the distinction between broadcaster and viewer. In Congress's view, both are "performing" a broadcast – the primary distinction between the two being that the viewer isn't likely to be engaged in that second requirement for copyright infringement because the viewer's "performance" isn't likely to be *public*. Congress also added: the Transmit Clause which, from its language, was clearly directed at cable television systems; and the Cable Compulsory License, which requires payment of royalties by cable television systems for retransmission of broadcast programming.

As Breyer saw it, "[t]his history makes clear that Aereo is simply not an equipment provider". It performs, just like the cable companies in *Fortnightly* and *Teleprompter* did.

Breyer emphasized that the decision is by design limited in scope.

Having concluded that Aereo "performs" the copyrighted works, Breyer turned to whether it does so "publicly". Aereo's view on that point was that, because subscribers can access only the programs they request, any individual transmission to a subscriber is by definition a private transmission. Not so, according to Breyer. As the Justice (and his five colleagues) saw it, Aereo's transmissions involve a "set of actions". He likened it to a person sending an email message to a number of friends: he or she can send the message through a single email to all or through multiple identical emails to each separately. (Another example offered by Breyer: Supreme Court Justices see the same Shakespeare play at different or the same showings.) So, too, can Aereo transmit a performance through one or several transmissions, when that performance is of the same program. The result is in either event a "public" performance.

Perhaps the most interesting aspect of Breyer's opinion is the last section, where he emphasized that the decision is by design limited in scope. In particular, it is *not* intended to unduly disrupt other industries. He distinguished Aereo's system from cloud computing services. He even suggested that the Cablevision Remote Storage DVR system – whose approval by the Second Circuit inspired Aereo's design – is also distinct from Aereo's.

The Dissent

Scalia's dissent addressed only whether Aereo "performs" anything at all. Because he concluded that Aereo does not perform, he did not need to determine whether any performance is "public". According to Scalia, Aereo is nothing more than an "automated service provider".

Scalia was especially critical of the majority for adopting a new (and, he thought, statutorily unsupported) standard, *i.e.*, the notion that, because Aereo "looks like cable TV", it is subject to copyright obligations equivalent to those imposed on cable. Scalia also noted that, because the broadcasters had accused Aereo of "direct infringement" (as opposed to "contributory infringement"), the Court needed only determine that Aereo had not engaged in any "volitional conduct", since that is required in "direct infringement" cases. Since Scalia saw no such conduct by Aereo in its system (because the subscriber makes all the decisions without any involvement by Aereo), the broadcasters' claim of "direct" infringement must fail.

By way of example, he pointed to "copy shops", where the proprietor makes copying equipment available for customers to use on a self-service basis. The copy shop isn't liable for *direct* infringement when customers illegally reproduce famous works (though it could be liable for contributory infringement in certain situations). In Scalia's view, Aereo is akin to a copy shop that gives users a library card to find freely available content, the key point being that "the subscribers call all the shots". As Scalia saw it, Aereo's system does not relay any program until a subscriber selects the program and tells Aereo to relay it, so the subscriber is calling all the shots.

That said, Scalia indicated that he was no fan of the Aereo system. Even if the Court agreed with Scalia that no direct infringement had been shown, as the litigation proceeds the broadcasters would still presumably argue that Aereo was contributorily infringing in the public performance of the programs (and possibly both directly and contributorily infringing through the reproduction of the programs).

But, again, those weren't the questions before the Court in this case. In this case the Court was looking only at whether Aereo's "live" streaming of broadcast programming constitutes direct copyright infringement. By focusing on the "similar to cable television" analysis, the majority opinion left many questions unresolved. For example, is the Court's decision limited only to systems that offer access to live television to qualify? If similarity to cable-television service is the measure, then the answer must be yes. But does that leave the door open for Aereo to run a record-only service? And what about the application to non-cable television type services. Justice Scalia worried that "it will take years, perhaps decades, to determine which automated systems now in existence are governed by the traditional volitional-conduct test and which get the Aereo treatment."

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It should also be noted that even though Scalia's opinion was labeled a dissent – and, therefore, presumably a vote in support of Aereo – it appears that, in the long run, Aereo shouldn't be counting on Scalia for much help. He seemed to signal that he suspects that Aereo may be guilty of infringement of some kind – just not the kind that was (in his view) the proper focus of this particular appeal.

Frequently Asked Questions

Having reported on the *Aereo* litigation for more than two years, I have developed a feel for readers' interest in the real world implications of the Court's resolution of this case. So here are answers to the most likely questions on your mind.

What's next?

The Court remanded the case back to the Second Circuit, which in all likelihood will simply remand the case back to the trial court (that would be the United States District Court for the Southern District of New York). There Judge Alison Nathan will have to decide whether to enjoin Aereo from operation pending the conclusion of the proceeding.

It's a pretty good bet that Judge Nathan will enjoin Aereo. Even though the question resolved by the Supremes (*i.e.*, is Aereo infringing the broadcasters' copyrights?) is just one of four factors to be considered in deciding whether an injunction should be imposed, Judge Nathan sympathized with the broadcasters on the other three when she first addressed the issue.

It's a pretty good bet that Judge Nathan will enjoin Aereo.

But even if Judge Nathan opts not to enjoin Aereo, we are still looking at a pretty inevitable conclusion. The broadcasters are likely to file a Motion for Summary Judgment, arguing that this Supreme Court decision mandates a finding in their favor.

At that point Aereo would seem to have only a couple of possible "outs".

It could try to avoid summary decision by demonstrating that there are some questions of fact that would require a full trial to resolve. The problem there is that Justice Breyer seemed to indicate that the few factual questions that haven't been resolved (*e.g*, do the individual Aereo antennas really capture the programming and save that programming as Aereo claims?) don't really matter.

A more likely scenario, particularly in light of Justice Scalia's opinion: Aereo voluntarily withdraws the portion of its service which allows subscribers to view programming "real time" and instead provides only a record-and-watch-later service. (Justice Scalia predicted this will be one of the first questions the lower court will have to face on remand.)

Does this ruling affect the future of cloud computing and other new technologies?

Not very much. Again, this was a pretty limited holding that is clearly intended to apply only to Aereo. Justice Breyer expressly disavowed any wider impact in several ways. So I think that the future of "cloud locker" services (*e.g.*, Dropbox, iTunes and Amazon) is not threatened.

Does this ruling affect RS-DVR Services offered by Cablevision and others?

Not really. If anything, it underscores and expands their validity. Until now, the RS-DVR service had been approved by only one federal court of appeals – the Second Circuit – in the *Cablevision* case that spawned Aereo. By apparently distinguishing RS-DVR service from Aereo's, Breyer has effectively affirmed the legality of RS-DVR. And when the Supreme Court affirms the legality of something, that affirmation has nationwide effect. So if any cable operators outside the Second Circuit had had any doubts about offering an RS-DVR service, they can breathe easier now.

How influential was the oral argument to the Final Result?

This is a total guess – I'm just the Swami, I'm not a mind-reader – but I'd say it was moderately important. Sure, there wasn't much discussion during oral argument regarding the text, history and meaning of the relevant provisions of the Copyright Act, and that *was* a central element of Breyer's opinion. But don't forget that the first question out of the box at the argument was from Justice Sotomayor, asking why Aereo wasn't a cable company. And the majority's conclusion that Aereo is, in fact, like a cable system was the basis for its ultimate decision. My strong sense is that the six Justices in the majority were clearly swayed by what they heard on that issue during oral argument (and just as clearly not dissuaded by Aereo's counter-arguments).

What could Congress do to help Aereo?

Engage in a wholesale rewrite of the Copyright Act, which many have already suggested is necessary. Less ambitiously, Congress could perhaps home in on the very narrow issue of the "Transmit" clause to clarify that "public performance" occurs when one transmits the "transmission", not the work. But given Congress's dysfunctional nature right now, the prospect for any significant movement – broad-brush or narrowly-targeted – is doubtful.

Sixth White Space Coordinator Completes Tests

The FCC has asked for comment on white space database tests recently conducted by Comsearch. Comsearch's test report can be found here.

It's been about three and a half years since Comsearch (and eight other database administrator wannabes) got the initial nod from the FCC. But things have moved slowly since then. The original group of nine was eventually expanded to ten when Microsoft arrived late to the party, and most recently to 11 when Google tossed in a "major modification" to its previously-approved system. Before any administrator can be finally approved, its proposed system has to be tested, and the test results must be made available for public comment. Only four of the 11 systems have made it all the way through to final approval thus far. One other (LS telcom AG) has finished its testing but still hasn't gotten the FCC thumbs up.

You can find a report about the commencement of Comsearch's tests here.

Comments on the Comsearch test report are due by ***July 8, 2014*** and reply comments by ***July 15***.

For background on the databases and what they do, see this article.

Coordinator	Test Started	Test Finished; Comments Sought	Coordinator Approved
Comsearch	**Feb. 24, 2014**	**June 23, 2014**	
Frequency Finder Inc.			
Google Inc.	**Feb. 27, 2013**	**May 29, 2013**	**June 28, 2013**
Google Inc. II	**June 2, 2014**		
LS telecom AG	**June 18, 2013**	**Nov. 14, 2013**	
Key Bridge Global LLC	**March 4, 2013**	**May 29, 2013**	**Nov. 19, 2013**
Microsoft Corp.			
Neustar Inc.			
Spectrum Bridge Inc.	**Sept. 14, 2011**	**Nov. 10, 2011**	**Dec. 22, 2011**
Telcordia Technologies	**Dec. 2, 2011**	**Feb. 1, 2012**	**March 26, 2012**
WSdb LLC			

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The real issue at hand, however, is the fact that technologies are shifting faster than the law can adapt. In many ways, the copyright law, like many telecommunications laws and regulations, has historically been crafted around traditional industry "silo" models such as radio vs. TV vs. cable vs. telephony vs. Internet vs. publishing vs. recording. But thanks to the continuing evolution of technology, those once-clearly delineated lines are blurring and will continue to blur. This may require a complete overhaul of the system.

There are already initial efforts underway to update the Communications Act to remove the traditional industry silos of broadcasting, cable, wireless and telephony. Such changes will have to be carefully crafted and interpreted to avoid unintended consequences. In 2008, for example, the Second Circuit's Cablevision decision – which held that Cablevision's remote storage DVR did not infringe on broadcasters' copyrights – led to an unintended consequence we now know as Aereo, much like the 1908 player piano decision changed for the next century the law of how music is copied and licensed.

In the Aereo oral argument before the Supreme Court, the justices were clearly concerned about the impact their decision could have on other developing technologies such as cloud storage. We are a long way from player pianos, but lessons can be learned and old models need revising.

Porn troll patrol

D.C. Circuit Rules Against “John Doe” Lawsuits

By Kevin M. Goldberg
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More than four years ago we introduced our readers to the porn troll, a particularly insidious creature who engages in a form of blackmail under the guise of copyright enforcement. Within six months of that introduction, we reported that the trolls were riding high after a couple of significant victories before U.S. District Judge Beryl Howell in Washington, D.C.

What a difference a few years make! Last year we noted that a federal judge in California had swatted down a porn troll collective. [*Editor’s note: If you haven’t read Tony Lee’s post on CommLawBlog.com about that particular decision, you’re missing a true classic.*] And we are now pleased to report that the U.S. Court of Appeals for the D.C. Circuit has reversed one of Judge Howell’s rulings. As a result, the porn troll business has just gotten considerably harder, which is good news.

And, perhaps even more heartening (at least for us lawyers who deplore porn troll practices) is the disdain for trolls that dripped from the court’s opinion.

If you need a refresher on the porn troll business, the D.C. Circuit’s Judge David Tatel has given us an opinion that should be required reading.

From the first paragraph, you know it won’t end well for the troll: Judge Tatel brands trolls as “individuals seek[ing] to manipulate judicial procedures to serve their own improper ends” and then tips us off to the end result (as if we needed any more tipping off) by saying that “[t]his case calls upon us to evaluate – and put a stop to – one litigant’s attempt to do just that.” Three sentences later he observes that a “full understanding of this case requires knowing some things about the lawyer and the ‘law firm’ that initiated it.” (Practice tip: When a judge refers to your law firm as a “law firm” in quotation marks, you can be reasonably sure that that’s not good news for you.)

The case in question involved a garden-variety porn troll scenario. The plaintiff, AF Holdings, is a company formed by “attorneys with shattered law practices”. (Practice tip: See practice tip, above). It supposedly bought the copyright to a pornographic movie, *Popular Demand*, and then searched for evidence that the movie had been downloaded through BitTorrent. That search generated a list of downloaders’ IP addresses. AF Holdings then brought a single lawsuit against 1,058 John Does identified only by their IP addresses.

The next step in the porn troll playbook is to subpoena various ISPs seeking the names and addresses of the individuals associated with the IP addresses. The goal seems to be *not* to litigate any of the cases – in fact, according to Judge Tatel, none of AF Holdings’s previous cases had ever gone to trial. Rather, the apparent goal is to send a message, directly or otherwise, to the downloading individuals that they are about to be publicly named as (alleged) downloaders of pornography. That then leads to settlement negotiations with the anonymous John Does who would understandably prefer not to have their names associated, on the public record, with pornography.

The strategy has been successful. Judge Tatel reports that, without having to litigate even one case, one porn troll company managed to make about $15 million in less than three years.

The strategy, of course, depends on the troll’s ability to get over a couple of hurdles in the early stages of the litigation. As we spelled out here, ISPs and John Does trying to get the cases dismissed have a number of arguments available. Unfortunately, as we spelled out here, at least some district court judges – including particularly Judge Howell (but not including Judge Wright) – weren’t especially receptive to those arguments.

Which is why the D.C. Circuit decision is especially encouraging.

The ISPs had argued to Judge Howell that, under the Federal Rules of Civil Procedure, having to cough up the names and addresses associated with the 1,058 IP addresses would impose an “undue burden”. Their reasoning: AF Holdings couldn’t establish personal jurisdiction in D.C. over all but a few of the John Doe defendants. Specifically, only 20 of the 188 Verizon subscribers could be traced to D.C., while only one Comcast subscriber appeared to live in D.C. and none of the others had D.C. ties. Nor, they argued, was there any valid reason to join all the defendants in one lawsuit.

Predictably, Judge Howell ruled for AF Holdings, although she allowed the ISPs to appeal her decision immediately (rather than wait until the end of the trial). And that led to Judge Tatel’s decision (in which Judges Laurence Silberman and David Sentelle joined).

In Tatel’s view, modern geolocating technology being what it is, AF Holdings could not possibly believe that the majority of the 1,058 John Doe defendants were

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subject to personal jurisdiction in the District of Columbia. Judge Tatel noted that for just eight bucks some geolocation services can review the location of 1,000 IP addresses and determine the city or cities in which the users associated with those addresses are located. By taking this "minimal" step, AF Holdings could have narrowed its initial filing to only those John Doe defendants with actual D.C. ties. By trying to use the discovery process to determine the identities of scads of individuals over whom the court did not have jurisdiction, AF Holdings "clearly abused the discovery process".

He reached a similar conclusion with regard to the issue of joinder. The Federal Rules allow a plaintiff to target (or "join") multiple defendants in a single suit as long as, among other factors, the claims against all of them involve "the same transaction, occurrence or series of transactions or occurrences". AF Holdings claimed that the use of BitTorrent necessarily meant all the defendants were part of the same downloading/sharing "transaction".

Judge Tatel disagreed. Instead, he borrowed from an opinion by Judge Harold Baer (of the U.S. District Court for the Southern District of New York), whose explanation of BitTorrent is the most understandable I've ever read:

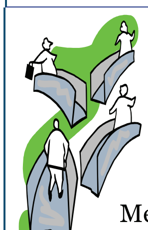
BitTorrent and similar protocols break a large file into pieces while tagging each piece with a common identifier. Where in the normal course a user would download a file from a single source, and download it sequentially from beginning to end, with the BitTorrent peer-to-peer protocol, users join forces to simultaneously download and upload pieces of the file from and to each other. This reduces the bottleneck of Internet traffic that normally occurs at the server where the entire file is located and allows for faster download speeds for users. This interconnected web of information flowing between users, or peers, is called a swarm.

While agreeing that users who participate in the same swarm at the same time might be part of the same series of transactions, Tatel concluded that merely downloading or sharing the same movie at different times is not the same. He was particularly swayed by an analogy presented by amicus curiae Electronic Frontier Foundation: those downloading or sharing at different times were more akin to blackjack players playing at the same table, with the same dealer, albeit at different times. They're simply not playing together.

Where does this leave us? For both ISPs and potential defendants, in a good place. For would-be trolls, not so much. The welcome mat that Judge Howell had put out at the front door of the U.S. District Court in D.C. now appears to have been removed. And since D.C. may have been the only court that still allowed trolls to engage in mass filing against multiple John Doe defendants, the loss of that option should discourage, if not stem altogether, further troll activity. After all, the porn troll business model is built largely on the troll's ability to get into court with such mass filings without having to do any of the hard work of identifying specific defendants. Once in the courtroom door, the troll can merely raise the fear that defendants might be identified through the discovery process. That then allows the troll to threaten the "outing" of a defendant as an illegal downloader, often of a pornographic movie, which threat can then be leveraged into a quick settlement that the defendant agrees to only as a means of concealing his or her identity and good name.

Without the opportunity to file mass suits again bunches of "John Does", the troll faces a considerably more discouraging, and likely less lucrative, range of options.

The courts, of course, remain available for legitimate copyright infringement actions against properly identified wrong-doers. But the D.C. Circuit, for one, has now clearly signaled to would-be trolls that they are not welcome in D.C.



FHH - On the Job, On the Go

If it's June, it must be London . . . This month **Kathy Kleiman** has traveled transatlantically to England to attend the latest ICANN confab where, she reports, talk centered on New Generic Top Level Domains, privacy issues in future domain name registrations, and the upcoming transition of IANA functions.

Meanwhile, stateside, **Frank Montero** attended the New York State Broadcasters Summer Convention in NYC on June 12-13, then sauntered south to the New Jersey Broadcasters Association convention in Atlantic City on June 17-18 (where he made a presentation on FCC- and copyright-related matters to the Association's Board). And **Frank**'s summer travels aren't over: he'll be making a presentation on FCC issues to the Puerto Rico Broadcasters Association at its convention in San Juan on July 9; then it's back to D.C., where he'll be speaking at the annual MMTC Access to Capital Conference on July 28-29.

When he's not flying all over the place, **Frank** has also been writing. He's got an article on "Performance Royalties: The State of Play" scheduled for publication in Radio Ink's *40 Most Powerful People in Radio* at the end of July. And we're also pleased to announce that **Frank** has been invited to be on the Advisory Board of a new web-based news service currently in the planning stages at Bloomberg BNA. It's tentatively called *Bloomberg BNA Now: Tech and Telecom*.

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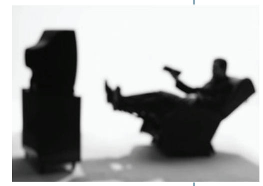
Already? Yup, already!



Revised CALM Act Rules Adopted

By Harry F. Cole
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The CALM Act, designed to make LOUD COMMERCIALS a thing of the past, was enacted in late 2010. The Commission diligently undertook the necessary follow-up rulemaking to implement the Act. The resulting rules were adopted in December, 2011; they took effect in December, 2012, per the schedule dictated by Congress.

And, as we reported last year, by 2013 the rules already had to be amended.

That led to a further rulemaking proceeding which has now been concluded. Since Congress gave the FCC no discretion in the matter, the rule changes proposed last fall have been adopted.

If you want more background on all this, check out the item we posted on CommLawBlog.com last November. The short version: The CALM Act ordered the FCC to incorporate into its rules ATSC A/85 Recommended Practice (RP), a standard for monitoring and controlling the loudness level of digital TV programming. At the time, the latest and greatest version of that RP was vintage 2011, so that's the one the FCC adopted. But, recognizing that standards and technology are constantly evolving, Congress also ordered the FCC to update its rules to incorporate any subsequent changes to the RP.

Sure enough, the RP was updated in early 2013, which meant that the FCC had to do likewise with its rules.

The change: where the RP refers to ITU-R BS.1770 (an ITU-recommended algorithm), that reference has been revised to specify "ITU-R BS.1770-3", the most recent iteration of the algorithm. If you really must know, ITU-R BS.1770 is a "measurement algorithm [that] provides a numerical value that indicates the perceived loudness of the content (measured in units of LKFS – loudness, K-weighted, relative to full scale) by averaging the loudness of audio signals in all channels over the duration of the content." Happy now?

While the FCC had no choice but to adopt the revision, it did have some discretion when it came to setting the effective date for the change.

In this case, the Commission has decided that the newly-revised rule will not take effect until ***June 4, 2015***. The FCC's thinking (seconded by the NAB) is that many TV licensees and MVPDs bought CALM Act-compliant gear when the initial rules took effect in 2012; according to the NAB, most of the gear deployed to comply with the 2011 ATSC A/85 RP can be modified through "relatively low-cost software upgrades" to comply with the 2013 version. Because of that, the Commission figures a year should be plenty of time to get the job done. (The FCC does note that anybody who wants to comply with the 2013 RP now rather than wait until next year may do so.)

The Commission advises that, come June 4, 2015, waivers *may* be available to those who can show that to comply with the 2013 RP would be "significantly burdensome". But even if such a waiver is granted, the station or MVPD will still be expected to comply with the 2011 RP in the meantime. (A few stations already have waivers covering the 2011 RP, but those are set to expire no later than December 13, 2014.)

FHH - On the Job, On the Go

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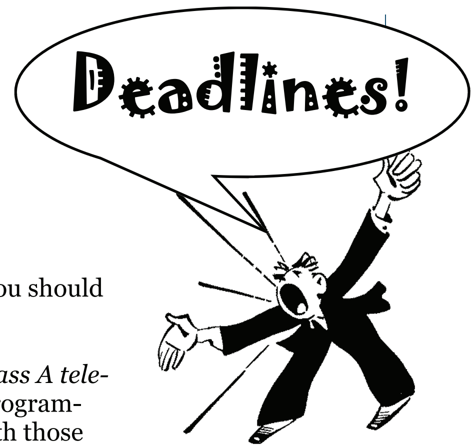
Frank Jazzo, along with the NAB's **Ann Bobeck**, will provide an FCC/Legal update at the annual convention of the Arkansas Broadcasters Association on July 18 in Little Rock.

In the wake of the Supreme Court's *Aereo* decision, **Kevin Goldberg** and **Harry Cole** – who covered the Aereo wars for CommLawBlog.com from their beginning more than two years ago – got called on for comments by folks from all over. They ended up appearing in reports on CBSNews.com and TechCrunch, in the Boston Globe and the AP, on LXBN TV (featuring **Kevin** in a video interview) and in an explanatory piece circulated to the members of Media Financial Managers.

Ordinarily, that would scream **joint** *Media Darlings of the Month*, right? Yes, but . . .

Earlier in the month, the U.S. Patent Office's Trademark Trial and Appeal Board announced that it was cancelling the federal registrations of six trademarks associated with the Washington Redskins. Within an hour or so of the announcement, **Kevin** was already on 106.7 The Fan, D.C.'s sports station, explaining things. He did so well that he got invited to appear that evening on CBS affiliate WUSA 9 with an in-studio interview on the 6:00 news, followed by a second interview on the 11:00 news. Hey Kevin, are you ready for your close-up? You'd better be, because you're our *Media Darling of the Month*.



July 10, 2014

Children's Television Programming Reports – For all *commercial television* and *Class A television* stations, the second 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, as the FCC bases its initial judgments of filing compliance on the contents and dates shown in the online public file. Please note that the FCC's filing system now requires the use of FRN's prior to preparation of the reports; therefore, you should 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.

August 1, 2014

Television License Renewal Applications – *Television* and *Class A television* stations located in **California** 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. LPTV and TV translator stations also must file license renewal applications.

Television Post-Filing Announcements – *Television* and *Class A television* stations located in **California** must begin their post-filing announcements with regard to their license renewal applications on August 1. These announcements then must continue on August 16, September 1, September 16, October 1 and October 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 **Alaska**, **American Samoa**, **Guam**, **Hawaii**, **Mariana Islands**, **Oregon** and **Washington** must begin their pre-filing announcements with regard to their applications for renewal of license on August 1. These announcements then must be continued on August 16, September 1 and September 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 **California**, **Illinois**, **North Carolina**, **South Carolina** and **Wisconsin** 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 **California**, **North Carolina** and **South Carolina** 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 **Illinois** and **Wisconsin** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323-E.