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Memorandum to Clients

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Put it in writing

New Video Captioning Standards Coming Soon

By Anne Goodwin Crump
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In its continuing effort to assure that television programming is more accessible to the deaf and hard of hearing, last February the Commission ratcheted up the captioning requirements for Video Programming Distributors (VPDs) and video programmers. And now, thanks to a low-key announcement in the Federal Register, we know when the last of the new requirements will kick in: ***March 16, 2015***. Anyone involved in the production and/or delivery of video programming to residential consumers should start getting familiar with the new rules as soon as possible, if they haven't already done so. The whole shooting match may be found in the Commission's 153-page "Report and Order, Declaratory Rule, and Further Notice of Proposed Rule Making" (*R&O/DR/FNPRM*) released February 24, 2014.

The new rules apply to both VPDs and video programmers. VPDs are defined as "all entities who provide video programming directly to customers' homes, regardless of distribution technology used (*i.e.*, broadcasters and MVPDs." In essence, these are the folks who are ultimately responsible for delivering programming directly to the consumer. Video programmers, by contrast, are "entities that provide video programming that is intended for distribution to residential households including, but not limited to, broadcast or nonbroadcast television networks and the owners of such programming." We can think of these as the folks who produce the programming that VPDs then deliver to consumers. Of course, with respect to some programming – local news programs, for example – a single entity may be both VDP and video programmer.

The new rules may be summarized as follows:

ENT "Best Practices".

Some of the rules adopted last February took effect several months ago, including the requirement that all VPD's still eligible to use Electronic Newsroom Technique (ENT) to caption news programming may continue to use ENT for live programming ***only if*** they adopt new ENT Best Practices. (The universe of eligible VPD's includes, for broadcasters, all stations not affiliated with ABC, NBC, CBS, or Fox, plus affiliates of these four networks outside of the top 25 Nielsen DMA's.) Of course, a station may elect to provide real-time captioning for its live programming instead of relying on ENT captioning. For those sticking with ENT, however, the required Best Practices are as follows:

- *Pre-produced Programming* – Pre-produced programming must be scripted, at least to the extent technically feasible.
- *In-studio Programming* – All programming produced in-studio must be scripted. This requirement includes news, sports, weather, and live entertainment programming.
- *Weather Interstitials* – These segments must be scripted. The script should explain the on-screen visual information and convey forecast information, but the script is not required to precisely track the exact words used on air.
- *Interviews/On-the-Scene, Breaking News Segments* – If such interviews, live on-the-scene, or breaking news segments are not scripted, then the station must supplement them with crawls in the lower third of the screen, textual information, or other means.
- *ENT Training/Compliance* – The station must provide to all news staff members training on scripting to improve ENT function, and each station must appoint an ENT Co-ordinator to be accountable for compliance.

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Inside this issue . . .

A tale of two cities

Professional Football Team in Nation's Capital Loses Name, Logo, Colors

By Kevin M. Goldberg
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It's big news when a storied sports franchise loses its identity. And that's what's happened with a prominent professional football team in its nation's capital, a team with which you're all doubtless familiar: No, not the Washington, D.C. NFL team, but Steaua ("Star") Bucharest, the most successful football (or what a small minority of the world refers to as "soccer") team in Romanian history.

Or should I refer to the team *formerly known as* "Steaua Bucharest"? More on that below.

You might have thought that I was talking about the Washington, D.C. NFL team with the controversial name. Not today. In fact, the team has just won an indirect victory at the FCC (and trust me, this year the team can use any victory it can get its hands on): the Media Bureau's Audio Division has dismissed several petitions to deny the license renewals of stations that mentioned the team's name on the air. The decision is relatively short and sweet and totally right on the money: however offensive the name may be to however many people, there is no basis in the FCC's rules (or any other law, for that matter) to deny a station's license renewal because of its use of racial or ethnic epithets. Indeed, as my colleague Steve Lovelady pointed out when the petitions were first filed, the FCC itself has expressly taken that consideration off the table. So stations can continue to play "Hail to the Redskins" without fearing for their next renewal.

All is not so copacetic in Bucharest, however.

Surely you're familiar with Steaua Bucharest's résumé: founded in 1947; winners of 25 Romanian Liga 1 titles and 21 Romanian Cup titles; finished in 6th place or better more than 60 times; named as the favorite team of 60 percent of Romanians in a recent poll; beat Barcelona in 1986 to become the first Eastern European team to win the European Cup, the precursor to the current European Champions League (they returned to the final in 1989, only to lose to AC Milan).

The team was originally owned by the Romanian Ministry of Defense back in the Communist era. The Ministry relinquished ownership to private owners in 1998 after Communism took a dive, but somehow the Ministry retained ownership of the related intellectual property. (No, I'm no expert in Romanian law, so I can't explain how that worked.) The Ministry allowed the team to continue to use the team's primary identifiers: name, color scheme (red, blue and yellow, corresponding to the national colors), and emblem.

But sometime around 2004 there was a falling-out between the Ministry and the team's then owner, one George "Gigi" Becali – former shepherd, former member of the European Parliament, former member of the Romanian Parliament, present-day convict serving a three-year sentence for abuse of power. The Ministry declined to let the team under Mr. Becali use its historical name, colors and emblem, but Becali did so anyway. In 2011 the Ministry sued and, earlier this month, a Romanian court held for the Ministry. As a result, the team has no name: when it played in its home stadium after the verdict, the scoreboard identified the team merely as "Hosts". The team also has no colors: the players have taken to wearing solid yellow uniforms that make them look like Laa Laa the Teletubby.

What does this have to do with Washington's NFL club and its current trademark fight? The cases are, of course, entirely different. As a result of ongoing trademark litigation (not having anything to do with the FCC), the Washington football team might lose its exclusive right to its name and certain formulations of its logo but, unlike Steaua Bucharest, it could still use that name and logo – although it would be unable to prevent anybody else from using the same name and logo. By contrast, in Romania the Ministry currently holds the exclusive rights to

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Onward to the paperless future …

ECFS Now Available for Non-Docketed Filings

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In a move presumably designed to make everybody's lives easier, the Commission has expanded its Electronic Comment Filing System (ECFS) to accept a wide range of filings that previously could be filed only on paper. That's good news. But before you take advantage of this new opportunity, be sure you're familiar with the fine print.

Historically, ECFS has been available only for materials being submitted in docketed proceedings. Since many FCC activities don't involve such proceedings, paper filings have continued to be the order of the day in many areas. (Two years ago the Media Bureau opened up its CDBS system for pleadings directed at particular applications, but that still left many filings plodding the paper trail.)

Now the Commission has included a new "module" (dubbed, not surprisingly, the "Submit a Non-Docketed Filing" module) in ECFS to accept, electronically, certain non-docketed submissions.

The new module is currently up and running and ready to receive your non-docketed filings.

The new module is currently up and running and ready to receive your non-docketed filings, so feel free to use it for any of the types of filings listed below starting now. Use of the module is voluntary for the time being – so if you want to burn through those last couple of toner cartridges and boxes of copy paper, feel free to stick with hard-copy filings – but note that electronic filing for items so identified in our list below will be ***mandatory*** in the near future. (The dates when voluntary turns to mandatory have been set for some types, but remain To Be Determined for others, as indicated below.)

Filings accepted by "Submit a Non-Docketed Filing" module in ECFS:

- Formal complaints submitted pursuant to Section 208 of the Communications Act (***mandatory as of 1/12/15***)
- Pole attachment complaints submitted pursuant to Section 224 (***mandatory as of 1/12/15***)
- Network change notifications by incumbent local exchange carriers (***mandatory – date TBD***)
- Domestic Section 214 transfer-of-control applications (***mandatory – date TBD***)
- Domestic Section 214 discontinuance applications (***mandatory – date TBD***)
- Part 15 waiver requests
- Miscellaneous waiver requests
- Parts 32, 43, 64, 65 and 69 waiver requests for which a fee is required
- Petitions for declaratory rulings
- International High Frequency applications
- Section 325(c) applications (for delivery of service to foreign stations)

(*Editor's Note: Our calculation of the 1/12/15 date for mandatory filing is based on this notice in the Federal Register.*)

The process for filing is essentially the same as for docketed filings:

- Go to the ECFS home page;
- Click on the "Submit a Non-Docketed Filing" link in the list of "ECFS Main Links" (top left corner of the screen);
- From the drop-down menu select the type of filing you're submitting;
- Complete the rest of the form;
- Upload the document you want to file;
- Click the "Continue" button;
- Follow the remaining prompts.

The system will give you a confirmation screen with a unique confirmation number once the filing has been received into the system. (Practice tip: It's always a good idea to make and keep a screen grab copy of the confirmation screen, just in case any question ever arises.)

Easy-peezy, right? Sure, but don't forget the fine print cautions, which include:

When a filing is supposed to be accompanied by a fee (*e.g.*, transfer-of-control applications, certain waiver requests), you've got to pay the fee through the Commission's fee filer system.

Petitions for declaratory ruling seeking a Section 310(b) finding relative to foreign ownership of a wireless licensee should continue to be filed using the Commission's International Bureau Filing System.

Parties seeking confidential treatment for any of these filings should follow the Commission's rules requiring that the request be submitted through the

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Radio, cable, DBS, SDARS set to join TV in online public file club

Push to Expand Online Public File Obligations Moves Ahead at Warp Speed

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Back in July – that would be less than six months ago – three public interest groups asked the Commission to revise its rules to require cable TV and satellite TV (DBS) operators to maintain online public inspection files akin to the online files that conventional TV broadcasters have been required to maintain for about two years. As we reported in August, the Media Bureau wasted no time in seeking public comment on the proposal (which the Bureau expanded to include radio broadcasters and satellite radio (SDARS) operators as well) a couple of weeks after the proposal's submission.

And now, a mere four months later, the Commission has issued a Notice of Proposed Rulemaking (*NPRM*) formally proposing that cable and satellite operators (both TV and radio) – ***and*** radio broadcasters – all be subject to essentially the same online public file regime to which TV licensees are already subject.

While the FCC is moving unusually fast on this proposal, we probably shouldn't be surprised.

While the FCC is moving unusually fast on this, we probably shouldn't be surprised: the shift to online public files for TV licensees has proven to be relatively uneventful, and it has yielded a bounty of data for national public interest groups eager to slice and dice trends in political advertising. (That eagerness has already led to multiple complaints – check out CommLawBlog posts here and here, for example – in which watchdog public interest groups have questioned stations' compliance with the political file requirements.) With this success under its belt, the Commission presumably figures that it's a no-brainer to bring TV's cable, satellite and radio sibs to the online public file party, too.

It doesn't look like the FCC plans to make any changes to the existing online public file system (although the Commission has solicited any suggestions that commenters might want to offer). The materials required to be included in the public file aren't expected to change in any major ways for radio broadcasters. In particular, noncommercial stations would be required to post their donor lists (just as NCE TV stations are required to do) – although the *NPRM* expressly invites comments on that point. One possible change: the FCC thinks it would be easier for the Commission itself to generate stations' contour maps; however, stations would have to post the location of their main studios and their contact information (phone number/email address) online. The rules for cable and satellite operators may involve some similarly slight tweaks relative to the file's contents and organization.

As is the case with existing TV files, cable/satellite/radio folks would not be required to upload most materials that are already filed with the Commission, since the FCC will simply provide automatic links to such materials. For readers generally unfamiliar with the way the TV system works, take a look at a couple of CommLawBlog posts (here and here, for two) describing some of the practical ins and outs. Obviously, if you've got ideas about how it might work better, you should let the Commission know – but you probably shouldn't get your heart set on a prompt and favorable agency reaction.

As for the anticipated roll-out of the expanded online public file requirement, the FCC plans to use the same approach it used for TV broadcasters: a reasonable amount of time for one and all to get familiar with the system; no obligation to post political files or communications from the public created prior to the effective date of the expanded rules; relatively minor changes to the texts of public announcements required in connection with renewal applications. The roll-out would be phased in to reduce the burden on smaller broadcasters and cable systems. Radio stations which (a) are in the top 50 Nielsen Audio (formerly known as Arbitron) markets and (b) have five or more full-time employees would have to take their files online at the same time as cable, DBS and SDARS operators. Other broadcast radio licensees would be off that particular hook for two years. Sensitive to the potential burdens maintenance of an online public file might impose, the *NPRM* also proposes to "initially exempt" noncommercial educational radio stations and all radio stations with fewer than five full-time employees from any online public file requirement. It's not clear how long that "initial exemption" might last, but the *NPRM* does ask whether such an exemption should be made permanent.

Similarly, the FCC is thinking of rolling out the online requirement for cable systems based on their size: first up would be systems with 5,000 or more subscribers, then systems with between 1,000 and 4,999 subscribers. The Commission is currently thinking that systems with fewer than 1,000 subs might be permanent-

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ly exempted from the requirement.

The Commission's full-speed-ahead approach to the online public file proposal contrasts sharply with its plodding approach to AM revitalization. As indicated above, the proposal to spread the online public file requirement beyond broadcast TV didn't surface until last July, and then it didn't include broadcast radio. Apparently on its own motion the Bureau, in seeking preliminary comments, expanded the proposal in August and now, a mere four months later, we're looking at an NPRM. Contrast that to AM revitalization. While the FCC did issue – in 2013 – an NPRM looking to improve various aspects of AM operation, many of those changes had been formally proposed in petitions for rulemaking as early as 2009. To be sure, some of the AM revitalization components may be more complex than mere expansion of the now-tried-and-true online public file system, but at least some of the AM revitalization components could presumably be adopted and implemented without much muss and fuss. Why those components have been left on the sidelines for more than five years while the online public file expansion has been moved to the head of the line in less than six months is not clear.

The Commission's proposal is ironic in at least a couple of respects.

The Commission's proposal is ironic in at least a couple of respects. According to the *NPRM*, moving public files online is warranted in large measure because the "evolution of the Internet and the spread of broadband infrastructure have transformed the way society accesses information today", so much so that it is "no longer reasonable" to expect the public to have to travel to a station to review its public inspection file. That may be the case, but why then does the Commission persist in fining licensees who rely primarily, if not exclusively, on online employment notices when recruiting to fill staff vacancies? (In addition to this post from a couple of years ago, check out this decision released by the Media Bureau the day before the *NPRM*.) Ditto for the FCC's resistance (which seems at long last to be cracking) to the notion of maintaining contest rules online?

Another irony: Despite the proposed Internet-ization of the broadcast public file rule, the title of that rule would remain unchanged. According to the *NPRM*, the title would still refer to the "**LOCAL** Public Inspection File" (emphasis added). This is ironic because placing these files online is the antithesis of localization. Absent some kind of geo-fencing (and the *NPRM* does not address that possibility), the placement of public files online expands their availability exponentially, well beyond each station's respective service area. Complaints filed thus far based on information gleaned from online TV public files have not been filed by local individuals or entities.

Historically, a broadcast station's public file has been required to be located within the station's service area to insure the station's audience reasonably convenient access both to the file and to the station's management personnel. Online availability may make the files somewhat more accessible to some members of the station's audience, but it does not bring audience and station management any closer together. The primary effect of online availability is to provide accessibility to folks far outside the station's service area, folks who could not themselves be local listeners. In that respect the proposed change undeniably signals a fundamental shift in the effect of the rule. While the FCC might claim otherwise, the proposed change also signals a fundamental shift in the purpose of the rule as well. That being the case, it would seem appropriate, and honest, to revise the rule's title to reflect that change in effect and purpose.

The deadlines for comments and replies have not yet been established. Check back with CommLawBlog for updates on that front.

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Secretary's office with a redacted version submitted electronically. (Remember, anything filed electronically will be available for all the world to see. You have been warned.)

> In some situations, the filing of a non-docketed item may cause the Commission to open a new docket. When that happens, any further filings, included responses, will have to be filed through the conventional ECFS interface, referencing the now-docketed proceeding.

And as the notice at the top of the "Submit a Non-Docketed Filing" page warns,

> Do not use this form to submit informal complaints about service providers. Do not use this form to submit comments in a proceeding for which a docket number (e.g. 14-1) or rulemaking number (e.g. RM-10001) has been assigned, comments on existing licensing proceedings, comments in existing formal complaint proceedings, or anything for which another existing electronic-filing system is available.

Eventually this will all become second nature to all of us, but it will be good to keep these various considerations in mind as we get used to the opportunity to file non-docketed items electronically. Anyone contemplating such a filing should be sure to take a close look at the Commission's public notice announcing the new system.

Pre-spectrum auction gear certification

Now Available for Your Review and Comment: Form 2100, Schedule 381

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In early December we came upon a Federal Register notice announcing the start of a two-month period for the filing of comments about a new FCC form (Form 2100, Schedule 381, to be exact - a/k/a "Certification of TV Broadcast Licensee Technical Information in Advance of Incentive Auction"). No copy of the form was included in the Federal Register notice, and our request for a copy (emailed to the Commission) went unanswered – which caused us to wonder why the FCC had bothered to put the notice in the Register in the first place. But a couple of weeks later we got word that the form had become available and, sure enough, when we emailed the Commission again asking for a copy, we got one lickety-split. Here's a link to what was sent to us. (Actually, we received a Word version, which we have converted to PDF.)

As a quick glance indicates, it's still something of a work in progress. That's to be expected when the FCC invites comments on a form: by definition the form is subject to change based on the comments that get submitted. So here's your chance to take a look at the Commission's current draft and chip in your two cents' worth.

The information about equipment will be used in determining relocation reimbursements.

Schedule 381 is designed to provide the Commission assurance that the technical profile of the television industry as reflected in the FCC's database is accurate. That's obviously important because that profile will be used both to identify the facilities to be sold in the reverse auction and to form the starting point for the spectrum repacking effort which is the ultimate goal of the auction. Secondarily, the completed forms will provide the FCC with a comprehensive database of all the specific transmission equipment (transmitters, antennas, transmission line) currently in use. The detailed information about equipment will be used in determining relocation reimbursements.

All full-power and Class A TV licensees entitled to mandatory protection in the auction – and those with Commission-afforded discretionary protection – will have to complete and submit Schedule 381. Those folks all presumably have an idea of who they are, but they will know for sure when the FCC issues its "Eligibility Public Notice" spelling out the facilities that the Commission believes to be entitled to protection. The notice will specify a deadline by which protected licensees will have to submit Schedule 381. (We're guessing that that won't happen before the late summer of 2015, but you never know.) Completion of the form will entail a number of separate and distinct chores.

Database Certification. A licensee's "Eligible Facilities" will be those specified in a specific authorization file number that will be pre-filled in the Schedule 381 for each station. Each respondent will have to review that authorization and confirm that the authorization accurately reflects the facilities actually used by the station. Additionally, respondents will have to do the same for

> all underlying technical data that sets forth the operational parameters of the Eligible Facility, including but not limited to technical information that may be found in the Commission's Consolidated Database System and Antenna Registration System.

Ideally, the precise metes and bounds of that latter category – referred to as "Database Technical Information" – will be tightened up some before the form is finalized. CDBS and ARS are, after all, fairly expansive databases in which a wide variety of not-necessarily-consistent information "may be found". Since the FCC will be asking respondents to certify to the accuracy of certain information, the respondents should be given the clearest possible direction as to what information they're certifying about.

Once the authorization and all the Database Technical Information (DTI) have been reviewed, the respondent will have to certify that one of three circumstances applies: (1) the authorization and DTI are all consistent with themselves and with the station's actual facilities; (2) the authorization and the DTI vary in some respects; or (3) the station's actual operating facilities differ from those specified in the authorization/DTI. In the latter two events, explanatory exhibits must be included.

(Also, if the station's facilities don't match up with the authorization/DTI, the licensee will have to apply for (1) a minor mod – to bring its authorization into conformity with its facilities – and (2) an STA to operate with its variant facilities until its mod application is granted. But note that that won't affect the facilities protected in the auction/repacking process: each licensee can expect to be protected only to the extent of the

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parameters set out in the Eligibility Public Notice.)

Since review of the authorization and DTI really can't get started until the authorization is identified and the notion of DTI is clarified just a bit, it's probably too early to worry about that end of things just yet. But it's not too early to gather the information sought by the rest of the form.

Information on Eligible Facility. As currently drafted, the second and final chunk of the form asks for details about the equipment currently used in the station's transmission system:

Transmitter. The "main" or "primary" (the form uses both descriptives) transmitter must be identified by make and model number (no dashes or spaces, thank you very much), and its maximum power output capacity according to the manufacturer's specs must be provided. You will also have to indicate whether it's solid state or tube.

It's extremely important that the description of the station's actual facilities be accurate.

Antenna. No need for make/model number, but you will have to specify (from a list of options) what kind of antenna it is (*e.g.*, slot, panel, batwing, etc.) and how it's mounted (*e.g.*, top-mount, side-mount, candelabra, etc.). If the options listed in the form don't cover your particular antenna, you'll have to provide an explanatory exhibit. You'll also have to say whether it's a broadband unit – that is, whether it can operate over multiple channels – and, if it is, you'll have to provide its frequency range. And the Commission wants to know whether you're sharing the antenna with another station and, if so, which station (call sign and Facility ID number, please).

Transmission line. In this portion, you're supposed to say whether your transmission line is flexible or rigid – no real problem there – and if it's rigid, you're supposed to indicate the "length sections". But then the form adds parenthetically that "If no single component consists of 90% or more of the entire transmission system, include an explanatory Exhibit." We suspect that the term "entire transmission system" may refer to the "entire length of transmission line from transmitter to antenna", but we're not sure.

Antenna Support Structure. And the last portion involves the station's antenna support structure. In its current draft the form first asks "In what year was the last structural analysis conducted on the structure?" The possible answers are "select year" or "other". It's not clear how you could answer a question starting with "in what year" in any way that does not involve selecting a year but, of course, if you were to pick "other" you'd have to provide an explanatory exhibit.

The second tower question is "Under what structural standard was the last structural analysis conducted?" Your choices: TIA 222-Revision F, TIA 222-Revision G, and (of course) Other. Again, an "other" answer requires an exhibit.

And the third question: Does the respondent licensee own the tower and, if not, who does?

It seems like that third question might be more usefully moved up to the first question. After all, if you're just a lessee on a tower, will you necessarily know when the last structural analysis was done? And even if you happen to know the date, how likely are you to know the structural standard used? It seems far more likely that the tower owner, rather than its lessees, will have that information. And if that's the case, why not ask first if the respondent/licensee is the owner? If it is, then it can answer the follow-up questions; if it isn't, it can provide the tower owner's contact information for the FCC to follow up with.

Virtually all of this information will probably need to be assembled by a competent engineer (although, as noted, the tower structure information will most likely have to be obtained from the tower owner). Again, it's extremely important that the description of the station's actual facilities be accurate because that description will be an important determinant in calculating the licensee's relocation reimbursement. While the particular way in which the Commission asks for this information may ultimately be revised somewhat from the current draft of Schedule 381, it's pretty definite that this is the information the Commission will be looking to obtain one way or the other. If you have suggestions that might improve this information collection process, now would be a good time to let the FCC know.

And the bad news for those of you who happen to be using a distributed transmission system (DTS): you're going to have to complete a separate Schedule 381 for each separate transmitter/antenna.

Again, let us emphasize that the form is still in a formative state: nothing is etched in stone, and input from the folks who will eventually be subject to the form may prove useful both to themselves and to the Commission. We encourage one and all to go through it carefully and let the FCC know what you think.

So there you go – Form 2100, Schedule 381, all set for review and comment. If you have any suggestions, you've got until ***February 2, 2015*** to let the Commission know.

Ah, Wilderness!

Forest Service Re-examining Standards for Media Access to Wilderness Areas

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If you as a broadcaster, producer, or artist want to head into a congressionally-designated wilderness area to create some programming (both newsgathering and other programming), you will likely have to get a permit to do so from the National Forest Service (NFS). And yes, the power to require a permit also encompasses the power to require a fee for that permit, so you can expect to have to pay for the privilege.

For years the standards imposed by the NFS on requests for such permits have been considerably subjective, which is never a good thing: the First Amendment frowns on governmentally-imposed limitations on freedom of expression and the press, especially when those limitations can be arbitrarily applied. To its credit, though, the NFS is considering tightening up its criteria. Whether the end result will assure broadcasters a constitutionally acceptable set of standards remains to be seen. But any broadcaster operating near a federal wilderness area – or who might at some point want to send a crew into such an area – should be aware of the NFS's proceeding.

The NFS's standards are far from definite, which gives it a lot of wiggle room.

The NFS is charged with (among other things) the protection of wilderness areas. To that end, it has the authority to limit access to those areas. No problem there. But for some time the NFS has been imposing an "interim" directive specifying that permits for still photography or "commercial filming" in wilderness areas "may" – but not must – be issued. For these purposes, "commercial filming" includes the use of "motion picture, videotaping, sound-recording, or any other type of moving image or audio recording equipment", for the purpose of

> the advertisement of a product or service, the creation of a product for sale, or the use of actors, models, sets, or props, but not including activities associated with broadcasting breaking news. For purposes of this definition, creation of a product for sale includes a film, videotape, television broadcast, or documentary of historic events, wildlife, natural events, features, subjects or participants in a sporting or recreation event, and so forth, when created for the purpose of generating income.

(Note that this reaches both TV *and* radio broadcasters.) The term "commercial filming" does *not* exclude news and documentary production (except for "broadcasting breaking news"), nor does it necessarily exclude noncommercial broadcasters. (FYI – According to the NFS, the term "breaking news" is narrowly construed to involve "[a]n event or incident that arises suddenly, evolves quickly, and rapidly ceases to be newsworthy.")

In other words, as matters now stand, if any broadcaster wants to send a crew into a wilderness area to produce a piece on, say, migratory birds, a show about your local Forest Service lands akin to The National Parks documentary by Ken Burns, or some other newsworthy topic that doesn't happen to be "breaking news", the broadcaster may be required to make the necessary showing. The broadcaster will then have to keep its fingers crossed, hoping that the NFS will be satisfied that the proposed activities: (a) meet certain threshold screening criteria; (b) won't harm the land, (c) won't interfere with others' use and enjoyment of the land, (d) won't create any risk and (e) will "contribute[ ] to the purposes for which the wilderness area was established".

Let's face it, those standards – and particularly that last one – are far from definite, which means that the NFS has a lot of wiggle room. And, sure enough, according to comments filed with the NFS by a number of public broadcasting organizations, the current standards have been interpreted differently by different NFS officials, leading to a range of disparate treatments of similar requests. Take, for example, the case of Idaho Public Television (IPTV). According to the comments, in some instances NFS officials let IPTV film without a permit because it's noncommercial, while other times a permit was required because IPTV was "considered a commercial entity". (That last conclusion was reportedly based on the fact that IPTV's "employees are paid a salary, or because it fundraises for its operations from private contributions, or because it makes some of its free on-air and online content available in a DVD format as a service for viewers at a small cost.")

Recognizing that the interim directive currently in place doesn't provide "adequate guidance" relative to commercial photography and filming permits, the NFS has proposed alternative wording. The goal is to estab-

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lish guidelines for the evaluation of requests for special use permits related to still photography and commercial filming in wilderness areas. Whether the proposed language changes achieve that goal is not at all clear.

The proposal retains the initial four guidelines, but amplifies considerably the fifth (*i.e.*, the one requiring that the proposed activity "contributes to the purposes for which the wilderness area was established"). The NFS is instead proposing that an applicant seeking to engage in commercial photography or filming demonstrate that its proposed activity:

- has a primary objective of dissemination of information about the use and enjoyment of wilderness or its ecological, geological, or other features of scientific, educational, scenic, or historical value;
- would preserve the wilderness character of the area proposed for use, for example, would leave it untrammeled, natural, and undeveloped and would preserve opportunities for solitude or a primitive and unconfined type of recreation;
- is wilderness-dependent, for example, a location within a wilderness area is identified for the proposed activity and there are no suitable locations outside of a wilderness area;
- would not involve use of a motor vehicle, motorboat, or motorized equipment, including landing of aircraft, unless authorized by the enabling legislation for the wilderness area;
- would not involve the use of mechanical transport, such as a hang glider or bicycle, unless authorized by the enabling legislation for the wilderness area;
- would not violate any applicable order; and
- would not advertise any product or service.

While the new language certainly puts flesh on the previously skeletal standard, it does not eliminate the First Amendment problems. To the contrary, it highlights them. Most obviously, the first element – requiring analysis of the "primary objective" of the activity – gives rise to possible content-based discrimination in the issuance of permits. From a wilderness conservation perspective, what difference does a broadcaster's ultimate editorial purpose make? Sure, the NFS can and should protect against the possibility of physical harm to the wilderness area. But once such protection is assured, the photographer/sound-recorder/videographer's ultimate editorial goal should be of no consequence to the NFS.

That's especially true in view of the fact that "commercial filming" encompasses all manner of documentary and news-gathering except for the particularly narrow "breaking news". Normally, news media would prefer not having their access to federal facilities limited based on their editorial purposes.

On the positive side, the National Forest Service Chief has acknowledged the potential problems and has sought to de-fuse them in a memorandum issued last month. According to Chief Thomas Tidwell,

> Journalism is not to be considered a commercial activity for purposes of the regulations or our permit policies on any NFS lands. Journalism includes, but is not limited to: breaking news, b-roll, feature news, news documentaries, long-form pieces, background, blogs, and any other act that could be considered related to news-gathering.
> ...
> If the primary purpose [of the proposed activity] is to inform the public, then no permit is required and no fees assessed.

The new language doesn't eliminate the First Amendment problems; it highlights them.

While that may sound comforting, the actual language proposed by the NFS stops far short of Chief Tidwell's gloss. As a result, notwithstanding that gloss, the potential for constitutionally inappropriate limits on access to wilderness areas could likely continue even if the NFS's proposal were adopted. Ideally, the Chief's recognition of the problem may lead to revisions to the directive's language before it is adopted. Along the same lines, the NFS may want to take a look at its definition of "commercial filming".

In any event, broadcasters should be alert to the NFS's proposal and its potential impact on their activities. We'll keep track of this proceeding and let you know when we learn of further developments. Check back on CommLawBlog for updates.

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the Steaua marks, so it's in a position to bar anybody, including, apparently, the team itself, from using those marks at all.

There are lessons to be learned here about the value of trademark rights. The failure to secure those rights – or to properly vet your use of a name, logo or other branding element before commencing that use – can have not only financial ramifications (as the Washington football team might one day suffer) but it could even go further into forcing an entire identity crisis and rebrand (as Steaua Bucharest is facing now).

Hail to the, um, Hosts!

But who will laugh last?

D.C. Circuit Rebuffs SoundExchange in CRB Appeal of SDARS/PSS Royalty Rates

By Kevin M. Goldberg
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When it comes to setting copyright royalty rates, the Copyright Royalty Board (CRB) enjoys considerable leeway. Just ask the U.S. Court of Appeals for the District of Columbia Circuit.

In an across-the-board victory for the CRB, the Court has upheld the CRB's final 2013 ruling determining royalty rates for the Satellite Digital Audio Radio Service (SDARS, a service with only one operator, Sirius XM) and Pre-existing Subscription Services (PSS) (*e.g.*, the appellant in this case, Music Choice). While the particular rates at issue in the appeal are probably not of much direct interest to most of our readers, a couple of aspects of the Court's opinion could come into play when the CRB eventually resolves "Webcasting IV". That's the proceeding that will establish rates and terms for webcasting by radio stations and other non-interactive services for the years 2016-2020.

This is important to keep in mind when it comes to Webcasting IV.

First, there's the question of how the CRB reaches a particular royalty rate. If the affected parties (*i.e.*, service providers and copyright owners) can't come to mutually agreeable terms, the question goes to the CRB, which conducts a trial-type proceeding. The interested parties propose rates, or rate ranges, and then offer evidence to support their respective proposals. Each side gets to challenge the other's evidence. In the end, the CRB reviews all the evidence and comes up with rates to apply over the coming five-year term.

For the period ending 2012, Sirius XM was paying 8% of its gross revenues under the then-operative CRB rates; the corresponding rate for PSS operators was 7.5% of gross revenues. SoundExchange, representing copyright holders, wanted both numbers to go up … a lot. It proposed that SDARS rates jump to 12% in 2013 and then continue to climb to 20% by 2017. SoundExchange had even more extravagant ideas for PSS rates: in its view the current rate should be doubled to 15% for 2013 and then proceed upward to a whopping 45% of gross revenues in 2017. Not surprisingly, Sirius XM and Music Choice disagreed. Both wanted their respective rates to be reduced *below* 2012 levels: Sirius XM was thinking of SDARS rates down in the 5%-7% range, and Music Choice was thinking even smaller, proposing 2.6% on the PSS side.

Faced with the wide gulf between the various proposals, the CRB reviewed the evidence and concluded that the SDARS rate should start at 9% in 2013 and then proceed upward in annual 0.5% steps until it reaches 11% in 2017. On the PSS side, the CRB concluded that the 2013 rate should be 8%, rising to 8.5% for 2014-2017. In taking this route, the CRB rejected both sets of proposed rates and instead opted to use the current 2012 rates as "guideposts" for future rates. In the SDARS context, it also looked at its own deliberations in the previous rate setting proceeding (covering 2005-2012), in which the CRB had concluded that 13% was an upper limit for SDARS rates.

Needless to say, SoundExchange wasn't pleased on either the SDARS or the PSS front, and Music Choice was none too pleased, either. (Sirius XM appears to have been OK with the CRB's SDARS rates.) Both SoundExchange and Music Choice challenged the CRB both on its reliance onsupposedly outdated "guideposts" and on its refusal to accept the parties' proposals. The Court, however, had no problem with the CRB's approach. As the Court saw it, the CRB is entitled to a boatload of deference when it comes to rate-setting, and the CRB's approach in this proceeding was well within the bounds of the discretion accorded it by Congress.

This is important to keep in mind when it comes to Webcasting IV. While we can expect SoundExchange to propose significant increases in rates there, it should be comforting to know that: (a) the CRB does have a history of preferring more gradual step-ups tied at least in part to existing rates; and (b) the Court is fine with that approach. In other words, if the CRB in Webcasting IV finds itself in the same situation as in the SDARS/PSS proceeding, with wildly varying proposed rates, the CRB may very well take a more measured, split-the-baby course. And if it does so, there's a reasonably good chance that it will be upheld.

The second interesting point involved the definition of "gross revenues". Obviously, that term – the second half of the rate calculation – is as important as the percentages to be applied. And since the dispute about that definition involved (among other things) questions relating to pre-1972 sound recordings – a hot issue of late, as

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Dubious "special reports" net $115K penalty

Sponsorship ID Police Strike Again

By Howard Weiss
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The fake news business appears to have been booming in 2009 – at least as far as we can tell from a couple of FCC enforcement actions. Last February we reported on a $44K fine issued to a Chicago radio station for airing, in 2009, a number of bought-and-paid-for announcements gussied up to sound like newscasts. And now the Enforcement Bureau has announced a consent decree with a Las Vegas TV licensee, the terms of which call for payment of a $115,000 "civil penalty" for the broadcast of some 2009 "Special Reports" that (a) looked a lot like news but (b) were apparently bought-and-paid-for as well.

Don't let the fact that it took the Bureau five years to lower the boom on these stations distract you: it just demonstrates that the current Commission intends to enforce the sponsorship identification rules aggressively, regardless of when the violations may have occurred.

The Commission intends to enforce the sponsorship identification rules aggressively.

The sponsorship ID rule (Section 73.1212) is mandated by Section 317 of the Communications Act, which requires that broadcasters identify whoever is paying for the broadcast of any matter. To that end, Section 73.1212 requires that stations "fully and fairly disclose the true identity" of anybody paying to have any particular content broadcast.

Precisely what the Vegas station (KTNV-TV) did is not clear from the consent decree, which summarizes the violations only as follows:

> KTNV-TV accepted payment from the dealerships to produce and air several versions of what KTNV-TV called a "Special Report" about the liquidation at the dealerships. The "Special Reports" were formatted in the style of a news report and featured a KTNV-TV employee who, in the manner of a television reporter, questioned representatives of the dealerships about their ongoing liquidation sales events.

A 2009 report on the Las Vegas Review-Journal website provides a bit more context. It appears that an advertising agency representing some local car dealerships approached stations in the market with a proposal: the dealerships would buy a flight of conventional ads, but in addition the station would be expected to insert into their regular programming a series of on-site "news interviews" that would "promot[e] the liquidation sale of cars whose franchise had been cancelled by" the auto manufacturer. (Remember that this was 2009, when the car business wasn't doing so well.)

It's not clear whether the "news interviews" were to be scripted by the ad agency (or the dealerships), or whether that was left to the station. But what does appear clear is that the agency was insisting on some type of "news interviews" to be broadcast by the stations over and above the standard spots that were also to be broadcast. One station advised that it had been warned by the agency that "if you cannot guarantee the news coverage, you won't get that buy."

And sure enough, in the Review-Journal article, a KTNV-TV official was quoted as acknowledging that "the advertising agency representing the client at issue did request news coverage for the client as part of the advertising buy, [but] KTNV declined to provide such news coverage." That denial, however, is contradicted by the Consent Decree, in which KTNV-TV admits that the "Special Reports" – which presumably were the "on-site news interviews" – "were not in fact news coverage, but instead paid advertisements". (In its initial response to the FCC, KTNV-TV had argued that, while the interviews were indeed ads, the "context" of the interviews made it clear that they were ads – a claim the Bureau declined to accept.)

We're guessing that the agency tried to pitch the deal as essentially rewarding stations for covering news – *i.e.*, the liquidation of car dealerships as a result of the recession – that the stations would be covering anyway. And such rewards could be completely legal – ***IF*** the coverage (*i.e.*, the "on-site news interviews") had been properly identified to viewers as having been paid for.

This underscores the need for stations to be completely upfront with audiences when it comes to programming for which ***any*** consideration has changed hands.

Of course, this puts a station involved in such a deal in

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something of a bind. Suppose, for example, that its news department determined – independently of any advertising deal the station's sales department might have cooked up – that an interview with a car dealer about liquidation sales was newsworthy. The news department might legitimately believe that that interview would not have to be tagged with a sponsorship ID. But if the station can be shown to have agreed to broadcast some such interviews as part of an advertising package, how is the public – and the FCC – going to know which interviews are paid for and which aren't?

All of which counsels strongly against any kind of ad deal that would require the station to broadcast material – and particularly material dressed up to look like "news" – without including a sponsorship identification.

A note about the amount of the "civil penalty". In the case from last February, the Bureau calculated the fine based on a standard amount ($4,000) per violation, and each separate untagged newscast was deemed a violation – so the licensee there was charged $44,000 for 11 violations. In the Vegas case, the licensee copped to 27 violations which, at $4K a pop, would come to $108,000. Since KTNV-TV will be paying $115,000, did it get a bad deal? Maybe, maybe not.

By entering into a Consent Decree, the licensee has effectively closed the book on this investigation: no more FCC questions, no more legal bills, no more hassles. That could easily be worth the $7,000 differential between what it's paying and what the apparent rack rate for its violations would have come to. Of course, it did agree to a "compliance plan", which will require some ongoing effort (*e.g.*, appointment of a "compliance officer"; development and implementation of a "Compliance Plan" and "Compliance Manual"; "education" of sponsors regarding sponsorship ID; a series of reports to the licensee's Board of Directors and the FCC). While that might impose some day-to-day hassles, that's a non-cash cost. Ultimately, the bottom line apparently made sense to KTNV-TV.

And for everybody else, the bottom line should be an acute awareness that the sponsorship ID rules are alive and kicking and the FCC's Sponsorship ID police are prepared to bring the hammer down hard when those rules are violated.

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CommLawBlog readers know – the Court's decision deserves attention.

The CRB had agreed to let Sirius XM deduct from its "gross revenues" revenue attributable to the performance of pre-1972 sound recordings because, as we all know by now, there is no federal public performance copyright protection for such recordings. In response, SoundExchange claimed that that deduction amounted to "double deducting". Since, unlike the feds, some states do provide performance copyright protection for pre-1972 recordings, SoundExchange offered two alternative analyses. In states which do not offer such protection, according to SoundExchange, the CRB's established benchmark rates already reflect the "diminished value" of these recordings, which means that a CRB-approved deduction would be a double-dip. And in the other states, there is no need for any such deduction, at least as SoundExchange sees it.

The Court wasn't buying any of it. It agreed with the CRB that there was plenty of evidence indicating that the benchmark rates do not already reflect the value of pre-1972 recordings. And the Court also concluded that there's nothing in the Copyright Act concerning the effect of state-imposed copyright protection, so that factor need not be considered by the CRB in its rate-setting.

In the course of this discussion, the D.C. Circuit noted (in agreement with the CRB) that there is no federal copyright protection for pre-1972 sound recordings. While that may be reassuring on some level, it is no cause for celebration: as I have reported, three courts in California and New York have indicated that state laws creating certain copyright protection for these pre-1972 sound recordings extend to the public performance right. (In all three of those suits Sirius XM was the loser.) It's at least possible that the D.C. Circuit's prominent reminder of the non-existence of federal protection might hasten similar lawsuits at the state level – with similar results. It might even spawn a movement to legislatively expand state law protection for pre-1972 sound recordings. Or it might give rise to efforts to work a legislative fix at the federal level – and who knows what Congress might also choose to include (hint, hint: other Performance Rights?).

And if any (or all) of those circumstances do unfold, that could be bad news for Sirius XM, which has thus far enjoyed a largely royalty-free ride when it comes to pre-1972 recordings. So, even though it was the only party that didn't disagree with the CRB's ruling, Sirius XM's victory on the issue of how to calculate gross revenues could turn out to be pyrrhic for Sirius XM and unfortunate for others.

Mitchell Lazarus to Retire - Mostly

Mitchell Lazarus, FHH veteran and CommLawBlog regular, has announced he will retire at the end of this year. But not completely. Mitch will stay on the FHH letterhead as Of Counsel, will keep an office in our suite, and can still be reached through his FHH phone number and email address. We will, of course, also keep his suite in the *Memo to Clients* bunker (which we share with the nice folks at CommLawBlog) ready for him.

IMPORTANT: Mitch's active clients should have received an email about this transition. If you did not, please contact him at lazarus@fhhlaw.com.

Mitch came to the law the long way around and relatively late in life. Holding advanced degrees from M.I.T. and Georgetown University in three different fields, he has earned his living as an electrical engineer, psychology professor, education reformer, educational TV developer, free-lance writer, and (until now) telecommunications lawyer. His legal specialty, in addition to fixed microwave communications, has been securing regulatory approvals for new technologies. Most of this work involves behind-the-scenes industrial and commercial devices, but *Memo to Client* readers will be familiar with at least two of his successes: contemporary Wi-Fi and the "millimeter wave" body scanners used at U.S. airports.

Mitch is a frequent speaker on issues at the intersection of law and engineering. He has published several articles in the widely-read *IEEE Spectrum* magazine, and authored the widely-ignored "Government Warning" on U.S. alcohol beverage labeling. In his off hours, he is finishing a book about the Manhattan Project and tells us he has another book in the pipeline.

Mitch has promised to continue to stay in touch and contribute items of interest to *MTC* readers, and we intend to hold him to that. We here in the bunker are incredibly grateful to Mitch for his input over the years. We hope our readers are equally grateful. They have reason to be.

And with that, a final Editor's note to Mitch as he embarks on his next adventure: Godspeed.

FHH - On the Job, On the Go

On January 5 **Paul Feldman** will be moderating a panel (title: "Net Neutrality: Where Are We Now?") at the Broadband Conference at the Consumer Electronics Show in Las Vegas.

Scott Johnson will be participating in a meeting of the board of the Alabama Broadcasters Association on January 14 in Birmingham, after which he will zip over to Columbia, South Carolina where he'll be presenting an FCC regulatory and legal update program at the 2015 Winter Conference of the South Carolina Broadcasters Association on January 29. (**Doug Miller** and **Eric Rice** from the FCC's Atlanta Field Office are scheduled to join **Scott** in his presentation.)

On the academic side, **Harry Cole** will be participating in the Fifth Annual Sports and Entertainment Law Symposium presented by the Sports and Entertainment Law Society of the Duke Law School in Durham, North Carolina on January 16. (He'll be speaking about the *Aereo* case.)

Looking ahead to February, **Frank Jazzo** will be attending the Winter GM Conference of the New Mexico Broadcasters Association in Santa Fe on February 2-3. He'll be moderating the Legislative Update session on February 3.

And if you're planning on hitting the National Religious Broadcasters Convention (a/k/a NRB15 – the NRB International Christian Media Convention) in Nashville from February 23-26, be sure to look for the FHH contingent. Currently on the list are **Matt McCormick** and **Harry Martin**, but don't be surprised if others make the scene as well. **Harry M** has organized a panel, scheduled for February 23, on developments in radio regulation at the FCC. He'll be participating as a panelist, along with (among others) the FCC's **Peter Doyle**.

Meanwhile, **Frank Montero**, back from a jaunt to Point Pleasant Beach, New Jersey where he made a presentation to the Board of Directors of the New Jersey Broadcasters Association, will be attending and speaking at the Broadband and Social Justice Summit of the Minority Media & Telecom Council in Washington from January 21-22. But that's not all **Frank M**'s been up to. While he was on the train up to Point Pleasant Beach, he penned a brief piece about the FCC's regulation of "indecency" on Spanish-language radio – and it was published by (wait for it) the NEW YORK TIMES on the "Room for Debate" opinion page of its website. When you're talking about the Main Stream Media, it's hard to get more Main Stream than the NYT – which is why you, **Frank M**, are our *Media Darling of the Month*!

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- *Emergency Programming* – These Best Practices do not change the requirement that, in case of an emergency, ***all*** relevant emergency information must be conveyed by some means, whether it is closed captioning, open captioning, text crawls, or even hand-lettered signs.

The Commission intends to re-visit these new requirements after broadcasters have had the opportunity to test them out. One year after the new ENT requirements go into effect, broadcasters who have relied on the new measures must prepare a report which describes their experiences and the extent to which the measures have been successful in ensuring that full and equal access to news programming has been provided. The report must be prepared in consultation with consumer groups, and it may be prepared by the NAB on behalf of the affected broadcasters (although individual stations may provide their own reports as well). The Commission will consider economic and technological information provided to determine whether ENT should be phased out as a captioning method for at least some DMAs.

General Captioning Quality Controls.

The rules likely to have the greatest impact on broadcasters impose quality control standards for captioning. Despite the fact that captioning technology has been with us in one form or another for decades – and a regulatory requirement since 1997 – the FCC still hears from deaf/hard of hearing viewers complaining that captions are "gibberish", "garbled", "butchered", and the like. Way back when, the Commission expected that video programming providers would work with captioning companies to develop reasonably high standards for captioning. That apparently hasn't worked out as planned. Accordingly, the FCC is moving from the voluntary to the mandatory.

The FCC is moving from the voluntary to the mandatory.

Starting with the premise that captioning should "replicate the hearing listener's aural experience", the Commission has identified, and sought to standardize – at least generally – four separate qualitative components of captioning: accuracy, synchronicity, completeness and placement. The precise application of each may vary depending on the type of programming in question: while full compliance with all standards (other than the occasional *de minimis* error) is expected when it comes to pre-recorded programming, captioning of live and "near-live" programs may get some slack.

Accuracy – Captions should: (a) contain *all* the words audible to hearing viewers; and (b) be punctuated to convey precisely what is said. Spelling and grammar should be correct – *unless* some misspelling, grammatical errors or slang are intentionally included in the original content, in which case the captions should do what's necessary to reflect the particular phrasing. Don't forget sound effects, off-camera sounds/noises, and such – and identification of any off-screen speakers.

Synchronicity – Captions should be synched up with the audio so that the written words begin and end pretty much as the spoken words/sounds occur. The FCC cautions that "synchronicity" also means that captions must be displayed "at a speed that can be read by viewers" – which could cause some logistical problems in particularly rapid back-and-forth on-screen exchanges.

Completeness – The entire program must be captioned, from its absolute beginning to its absolute end. This appears to be a particular problem when it comes to live programming, where the captioning can lag behind the audio for obvious practical reasons – and when the show ends and a commercial or following program comes on, the captioning may be cut off even though it hasn't totally caught up with the broadcast content. The FCC recommends various types of cooperation between programmers and captioners to address this problem, and it's also soliciting suggestions for additional means.

Placement – The simple rule is that "captions should not block other important visual content on the screen". "Visual content" in this context means pretty much anything that is "essential to understanding" the program's content: character faces, featured text or graphics (in, *e.g.*, news and weather alerts), significant plot elements, etc.

When it comes to ***pre-recorded*** programming, the Commission expects near-perfect captioning relying on off-line captioning techniques. The use of "real-time" techniques – *i.e.*, the type of captioning usually used to caption live shows essentially on the fly – is discouraged for pre-recorded programs except when unusual circumstances require it.

Live or "near-live" programming, on the other hand, normally requires "real-time" captioning, and so will be subject to a somewhat more forgiving standard. ("Near-live" programming is defined as "video programming performed and recorded less than 24 hours prior to the time it was first aired on television.") Complaints about captioning of such programs will be assessed based on a variety of factors including, among other things, the overall accuracy of the captioning, the extent to which any errors effectively "prevented viewers from having access" to the programming, and the VPD's efforts to satisfy other quality-related standards imposed by the Commission (more on those below). Note, though, that the FCC expressly encourages that conventional off-line captioning be used when live or near-live programming

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is re-aired.

Responsibility for caption quality.

The bad news for VPDs is that, even though much of their program content is produced by others, the FCC has decided to place responsibility for captioning quality on VPDs. The good news is that VPDs can meet that responsibility by making "best efforts" to obtain appropriate certifications from program suppliers.

VPD Best Efforts. The "best efforts" drill requires the VPD to ask each programmer, ***in writing***, to provide a certification attesting that the programmer either:

- complies with the FCC's captioning quality standards; or
- adheres to the Best Practices for video programmers identified by the Commission (see below for more on that); or
- is exempt from the closed captioning rules under one or more properly attained exemptions (when an exemption is claim, the certification must identify the specific exemption claimed).

The VPD also has to request, again ***in writing***, that the programmer make this certification "widely available" within 30 days after receiving the VPD's request. The VPD must then check websites and "widely available locations used for the purpose of posting widely available certifications" to see if the programmer has provided the requested certification. VPDs might want to check for any posted certifications even before they send out the written request because the Commission says that VPDs may properly rely on such certifications even if the VPD hasn't previously requested them.

If the programmer does not provide the requested certification, the VPD must rat out the programmer to the FCC.

Merely asking for a certification is not the end of the road for the VPD. If the programmer does not provide the certification upon request, the VPD must rat out the programmer to the Commission (which will then compile and publicize a list of non-certifying programmers).

If a VPD jumps through all these hoops, no sanctions will be imposed on it for any captioning violations that are "outside the control" of the VPD. This "best efforts" obligation is among the rules set to take effect on ***March 16, 2015***.

Video Programmer Best Practices. As indicated above, a programmer's certification to be obtained through a VPD's "best efforts" may include confirmation that the programmer adheres to certain "best practices". For programmers, "best practices" include:

- agreements with captioning vendors which specify performance requirements;
- employee training requirements, and compliance verification;
- quality audio to increase accuracy of transcription; and
- advance provision to captioners of preparation materials such as scripts, proper names, and song lyrics.

Generally speaking, pre-recorded programming should be captioned off-line, except in unusual circumstances. Such "unusual circumstances" involve such things as: editorial changes that are required up until the last minute (as with a reality show or news content); programming that is delivered late; caption files subject to technical problems; or programming subject to proprietary or confidentiality considerations.

The new rules also lay out extensive and detailed "best practices" for captioning vendors, individuals who generate real-time captions, and off-line (pre-recorded) captioning vendors and captioners. For such other parties in the program production chain, the "best practices" largely boil down to self-monitoring, maintaining equipment, and ensuring accuracy.

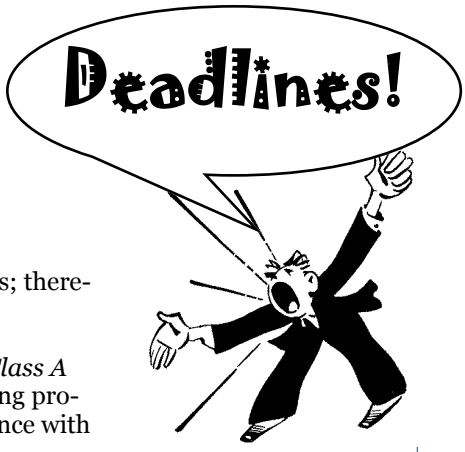
Equipment Monitoring and Record-Keeping

It has, of course, long been Commission policy that television stations must monitor their closed captioning equipment to make sure that it is working. But now that policy has been codified in a specific rule that requires technical equipment checks to be conducted in a manner "sufficient to ensure that captions are passed through to viewers intact." It's not entirely clear what this requirement means, as the Commission specifically disclaimed any requirement that stations monitor each and every program, but it's safe to assume that frequent checks are required. (The FCC is still mulling over whether it should mandate that equipment be routinely checked at some specific, minimum interval and, if so, what the interval should be.)

VPDs must maintain records of their activities related to maintenance, monitoring, and technical checks, and they must retain those records for two years. Again, no particular format for such records has been specified, but the records must be sufficient to prove that an operator has satisfied its legal obligations with regard to captioning. This is another of the requirements set to kick in on ***March 16, 2015***.

More to Come.

These changes, sweeping though they may be, are not necessarily the end of the FCC's efforts to improve closed captioning performance. The Commission is still considering a number of other measures. Check back with CommLawBlog for updates.



January 10, 2015

Children's Television Programming Reports – For all *commercial television* and *Class A television* stations, the fourth 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 continues to require 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.

January 12, 2015

Digital Transition of LPTV/TV Translator Stations and the Incentive Auction – Comments are due with regard to the Commission's proposed measures to facilitate the final conversion of low power TV and TV translator stations to digital service, while attempting to mitigate the impact on these stations of the upcoming incentive auction and the resulting channel repacking process.

January 21, 2015

Incentive Auction - Potential Broadcaster and Inter-Service Interference – Comments are due in response to a Further Notice of Proposed Rulemaking (GN Docket 12-268, ET Docket 13-26, ET Docket 14-14, FCC-14-157A1, released October 17, 2014) with regard to issues of aggregate broadcaster-to-broadcaster interference and the methods for predicting interference between broadcast and wireless operations in connection with the Incentive Auction, which will sell broadcast TV spectrum for mobile broadband use and require the re-packing of remaining TV spectrum.

January 26, 2015

Digital Transition of LPTV/TV Translator Stations and the Incentive Auction – Reply comments are due with regard to the Commission's proposed measures to facilitate the final conversion of low power TV and TV translator stations to digital service, while attempting to mitigate the impact on these stations of the upcoming incentive auction and the resulting channel repacking process.

January 30, 2015

Procedures for the Incentive Auction of TV Broadcast Spectrum – Comments are due with regard to the Commission's *Public Notice* (FCC-14-191A, released December 17, 2014) which seeks comments on proposed methods and procedures for conducting the broadcast television spectrum incentive auction to convert broadcast TV spectrum to mobile broadband use.

February 1, 2015

Television Post-Filing Announcements – *Television* and *Class A television* stations located in **New Jersey** and **New York** must begin their post-filing announcements with regard to their license renewal applications on February 1. These announcements then must continue on February 16, March 1, March 16, April 1 and April 16. Please

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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 **Delaware** and **Pennsylvania** must begin their pre-filing announcements with regard to their applications for renewal of license on February 1. These announcements then must be continued on February 16, March 1 and March 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 **Arkansas**, **Kansas**, **Louisiana**, **Mississippi**, **Nebraska**, **New Jersey**, **New York** and **Oklahoma** 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.

February 2, 2015

Television License Renewal Applications – *Television* and *Class A television* stations located **New Jersey** and **New York** 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.

Noncommercial Television Ownership Reports – All *noncommercial television* stations located in **Arkansas**, **Louisiana**, **Mississippi**, **New Jersey** and **New York** 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 **Kansas**, **Nebraska** and **Oklahoma** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323-E.

February 5, 2015

Incentive Auction - Potential Broadcaster and Inter-Service Interference – Reply comments are due in response to a Further Notice of Proposed Rulemaking (GN Docket 12-268, ET Docket 13-26, ET Docket 14-14, FCC-14-157A1, released October 17, 2014) with regard to issues of aggregate broadcaster-to-broadcaster interference and the methods for predicting interference between broadcast and wireless operations in connection with the Incentive Auction, which will sell broadcast TV spectrum for mobile broadband use and require the re-packing of remaining TV spectrum.

February 17, 2015

Update to Rules on Broadcaster Disclosure of Contest Terms – Comments are due in response to the Commission's proposals in its *Notice of Proposed Rule Making* (FCC-14-184A1, released) to update the rules on how broadcasters must disclose the rules of contests announced on-air.

February 27, 2015

Procedures for the Incentive Auction of TV Broadcast Spectrum – Reply comments are due with regard to the Commission's *Public Notice* (FCC-14-191A, released December 17, 2014) which seeks comments on proposed methods and procedures for conducting the broadcast television spectrum incentive auction to convert broadcast TV spectrum to mobile broadband use.

March 19, 2014

Update to Rules on Broadcaster Disclosure of Contest Terms – Comments are due in response to the Commission's proposals in its *Notice of Proposed Rule Making* (FCC-14-184A1, released) to update the rules on how broadcasters must disclose the rules of contests announced on-air.