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# Memorandum to Clients

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NEWS AND ANALYSIS OF RECENT DEVELOPMENTS IN COMMUNICATIONS LAW

No. 15-03

*Despite long hiatus and unclear standard*

## FCC Flexes Its Indecency Muscle

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It's been a while since we checked in on the FCC's indecency policy. When last we did, the constitutionality of that policy remained unresolved (and, in the minds of at least two Supreme Court justices, seriously in doubt). And the FCC had cryptically announced that it had re-jiggered the policy in some undescribed way(s) that permitted the Commission to summarily dismiss (apparently in a matter of minutes, if not seconds) a million or more indecency complaints that had been sitting around for years. And the Media Bureau had invited comments on possible, unspecified, revisions to the policy.

In other words, things on the indecency front seemed as muddied as ever.

So it was something of a surprise to hear that the Commission had suddenly lowered the boom on a Roanoke, Virginia TV station, fining it the maximum – $325,000 – for a single three-second instance of alleged indecency, the broadcast of which, during a 2012 newscast, was admittedly unintended. It looks like the FCC wants to send a signal to broadcasters.

The facts are relatively straightforward.

During a 6:00 p.m. newscast, the station aired a report about the addition of a new volunteer to a local rescue squad. The focus of the report – one Tracy Rolan – happened to have starred in a long list of adult films, using "Harmony Rose" as her *nom de filme*. The hook of the piece was obvious: Porn star as local volunteer. Definitely an audience grabber.

To open the story, the station used an image of Ms. Rolan/Rose – more precisely, her head and shoulders, and at least one of her fingers. (According to the FCC's description, she is seen "moving [her finger] up and down on her tongue, with her lips partially open and then closing as she appears to suck on her finger".) The image was obtained from the website of a distributor of Ms. Rolan/Rose's films.

Rather than use only *her* image, though, the station opted to display the entire webpage, which her image apparently dominated. But, as it turned out, the webpage contained additional imagery, including, along the right side of the screen, a number of "boxes" containing snippets from various films. One of those boxes included – for three seconds – the recognizable image of "a hand moving up and down the length of the shaft of the erect penis".

Ruh-roh.

We can all safely assume that the broadcast depiction of actual sexual activity, up close and personal (and, apparently, unclothed), is likely to send the FCC into DEFCON 1. Anyone who airs such content must recognize the near certainty that the FCC, prodded by complainants, will come calling, and the end result is not likely to be pretty. And that's what happened here. Complaints rolled in almost immediately, leading to a whopping fine.

It's easy to conclude, as the FCC has, that this particular broadcast can and should be punished, big time. Erect penises (and the manipulation thereof) are well outside the range of conventional prime-time acceptability.

But before we jump on board the FCC's bandwagon, let's think about this for a minute.

Exactly how the image of (in the FCC's delicate words) "a naked, erect penis and sexual manipulation thereof" escaped the station's attention is anybody's guess. The guy who prepared the report advised that he "did not notice" the

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## Inside this issue . . .

*ECFS – the online filer's friend*

# Getting Rulemaking Petitions On File Online

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If you're planning on filing a petition for rulemaking with the FCC but you're out of paper, or maybe your printer is low on toner and the local Kinko's is closed, we've got good news for you. The Commission has announced that petitions for rulemaking may now be filed electronically!

As we reported last December, the FCC has been tweaking its Electronic Comment Filing System (ECFS) to accommodate a wide range of electronic filings that previously could be filed only on paper. Thanks to those efforts, ECFS will now accept rulemaking petitions along with the other non-docketed filings we listed in our December post.

The drill for petitions for rulemaking is essentially the same as for other non-docketed filings:

1. Go to the ECFS home page;
2. Click on the "Submit a Non-Docketed Filing" link in the list of "ECFS Main Links" (top left corner of the screen);
3. From the first drop-down menu; select the FCC "inbox" to which your filing is to go – for a rulemaking petition, that would be (unsurprisingly) "Section 1.401 Petition for Rulemaking"; and from the "Filing Type" drop-down, pick "Petition for Rulemaking";
4. Complete the rest of the form;
5. Upload the document you want to file;
6. Click the "Continue" button; and
7. Follow the remaining prompts.

You'll know that you've successfully navigated the maze when you see a confirmation screen with a unique confirmation number. (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.)

Petitions filed electronically will be available to FCC staff (and the general public as well) within a day. The prompt accessibility of electronically filed petitions may mean faster staff assignment and Commission action, but you shouldn't necessarily count on that.

Since everybody and his little brother will be able to see it, you should keep in mind that they'll be able to see any confidential information that may be contained in the petition. That being the case, before you file, be sure to check out the rules governing the submission of information that you'd prefer not be made available to the public. (Section 0.459 of the FCC's rules is a good place to start.)

To access an electronically filed petition, go to the ECFS search page and enter "Inbox-1.401" in the "Proceeding" box. (You can also narrow your search by completing any of the additional boxes.)

Electronic filing of petitions for rulemaking is ***optional***, at least for now. That means that you may still file them the old-fashioned way, if you prefer. (Reminder: The electronic filing of some other non-docketed items is mandatory. Falling into that category are Section 208 formal complaints, Section 224 pole attachment complaints, ILEC network change notifications, and Section 214 transfer of control and discontinuance applications. Other non-docketed filings may be filed electronically at the filer's option: waiver requests under Part 15, miscellaneous waiver requests, waiver requests under Parts 32, 43, 64, 65 and 69 for which a fee is required, petitions for declaratory rulings, International High Frequency applications, and Section 325(c) applications.)

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*An omni no more*

# FM Licensee Says "Optimization", Audio Division Says "Directionalization"

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In the FM radio world, there are supposed to be only two kinds of antennas: directional and non-directional. While it has long recognized that that simplistic, idealized notion is not entirely valid, the Audio Division hasn't acted on that recognition – until now.

In a decision that likely disappointed at least one Texas FM licensee, the Division has ordered that licensee – whose station is licensed to operate, non-directionally, with ERP of 100 kW – to explain why its license shouldn't be changed to specify directional operation. Such a change would result in a reduction by more than half (from 25 kW to 9.1 kW) of the station's transmitter output power.

*Having rattled its saber in 1984, the FCC carefully placed it back in its scabbard ... until now.*

Non-directional antennas (a/k/a/ "non-D's" or "omni's"), of course, are supposed to transmit an equally strong signal in all directions. On the other hand, directionals – or "DA's" – are designed to produce a signal that is stronger in some directions than others. They come in handy when a station needs to avoid interfering with a co- or adjacent-channel station in one direction.

But things are not as simple as they might appear – mainly because, thanks to technical considerations, omni antennas do not necessarily provide an idealized circular signal contour. Perhaps most obviously, if a non-directional antenna is mounted on the side of a tower, rather than the top, the interaction of the signal with the tower structure itself can distort the signal in a number of ways. Recognizing this, antenna manufacturers have sought to adjust some omni's to "optimize" their performance, *i.e.*, to counteract such distorting effects.

But once you start down the "optimization" road, things can leave the rails pretty quickly.

After all, if you can adjust an omni's performance in some regards, you can adjust it in others. And sure enough, for more than 30 years various efforts have been made to convert ostensibly omnidirectional antennas into *de facto* directional antennas through an array of devices. Those include use of frequency-matched "lambda" towers specifically designed to support an antenna operating on a particular frequency. The frequency matching effect of the tower can significantly alter an omni's signal in various ways. Another device is the attachment of "parasitic elements" onto the antennas in various places. These, too, affect the signal.

While such devices are usually touted as efforts to compensate for common distorting factors, observers have long understood that they may also be used to achieve favorable directionalization that can extend a station's signal well beyond its predicted omnidirectional contour.

The Commission was onto this back in 1984. It issued an obscure, one-page public notice (not published in any official publication, and not easy to track down in 2015 – until this article, at least), in which it warned:

> In making allotments and in issuing construction permits and licenses the Commission assumes that FM non-directional broadcast antennas have perfectly circular horizontal radiation patterns. Actual antenna patterns shall conform to the ideal as closely as is practicable. The use of any technique or means (including side mounting) which intentionally distorts the radiation pattern of what is nominally a non-directional antenna makes that antenna directional and it must be licensed as such.

Having rattled that saber, though, the Commission carefully placed it back in its scabbard and locked it away, never to be wielded again. Until now.

The Commission received a complaint from a Class A FM in Texas whose signal was, according to the complaint, getting creamed by a 100 kW Class Co station. The Co is an omni, and its predicted contour indicated that it was protecting the Class A as it should. But in real life, that wasn't the case.

The Division asked the Class Co licensee about its transmission system and was told that the station's antenna had been "optimized", but not directionalized. Digging further, the Division determined that the Co's signal in the direction of the Class A was the equivalent of a signal transmitted with between 260-275 kW of ERP, more than twice the Co's authorized 100 kW ERP. Moreover, the maximum-to-minimum ratio for the supposed non-D antenna turned out to exceed the maximum value allowed for directionals in the horizontal plane. And there was evidence indicating that the directionalization was intentional: the antenna's supporting structure was a lambda tower matched to the station's frequency, and the licensee and its engineer had performed "pattern optimization" studies prior to construction. So the Co

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*Concentrate and ask again*

# Copyright Office Offers A Sketch of the Future of Music Licensing

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Almost one year after launching a far-reaching inquiry into the "effectiveness of existing methods of licensing music", the Copyright Office (CO) has released the 245-page report setting out its conclusions. Titled "Copyright and the Music Marketplace", it doesn't actually change anything – but it sets out a wide range of observations and recommendations that could resonate for years in Congress and elsewhere, possibly leading to major changes throughout the music licensing universe.

I wrote about the CO's initial two Notices of Inquiry last March and July. They posed 24 questions across eight different subjects relating to music licensing. The CO also held public roundtables in Nashville, Los Angeles and New York. It is therefore not surprising that the CO's report is comprehensive. But here's a surprise: Despite my earlier prediction that the CO's eventual conclusions would likely be unfavorable for broadcasters, as it turns out several recommendations actually favor users of copyrighted music, including broadcasters. And to the extent that the CO is looking to a possible overhaul of pretty much *all* aspects of the licensing process, all participants in that process could end up benefiting from a less fragmented, more consistent system.

*There are many aspects of the CO report that broadcasters should welcome.*

But the report clearly urges Congress to move legislation that would create a performance right applicable to over-the-air broadcasting (though not exclusively), so one side of the industry is still likely to benefit more.

Before delving into some of the details, we should probably note some general principles identified in the report. According to the CO, the study revealed broad consensus on four key principles:

- Music creators should be fairly compensated for their contributions.
- The licensing process should be more efficient.
- Market participants should have access to authoritative data to identify and license sound recordings and musical works.
- Usage and payment information should be transparent and accessible to rights owners.

Several additional principles also bubbled up:

- Government licensing processes should aspire to treat like uses of music alike.
- Government supervision should enable voluntary transactions while still supporting collective solutions.
- Ratesetting and enforcement of antitrust laws should be separately managed and addressed.
- A single, market-oriented ratesetting standard should apply to all music uses under statutory licenses.

As a responsible reporter, I urge you to read the report for yourself, but who am I kidding? It's 245 pages long, for crying out loud. So go ahead and do what you were probably planning to do: read the Executive Summary. That should give you a solid overview of everything the CO is proposing.

Also, be sure to read the section titled "Music Licensing Landscape". Sure, it's 50 pages long, and it doesn't include *any* CO recommendations. But it *does* provide an excellent summary of important copyright licensing concepts. For instance, do you know what a PRO is? (Spoiler alert: it's a "performance rights organization" – think ASCAP, BMI, SESAC.) How about the difference between a "musical work" and a "sound recording", and who gets paid when I want to use one or both of them? What's the difference between the "mechanical reproduction right", the "synchronization right" and the "performance right", and who do I talk to to obtain any of these?

But before you delve too deeply in the report, read the rest of this article (Our motto: We read it so you don't have to.) to get oriented about the high points as far as broadcasters go. I'll break those high points down into "The Good", "The Bad", and "Other Stuff You Should Probably Know About".

### *The Good*

Somewhat to my pleasant surprise, there are many aspects of the CO report that broadcasters (and others who use copyrighted music) should welcome. These include:

*Bundling licensing of mechanical and performance rights*: The "mechanical right" is the right to reproduce a musical work or sound recording. The "performance right" is the right to ultimately broadcast or stream that musical work or sound recording to the public. On the sound recording side, these tend to be "bundled": when a broadcaster negotiates for the right to *reproduce* a sound recording, the right to *perform* the same sound recording is part of the negotiation. But that's not always the case,

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and the current set-up makes it very difficult to do that with regard to musical works (as opposed to sound recordings). The CO suggests that the current PROs (ASCAP, BMI and SESAC) be allowed to do more than just license the performance of musical works; they should be allowed to license reproduction as well. This should allow broadcasters and other users of music more flexibility and opportunities, and it should also lead to increased efficiency in the licensing process.

*Public Broadcaster Statutory License*: Noting that "[p]ublic broadcasters must engage in a multitude of negotiations and ratesetting proceedings in different fora to clear rights for their over-the-air and online activities", the CO suggests that the ratesetting processes for public broadcasters be streamlined under a single, unified structure.

***The Bad***

But, yes, most of the recommendations will make broadcasters turn up their noses. These include:

*Extend the public performance right in sound recordings to terrestrial radio broadcasts*: This, of course, is the provision that broadcasters have feared, and fought, for years. Terrestrial broadcasters have never had to pay for a performance right for sound recordings – but that's just what the CO is now recommending. The CO would have these rights administered by SoundExchange, which already has experience administering the public performance right paid by digital services like webcasters and satellite radio.

*The CO stops short of claiming that radio's promotional value is gone entirely.*

As the CO sees it, "federal law currently exempts a $17 billion dollar industry from paying those who contribute the sound recordings that are responsible for its success". Further, as the market for music shifts away from actual music ownership, the potential for sales has diminished and the promotional value of radio may be less apparent. The CO stops short of claiming that radio's promotional value is gone entirely. But instead of giving broadcasters a complete exemption, the CO would have that promotional value be included as one factor to be considered under the "willing buyer/willing seller" standard that would be used in setting the royalty rate.

*Reconsider Consent Decrees*: The CO advocates in favor of the repeal of the Consent Decrees that have governed ASCAP and BMI for decades. While the CO acknowledges that the fate of those Decrees is a subject for the Department of Justice – whose antitrust suit against ASCAP and BMI led to judicial oversight of those two PROs – rather than the CO, the CO weighs in nonetheless: "The Office strongly endorses [DOJ review of the Consent Decrees], and – in light of the significant impact of the decrees in today's performance-driven music market – hopes it will result in a productive reconsideration of the 75-year-old decrees".

*Allow SoundExchange to terminate noncompliant licensees*: Despite all the pressure that SoundExchange puts on webcasters who aren't complying with the statutory license, SoundExchange actually has only limited ability to enforce the statutory license. The CO wants to change that. Such a change would increase the need for webcasters (including webcasting broadcasters) to understand and comply with the statutory license applicable to webcasting. And if a public performance right in sound recordings were to be imposed on terrestrial broadcasters and administered by SoundExchange (*see above*), then all affected broadcasters would also be subject to SoundExchange's increased enforcement authority – meaning that it would be essential for broadcasters to get their arms around this license immediately.

***Other Stuff You Should Probably Know About***

The CO report reminds readers that "the problems in the music marketplace need to be evaluated as a whole, rather than as isolated or individual concerns of particular stakeholders." Therefore, other recommendations will have an impact on those already identified. These include:

*Fully federalize pre-1972 sound recordings*: The CO argues that the Copyright Act should be extended to cover pre-February 15, 1972 sound recordings. Our regular readers should know that there is no federal copyright in these older sound recordings. (Fuzzy on this? Check out my piece on the "Flo and Eddie" litigation elsewhere in this issue.)

Why isn't this in the "bad" category? Because it's a complex issue. As my articles about the string of Flo and Eddie cases (in which state-based rights for pre-1972 sound recordings have been found) strongly suggest, the imposition of some kind of performance right obligations for these older sound recordings may be inevitable. But as things are now going, such obligations would be state-imposed, and thus would likely vary – rate-wise, process-wise, otherwise – from state-to-state. While many broadcasters obviously don't want to pay royalties for these sound recordings (especially if it involved paying not just for digital transmission but over-the-air as well), *if such payments were to be unavoidable*, a uniform rate structure under the federal Copyright Act would probably present a preferable method.

*Adopt a uniform market-based ratesetting standard for all government rates*: The CO wants to eliminate the distinction between the dual ratesetting standards that are used to determine the rates paid for different rights and different services. Currently, Section 801(d) of the Copyright Act is used to set the rates for just about all rights and all services *except* webcasting rates. Those

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*Drone even go there IV*

# Drones Now on NTIA's Radar

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We have previously reported on the FAA's regulation – or non-regulation, or proposed regulation – of drones (official bureaucratic name: unmanned aircraft systems or UAS). Most recently, the FAA finally managed to issue a Notice of Proposed Rulemaking looking at operational rules for drones. Think maximum size and operating height, need for an operator license, requirement that line of sight be maintained – that sort of thing. (Since Congress told the FAA back in 2012 to get rules along these lines in place by 2015, the FAA seems to be a little slow out of the gate here, but that's a story for another time.)

Now a second federal agency is joining the move to regulate drones. The National Telecommunications and Information Administration (NTIA), which of late has been focusing mainly on policies related to broadband, spectrum use and the Internet, has begun a multistakeholder process to address "best practices" for the commercial and private use of drones. (Law enforcement and other noncommercial governmental drone use is *not* on the table here.) The goal is to look at broader drone-related issues, such as privacy concerns, transparency and accountability.

*Issues on the table: privacy, transparency and accountability*

The NTIA is following up on a Presidential Memorandum issued last February by President Obama. In that Memorandum the President pledged that the federal government "will take steps to ensure that the integration [of civil UAS into the national airspace system] takes into account not only our economic competitiveness and public safety, but also the privacy, civil rights, and civil liberties concerns these systems may raise".

An ambitious, if not narrowly-targeted, agenda. But the NTIA is nothing if not game, so to get the ball rolling it's started off by posing a wide range of fairly open-ended questions covering three broad categories: privacy, transparency and accountability.

Privacy interests are obviously implicated in drone operation because drones can go places that most of us can't get to, and they can do it with a camera and GPS gear. The likelihood that drones could capture information – not just backyard nude sunbathing, but other activities that might normally be considered to be "private" – is clearly non-trivial. Other privacy concerns arise from proposals to use drones as a means of providing Internet service cheaply, particularly to remote areas. (Some drones can remain aloft over a relatively confined area for months.) With all that in mind, NTIA asks "what specific best practices would mitigate the most pressing privacy challenges while supporting innovation?"

On the transparency side, NTIA thinks that it might be a good idea to be able to identify who's operating which drones, and when, and what for, and what "data processes" are being used in connection with drone operation. That would make it easier to keep track of wayward, unsafely-operated or "nuisance"-causing drones. (NTIA does not, however, venture a definition of what a "nuisance" in this context might be, but we can all probably guess.) With all that in mind, NTIA is looking for suggestions for how to "promote transparent UAS operation". Standardized physical markings or electronic identifiers are two possibilities it mentions. It's also interested in how drone operators can most effectively alert the public to their operations.

As to accountability, NTIA is looking at possible "accountability mechanisms" to keep drone operators honest. These could include things like: rules governing "oversight and privacy training for UAS pilots"; "policies for how companies and individuals operate UAS and handle data collected by UAS"; audits, assessments, and "internal or external reports" to verify UAS operators' compliance with their privacy and transparency commitments. Those last items could, in NTIA's view, possibly be handled by "companies, model aircraft clubs, UAS training programs, or others".

This is just a preliminary proceeding, characterized by the NTIA as a "request for public comment". But it does provide all interested folks the opportunity to get in on the ground floor relative to any NTIA-based rules or policies that might eventually be de-

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*Including Muleshoe, Texas!*

## Auction 98: 131 FM Allotments on the Block

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The FM construction permits available in the 2015 auction have hit the showroom floor. If you're thinking about bidding on any of the 131 new and used models up for grabs, start looking now. The bidding action won't start until July, but that doesn't mean that it's too early to formulate your game plan. This year's listings include 113 brand new construction permits, seven used permits (*i.e.*, permits that were sold once but never built) and 11 permits – including Muleshoe, Texas – that went unsold during the last auction.

You can find a list of this year's offerings here. As you peruse the list you'll note that more than half (73 to be exact) are located in Texas. The remaining permits cover the map from New Hampshire to California and from Washington State to Georgia; there's even a C2 up for grabs in Hawaii.

As always, potential bidders should bear in mind that the FCC does not warranty what it sells. In fact, the FCC has included its standard four paragraph disclaimer, some in bold print, at page two of its notice. Among other tidbits, the Commission expressly disavows the useability of the CP's on the auction block: "The FCC makes no representations or warranties about the use of this spectrum for particular services." You have been warned.

The range of starting prices for permits runs from the dirt cheap ($500 for any of three Texas permits) to the pricier, but still modest, $75,000 (for certain permits in Georgia, Utah, Missouri and, of course, Texas). If you spot a permit on the list that you think is overpriced, you can bring it to the FCC's attention and request it to lower the price; that sometimes works. But even if it does, you should note that a lower starting price does ***not*** prevent the permit's eventual price from skyrocketing. As in previous auctions, the FCC has no set maximum price for the licenses.

*Potential bidders should bear in mind that the FCC does not warranty what it sells.*

If you would like to comment on the FCC's prices or any other auction proposal, you have until April Fool's Day – April 1, 2015 – to toss in your two cents' worth. Reply comments are due by April 8, 2015. The FCC has created a special e-mail address – auction98@fcc.gov – to which comments or reply comments should be sent (in addition to the standard FCC filing procedures). Comments can also address the FCC's proposed auction procedures, but the procedures described for the 2015 auction are pretty much the same as previous FM auctions. Still, true auction aficionados should take a close look at the fine print to make sure that they're on top of the details.

The usual bidding credit rules are set to apply this time around. Generally, a 35% bidding credit is available to bidders who own no other broadcast stations, and a 25% credit is given to bidders who own three or fewer stations (provided that none of those stations is in the same market as the target auction permit).

Check back with CommLawBlog for updates.

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veloped. NTIA is looking for suggestions about possible "best practices" for ensuring safe, non-invasive drone use. If you've got any thoughts on that, you've got until 5:00 p.m. (ET) on ***April 20, 2015*** to let the NTIA know about them.

And one final note. We now have the FAA working on nitty-gritty operational rules, and the NTIA working on fuzzier (but nonetheless important) concepts of privacy, transparency and accountability. The one agency we haven't heard from yet is the FCC.

The expanding use of drones raises questions about the spectrum needs for both video transmissions and communications. As our friend Michael Marcus has commented a couple of times already – here and here, for example – drones' reliance on spectrum could eventually spell trouble for Wi-Fi and cellular users. (You can read more of Dr. Marcus's thoughts on this topic on his blog, which we recommend.) The prospect of more drones in the foreseeable future should prompt the FCC to try to get ahead of the curve.


*SLAPP shot falls short*

## Flo and Eddie's Next Victim: Pandora

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In the continuing saga of Flo and Eddie vs. The Digital World, we have a twist. Sure, Flo and Eddie won again – it's not *that* much of a twist. But the adversary this time – that would be Pandora – came up with a new response, and it didn't go down without a fight.

If you're unfamiliar with the New Litigation Adventures of Older Rock and Rollers, check out my previous posts on the efforts of some , um, let's just say "more mature" rock artists looking for royalties for the digital public performance of pre-1972 sound recordings. If you're one of our regular readers, you'll know that the score to this point is:

Plaintiff Recording Artists or Record Labels: 3

Defendant Sirius XM: 0

The latest case pitted Pandora against Flo and Eddie, in front of U.S. District Judge Phillip Gutierrez in the Central District of California. Since F&E had already won one case in the same court before the same judge, Pandora was obviously looking at long odds. But that didn't stop it from pulling out a couple of novel arguments.

*A "SLAPP" is a frivolous lawsuit filed simply to harass the defendant into silence or inaction.*

Its main argument was that Flo and Eddie's lawsuit should be dismissed because it violated the California "Anti-SLAPP" Act. For those of you not in the know, in this context "SLAPP" stands for "Strategic Lawsuit Against Public Participation". A "SLAPP" is a frivolous lawsuit filed simply to harass the defendant into silence or inaction. Such suits tend to be filed by "Big Guys" looking to squelch "Little Guys" unable or unwilling to go through the expense of a trial against deep-pocketed opponents. Example: a suit filed by Daniel Snyder, owner of Washington's NFL franchise, against a local D.C. "alt-weekly" newspaper when the paper made fun of him.

Recognizing the unfairness (not to mention obvious impropriety) of such things, almost 30 states have enacted "Anti-SLAPP" statutes looking to discourage SLAPP suits. They take various forms, but generally they permit a defendant to get a SLAPP suit dismissed early in the litigation process, thereby reducing the financial impact of having to take the case all the way through a trial. Some statutes even allow a successful defendant to recover damages, possibly even triple damages.

Full disclosure: I'm on the board of a group called the "Public Participation Project", a coalition of businesses and individuals working to pass federal and state anti-SLAPP legislation. It also seeks to educate the public regarding SLAPPs and the consequences of these types of destructive lawsuits. So I'm a fan of Anti-SLAPP arguments.

But even I raised an eyebrow when Pandora invoked California's Anti-SLAPP law.

Turns out I was right: Judge Gutierrez rejected Pandora's argument. But I was wrong because he found the argument a lot more credible than I'd foreseen.

Resolving an Anti-SLAPP argument in California is a two-step process. The defendant claiming that a suit is SLAPP must first show that the defendant's conduct – the conduct that is the target of the alleged SLAPP – was "in furtherance of the exercise of the constitutional right ... of free speech in connection with a public issue or an issue of public interest". If the defendant successfully meets that burden, Step Two kicks in: The case will be dismissed unless the plaintiff can come demonstrate that it will probably prevail on the merits.

Pandora argued that it was exercising the constitutional right of streaming which, supposedly, is "a public issue or issue of public interest". Flo and Eddie responded that streaming isn't really a constitutional right when it involves infringement of copyright. But Judge Gutierrez agreed with Pandora: its streaming activity was "conduct in furtherance of Pandora's right to free speech in connection with an issue of public importance". (Interestingly, on this point Flo and Eddie argued only that Pandora was not engaging in constitutionally protected conduct; they did *not* argue that the streaming of old music – *their*- music – was not an "issue of public importance". By arguing that the public interest is served because the playing of sound recordings is culturally valuable to society,

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Pandora effectively blocked any counter-argument from Flo and Eddie. What were they going to say in response – "no, you're wrong, our songs are mindless drivel with no socially redeeming value or importance whatsoever"?)

The first element of California's Anti-SLAPP law having been satisfied, the parties moved on to the question of the probability of Flo and Eddie's success on the merits. Since they had already won a very similar case before Judge Gutierrez, Flo and Eddie's chances looked good. But reaching into its bag of novel arguments, Pandora came up with perhaps the only argument available: that Judge Gutierrez's earlier decision had been wrong.

*Pandora still has two bites at the apple in this case alone.*

Pandora relied on a very complex argument. It involved a close reading of various California statutes, including particularly a section providing that, once a song is sold to the public, it is "published", at which point state copyright protection ceases to exist because that is when the federal law recognized copyright protection in the given work. Judge Gutierrez somewhat succinctly summarized this argument as follows:

> Sound recordings were not afforded federal protection until the 1976 Copyright Act. Thus, Pandora explains that when The Turtles sold their recordings to the public in the 1960s, their California copyright protection expired and these sound recordings dropped into the public domain. Pandora does not limit its argument to public performance rights. When The Turtles placed an album on a music store shelf in the 1960s, the public could freely copy, distribute, and perform those sound recordings, so far as California copyright law was concerned.

Not surprisingly, Judge Gutierrez wasn't ready to conclude that he had been wrong, even if he hadn't addressed this particular argument in his earlier decision. Looking at that argument now, though, he wasn't impressed: "Pandora's theory results in an impotent law that protects only the tiniest class of sound recordings." Even Pandora itself could only "brainstorm" one example of an item that might fit in the "niche class" of pre-1972 recordings that might still be entitled to copyright protection: recordings of never-released historic live performances. To Judge Gutierrez, it was impossible that the California legislature would have written its laws in a way that covered just this tiny sliver of the sound recording universe. Further, reading the law this way would ignore California's "common law", *i.e.*, law derived from judicial precedents, which maintains property rights in these sound recordings.

So change that "3-0" to "4-0" for Flo and Eddie. But maybe put an asterisk by the "4", or at least just use a pencil, not a Sharpie. After all, Pandora still has two bites at the apple in this case alone. They have appealed the rejection of their Anti-SLAPP argument to the United States Court of Appeals for the Ninth Circuit; a decision there could be issued late this year or early 2016. And the proceedings before Judge Gutierrez will continue, where Pandora can file a "regular" motion to dismiss, raising more extensive or different arguments, to the extent any new legal theories or facts can be generated.

As always, stay tuned.

## Now Available: Kevin Goldberg on Music Licensing (The Online Version)

Frequent Memo to Clients (and CommLawBlog) contributor and copyright guru Kevin Goldberg (that's his smiling face to the right of the headline, above) presented a 90-minute webinar on "Everything You Wanted (or Needed) to Know About Music Licensing, But Were Afraid to Ask" on March 25. Kevin covered the full landscape of licensing issues for broadcasters and webcasters – his PowerPoint was more than 75 pages long, for crying out loud (but trust us, as Kevin took us all through it, it was highly accessible).

We promised all attendees that we'd be providing a link to the recording of the Swami's show, and here it is. This will get you the audio and video. Even if you didn't happen to be one of the lucky attendees, we welcome you to check it out (but you'll have to register by providing your name and email address).

Also, if you want a copy of the PowerPoint slides, you can access one here. It provides an excellent reference guide for anyone using music for broadcasting or webcasting.


*Radio coalition: Move IDs online*

# One-A-Day Sponsorship IDs?

*By Steve Lovelady*
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In an unusual petition that was filed last November – but took five months to hit the FCC's public radar screen – a group of radio station owners is asking the Commission to waive the sponsorship identification requirements for a "defined class of qualifying radio broadcasters". While the prospects for a grant of the requested waiver may be limited (because it may be asking for something the FCC can't provide), the fact of the request itself raises some interesting questions.

The petitioners, who call themselves the Radio Broadcasters Coalition, consist of nine companies, including several major radio group owners – iHeart Media (*née* Clear Channel), Emmis, Cox, Entercom, Greater Media, among others. According to the FCC's summary, they would like the Commission to let "radio broadcasters airing music or sports programming ... provide information about sponsored material through a combination of less frequent on air announcements together with enhanced online disclosures".

*An initial hurdle facing the proposal is the language of Section 317.*

Under the proposal, a qualifying radio station would, after a three-week "listener-education" period, have to make on-air sponsorship ID announcements only once each day (sometime between 6:00 a.m. and 7:00 p.m.), notifying listeners generally that (a) some programming on the station had been sponsored by certain identified sponsors and (b) listeners can find more details on the station's website. At its website, each qualifying station would have a page, specifically accessible through a tab or link identified as "Enhanced Disclosure of Sponsored Programing", containing "enhanced" sponsorship ID information. Such information would include a list of the names of sponsors, the names of the programs in which the sponsored material had aired, a list of the artists and music (or sports teams) affiliated with particular sponsor entities, and the types (but not amounts) of payments/services exchanged between sponsors and the station.

In order to grant the request, the FCC would have to waive its sponsorship ID rule (Section 73.1212) and Section 317 of the Communications Act, both of which currently require that sponsorship ID announcements be aired "at the time" the sponsored matter is broadcast.

In support of its proposal, the Coalition asserts that the waiver would allow the presentation of "far greater [sponsorship ID] information to consumers in a new, more detailed, and more easily accessible way". That, in turn, would provide greater "protect[ion for] the public's right to know the identity of sponsors by allowing enhanced sponsorship identification disclosures for [sponsored] programming through once-daily on-air announcements and online postings that together give listeners more sponsorship information than is currently available". And listeners would also benefit from a "more satisfying listening experience ... with fewer interruptions".

In effect, the Coalition would like permission to sell time on their stations (at least for music and sports programming), with the sponsors to be identified only once daily, and not necessarily in connection with programming they may have sponsored. Listeners would be directed to the station's website, where "additional information" would be available. While it's not entirely clear, it appears that that "additional information" might include, along with basic identification information, promotional information about the sponsors. In other words, the once-a-day broadcast announcements would simply encourage listeners to hop online to access advertising messages.

An initial hurdle facing the proposal is the language of Section 317, which clearly mandates that sponsorship ID's be aired "at the time of" the sponsored programming. Subsection 317(d) does afford the FCC discretion to waive that requirement "in any case or class of cases" if the public interest warrants. Waivers, of course, provide limited exceptions. In this case, the Coalition defines the supposedly limited "class" as all radio stations that (a) broadcast music and/or sports programming and (b) have a website. Since that "class" encompasses probably 80+% of all radio stations, it's hard to see the request as anything more than an effort to write the rule out of the books by creating a nearly universal exception. That would be somewhat like waiving speed limits for all vehicles with at least four tires.

Viewed in that light, the request doesn't really look like the kind of thing contemplated by Section 317(d). But you never know. (The only historical 317(d) waivers cited by the Coalition as precedent for their request occurred about 50 years ago; the two cases cited seem a little dusty from non-use.)

*(Continued on page 11)*

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Another potential stumbling block: the Coalition's justifications for the waiver seem less than compelling. The proposal would provide the listener "fewer interruptions"? While that's undeniably true, Congress must have realized that the sponsorship ID requirement would result in "interruptions", but it mandated it anyway. So – in a twist on our speed limit analogy – this rationale is kind of like a request for the elimination of speed limits because drivers could then go faster. The Coalition also suggests that listeners will appreciate online access to sponsorship information because they might miss broadcast information if they happen to be listening while driving through a tunnel, or next to a honking horn in traffic. It's a bit difficult to take that particular argument seriously.

*The proposal could be a response to continued calls for a performance royalty.*

Much of the petition is devoted to the fact that the public is increasingly relying on the Internet for many things, as the Commission has repeatedly acknowledged. The sense of the petition is that advertisers and the consuming public alike view Internet advertising as preferable – so allowing broadcasters to shift their sponsorship messages would benefit both advertisers and consumers, while affording listeners a "more satisfying listening experience". That may indeed be true, but it seems irrelevant to the sponsorship ID rule, which is aimed at insuring that listeners are told who is sponsoring programming they're listening to while they're listening to it.

Although not mentioned in the Coalition's petition, the proposal could conceivably be a response to continued efforts by record companies to make radio stations pay performance royalties for playing recorded music over-the-air. Congress has never provided for such royalties, mainly because it has perceived radio airplay as providing recording artists valuable exposure which compensates for the lack of performance royalties. But record companies and recording artists have persisted in seeking the amendment of the Copyright Act to guarantee them just such royalties.

While stations may, of course, take money for the broadcast of particular records, such payments have to be acknowledged in contemporaneous sponsorship ID announcements – which discourages rampant "pay-for-play" arrangements. But as our colleague Peter Tannenwald proposed here several years ago, making pay-for-play a business strategy might offset the record companies' proposed performance royalty. As Peter said in 2009: "Fix the sponsorship identification rule so that it becomes practical to comply with it, and then let the fur fly". One way to do that could be what the Coalition is proposing. Their approach would presumably let stations take money for the playing of particular records as long as those arrangements are disclosed on the Internet. That would certainly facilitate increased pay-for-play deals, thereby affording broadcasters some protection against a performance royalty for sound recordings.

As might be expected, some folks in the independent music and public interest communities haven't reacted favorably to the Coalition's petition. It remains to be seen how influential these calls to arms will be. Interested parties have until ***April 13, 2015*** to file comments and until ***May 12*** to file reply comments. Comments and replies may be filed through the FCC's ECFS online filing system; refer to Proceeding No. 15-52.

*(Continued from page 3)*

licensee "knew in advance" how the antenna would perform.

The Division's understated conclusion: "[I]t is difficult to credit [the Co licensee's] position that its facility should be considered non-directional."

Since the Class A is entitled to the level of protection from the Co predicted based on the Co's supposed omnidirectional antenna, the Division has ordered the Co to explain why its license shouldn't be modified to specify the *de facto* directional antenna (or, more precisely, the directional pattern) which it's using – but with power reduced to afford the Class A protection. As indicated above, such a major league reduction would be bad news of the Co.

One take-home lesson from this order is that the FCC is prepared to help stations who believe that they are not getting the protection to which they are entitled as a result of another station's "optimized" antenna.

Exactly how many such situations exist, however, is far from clear. If a station had been experiencing such interference, it would presumably already have thrown the flag at the Commission. As a practical matter, it's possible, if not likely, that lots of aggressively "optimized" antennas are currently in operation – but, since they aren't causing interference, there's probably not much chance that the FCC will start raising any questions about them.

But the order provides another take-home message. It sends the unmistakable signal to anyone who might be thinking about installing an aggressively "optimized" antenna that care should be taken to avoid any interference to anyone as a result of the optimization.

## FHH's Frank Montero Interviews Commissioner Clyburn

Deep in the heart of Texas, Francisco Montero (we call him "Frank"), one of Fletcher Heald's co-managing members, recently had the honor of interviewing Commissioner Mignon Clyburn at a joint session of the Radio Ink Hispanic Radio and Sports Radio Conferences. (You can read about the interview here.) Their tête-à-tête was just part of the festivities in Dallas, which included tours of the facilities of Dallas area Stations KXAS(TV)/KXTX(TV) ***and*** KUVN-TV/ KSTR-TV/ KUVN-CA. Commissioner Clyburn had expressed an interest in visiting a station while she was in Dallas and the gracious hosts of the tours, NBC/Telemundo and Univision, were more than happy to give the Commissioner an up-close-and-personal look at the inner workings of a couple of major market broadcast operations. Many thanks to


NBC/Telemundo and Univision for their hospitality, and a big shout-out, too, to Oscar Rodriguez of the Texas Association of Broadcasters, who was essential to making it happen.

## FHH - On the Job, On the Go

***SPECIAL NAB EDITION!***

April's just around the corner, and you know what that means: the NAB in Vegas! As usual, FHH will be well represented: **Kevin Goldberg**, both **Franks** (**Jazzo** and **Montero**), **Scott Johnson, Dan Kirkpatrick, Michelle McClure, Davina Sashkin**, **Peter Tannenwald**, **Kathleen Victory** and **Howard Weiss**. While they're all there to soak up the sun, see and be seen, several have more formal duties as well.

**Davina** will help open the show on Sunday, when she'll appear on a panel (working title: "Brave New World: Communications Policy Issues for 2015") at the ABA/FCBA Representing Your Local Broadcaster confab. And that's not all: the next day she'll be styling and profiling as a member of the Broadcast Education Association panel on "Broadband Expansion, Spectrum Auctions, Net Neutrality and the IP Transition – Legal and Policy Challenges in the Digital Age".

On Monday afternoon, **Kevin** will join the NAB's **Ben Ivins** for an "Ask the Copyright Expert" session. (The title should actually be "Ask A Couple of Copyright Experts", but let's not quibble.) **Kevin** will also be at the RAIN Conference on Sunday, for the online-inclined.

Also on Monday, **Peter** will join Media Bureau Chief **Bill Lake** and TV industry officials as a panelist at the Advanced Television Broadcasting Alliance session. **Peter** will also be on hand at the Save LPTV Rally on Sunday evening and the LPTV Industry Awards & Reception on Monday evening. The ATBA session will be at the convention center; the rally and reception will be at the Westgate. (If you can't catch up with him at any of these affairs, try the Spectrum Evolution hospitality suite at the Westgate; he has promised to be there on Sunday (4-6 p.m.), Monday (5-6 p.m.) and Tuesday (5-7 p.m.)).

And if you're looking for **Frank J**, you might try the "Representing Your Local Broadcaster" show on Sunday. (He's on the Program Committee.)

Meanwhile, back at the ranch …

Once Vegas wraps up, both **Franks** will be attending the Maryland/DC/Delaware Broadcasters Association Annual Convention in Baltimore on April 22. **Frank J** will also be at the Board Meeting earlier that day.

And never one at a loss for an interesting gig, **Frank M** will be moderating a panel on "The Future of the Internet: How Open is Open?" at the Emerging Tech Leaders Summit in Sacramento on April 1. (The LISTA Northern California TechLatino Council is hosting.) On May 5, he'll be back in D.C. to speak at a reception hosted by the Barristers Society of the George Washington University Law School Alumni Association. (Spoiler alert: He's going to be inducted as the new Chairman of the Society.) And on May 20-22, he be off to San Juan, where he'll be attending and speaking at the Puerto Rico Broadcasters Association annual conference.

*Tomorrow's Broadcast Leaders*

# Their Future's So Bright, They've Gotta Wear Shades

Another class of the brightest and the best is working its way through the Broadcast Leadership Training Program, and FHH is there to help. The BLT, of course, is a 10-month Executive MBA-style program created by the National Association of Broadcasters Education Fund (NABEF) to provide rising executives the specific knowledge and skills they'll need when it comes time for them to assess, buy, own and operate radio and television stations. The BLT provides "a blueprint for talented businesspeople to become a greater part of the industry and increase the diversity of voices available to the public", according to the BLT website. (Check out this page of the website for information on how to apply for next year's program; applications are due by May 31, 2015.)

BLT participants don't have to suffer through dry presentations offered by ivory-tower-cloistered lecturers. *Au contraire*, they are taught by a wide range of professionals who know what they're talking about because they've experienced it all first hand – including (and here we're quoting the BLT website) "leading communications attorneys". So it should not surprise you that the most recent session, on "Closing on the Acquisition of a Broadcast Station", was led by none other than FHH mavens (and *Memo to Clients* contributors) Frank Montero and Dan Kirkpatrick. (A session last month featured our colleague, Kathleen Victory.) Frank and Dan took their tutees through practical issues they're likely to confront, including preparing closing documents, obtaining necessary consents, getting all financing in order, and the like.

This year's class includes: Anthony Arbucias, Graham "Skip" Dillard, Manny Fantis, Jacqué Freeman, Marlon George, Dustin Hall, Kelly Landeen, Sarah Miles, Brian Paul, Erica Pefferman, Claudia Puig, Mary Rogers, Deborah Salons, Ryanne Saucier, Scott Schurz, Matt Smith and Robert Yanez. They're shown in the photo below, along with Michelle Duke (of the NABEF), DuJuan McCoy (an NAB Board Member *and* a BLT Trustee and alum), and Frank and Dan. That's Frank on the right, giving the thumbs-up. But you don't need his imprimatur to know that you're dealing with the broadcast industry's next generation of up-and-comers. You can tell that because they're all sporting their CommLawBlog shades. (Don't you wish you had your pair?)

(Continued from page 1)

"small" video-laden boxes next to Ms. Rolan/Rose's come hither image on the site. Since we don't have a screengrab of the webpage he was looking at, we don't know how credible that is – but let's assume for the moment that the boxes really were relatively small and might thus have passed unnoticed (especially if the guy was focusing on the image he was looking for, *i.e.*, that of Ms. Rolan/Rose). According to the station, the webpage – *i.e.*, showing both Ms. Rolan/Rose *and* the boxes – was not fully visible on monitors in the station's editing bay, so neither the News Director nor any other folks who reviewed the piece prior to broadcast saw the boxes.

So it's not unreasonable for the station to claim that it did not intend to broadcast the objectionable image. (The FCC does not dispute this.) And that image appeared on-screen for only three seconds, in the particular context of a newscast. While the FCC emphasized that those factors – newscast, inadvertence, brevity – did not warrant cutting the licensee any slack at all, its claims are not unassailable.

***On penalizing a station for material in its newscasts***. The FCC states: "*The Commission has repeatedly held that there is no exception from indecency laws for news broadcasts*." The licensee argued that the FCC hadn't provided adequate notice as to what news programming, if any, might be subject to indecency considerations. In response, the FCC cites a 2006 decision in which the FCC did indeed say that "there is no outright news exemption from our indecency rules". But, as in all things, context is important.

*If the FCC really does have extensive "Commission precedent" , it could and should have hauled it all out.*

The language quoted by the FCC comes from a reconsideration decision involving an incident in which, on a CBS news program, an interviewee had used the term "bullshitter" once. In its initial consideration of the facts (in March, 2006), the FCC characterized "the S-word" (including, presumably, any variants, like "bullshitter") as "one of the most vulgar, graphic and explicit words ... in the English language", so much so that even a single use is "shocking and gratuitous", "particularly during a morning news interview". So CBS was guilty of broadcasting indecency (and profanity, too).

On reconsideration eight months later, however, the Commission changed its tune: "[R]egardless of whether such language would be actionable in the context of an entertainment program, ... the complained-of material is neither actionably indecent nor profane in this context [*i.e.*, in the context of a news program]." In other words, use of "one of the most vulgar, graphic and explicit words", a word guaranteed to shock and offend the audience with just a single appearance, was no longer indecent *or* profane *thanks to the fact that it occurred in a newscast*. In performing this U-turn, the Commission did profess not to be establishing an "outright news exemption" – but its action belied that claim.

The Roanoke station could legitimately argue that it should be entitled to similar treatment. And while graphic images of sexual activity may be viewed as somehow more offensive than mere words, the Commission appears to have painted itself into a corner on that point by its extreme characterization of "shit" as extraordinarily "vulgar, graphic and explicit" and guaranteed to shock and offend. Having effectively declared "shit" to be the absolute height of indecency, and then having given CBS a pass on its broadcast of "bullshitter", the Commission may be hard-pressed to explain why the same should not apply to other seemingly "vulgar, graphic and explicit" indecent content.

***On penalizing a station for a fleeting, three-second instance of alleged indecency.*** The FCC states: "*[I]t was clear from Commission precedent that even brief displays of nudity could be actionably indecent*." Again, the alleged indecency in this case lasted three seconds. (Frame of reference: In Mark Ronson's ubiquitous song "Uptown Funk", the time it takes Bruno Mars to sing "Stop, wait a minute, fill my cup, put some liquor in it" is exactly three seconds.) That's little more than the blink of an eye. To demonstrate that Commission precedent "clear[ly]" establishes that "brief" indecency may not be condoned, the best the Commission can do is cite a concurring opinion of Chief Justice Roberts with respect to a 2012 decision by the Supreme Court *not* to hear an appeal in the CBS/Janet Jackson case. With all due respect to the Commission (and to the Chief Justice), that is hardly persuasive, much less conclusive, authority. If the FCC really does have extensive "Commission precedent" on this point, it could and should have hauled it all out. The fact that it did not does nothing to shore up the Commission's credibility on this point. (And, of course, let's not forget that in recent years a number of judges have questioned the lawfulness of the FCC's penalization of "fleeting" indecency – although its constitutionality has thus far escaped any conclusive judicial review.)

***On penalizing a station for the* inadvertent *broadcast of alleged indecency.*** The FCC states: "*Having made the choice to gather and display images from an adult film website as part of*

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*its newscast, WDJB is subject to sanction for its broadcast of actionably indecent sexual material without taking adequate precautions to avoid such result.*" Granted, the station here was playing with fire when it decided to focus on an adult film actress. But it's clear that the station did ***not*** intend to broadcast the penis-in-hand image as part of that story. Could the station have avoided this problem by being a bit more careful? Sure. But so could CBS when its interviewee (the subject of the 2006 decision mentioned above) used the grievous term "bullshitter". No mention of "adequate precautions" was made back then: the Commission determined that no "actionable indecency" occurred even though a simple tape delay system could presumably have spared the audience exposure to the indelicate word.

In the Notice of Apparent Liability addressed to the Roanoke station, the FCC cites no precedent in which it precisely spelled out the "adequate precautions" that the licensee should apparently have taken. The Commission does rely (in a footnote) on a sentence from its March, 2006 omnibus indecency decision. But that sentence says, in relevant part, only that licensees "will be held accountable for violating federal restrictions on the willful or repeated broadcast of obscene, indecent, or profane material". Since the Roanoke station's broadcast was neither intentional (*i.e.*, willful) nor repeated, it's not clear how quoting that sentence helps the Commission here.

Nevertheless, the FCC concludes that the licensee acted "with reckless disregard for the content of its broadcast". This is because the one guy didn't happen to notice the allegedly indecent material, none of his superiors at the station caught it either, and the station's editing equipment didn't permit news personnel to make sure that the station's audience wouldn't be exposed to this kind of material. In the Commission's view, that's enough to transform the unintended broadcast into a "willful or repeated" violation worthy of a $325,000 fine. Some might view that as a stretch.

The Roanoke licensee also argued that the fact that the FCC's indecency policy is in flux made it difficult, if not impossible, to know what the standard was. In response, the FCC observes, correctly, that the announcement that changes to the policy might be under consideration wasn't made until April, 2013, some nine months *after* the broadcast. Obviously, that announcement could not have affected the station's July, 2012 decision to broadcast the Rolan/Rose piece. And anyway, the Commission piles on, the April, 2013 announcement made clear that, notwithstanding the possibility of a change in policy, the previously established policy would remain in effect for the time being.

But wait. In that April, 2013 public notice, the Commission disclosed that, since September, 2012, it had been utilizing some alternate policy focusing strictly on "egregious" cases. *And* it had been applying that alternate policy to cases long pre-dating September, 2012, resulting in the summary dismissal of more than a million such cases. Since the FCC had not previously disposed of those cases – and, indeed, had in many instances declined to renew licenses because those cases were pending – the facts in each of them must have at least facially met the old standard of indecency. And yet, once the new "egregious" standard kicked in, out they all went. Doesn't that indicate that, contrary to the FCC's protestations, its policy *had* in fact changed in some respects? And if it changed, isn't the Roanoke licensee entitled to know what the new policy is?

*The relevant factors don't scream "We've got to throw the book at him".*

The FCC would likely respond that the penis image would have been deemed "egregious" anyway. But the Commission has never described how its new "egregious" standard works in practice, nor has it explained how more than a million long-pending allegations of indecency happened not to satisfy the "egregious" standard. That being the case, how is the Roanoke licensee to know that it is not being arbitrarily singled out here?

And then there's the issue of the size of the fine.

Under the Commission's rules, the standard forfeiture for violation of the indecency rules is $7,000. But the FCC may "adjust" fines upward if it believes the circumstances so warrant. And, in the wake of the Janet Jackson incident, Congress authorized the FCC to whack broadcasters up to $325,000 for indecency violations. (That figure has since been upped to $375,000, but at the time of the Roanoke broadcast it was still $325K, so that's the max that could be imposed here.)

Starting with the $7,000 base fine, the FCC concludes that the "nature of the violation, and the Licensee's degree of culpability and ability to pay" all justify a "significant upward adjustment". Again, let's bear in mind that the "nature of the violation" was an *inadvertently* broadcast, *three-second* image that was confined to a small "box" located along the side of a screen otherwise dominated by the finger-licking Ms. Rolan/Rose. And as far as "culpability" goes, the violation was admittedly unintentional; the licensee had been, at worst, merely reckless. Those factors don't scream "We've got to throw the book at him".

As to ability to pay, the licensee happens to be a large entity owning a number of media interests. It could

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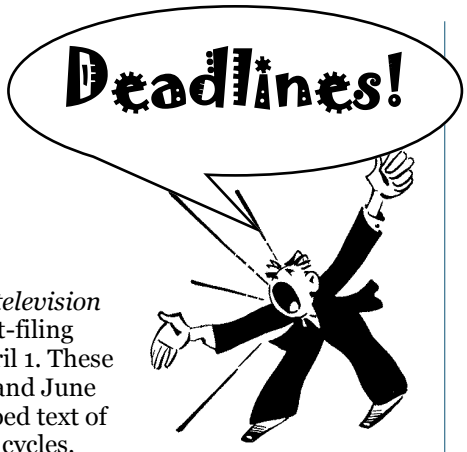


**April 1, 2015**

***Television License Renewal Applications*** – *Television* and *Class A television* stations located **Delaware** and **Pennsylvania** must file their license renewal applications. These applications must be accompanied by FCC Form 396, the Broadcast EEO Program Report, regardless of the number of full-time employees. LPTV and TV translator stations also must file license renewal applications.

***Television Post-Filing Announcements*** – *Television* and *Class A television* stations located in **Delaware** and **Pennsylvania** must begin their post-filing announcements with regard to their license renewal applications on April 1. These announcements then must continue on April 16, May 1, May 16, June 1 and June 16. 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.

***EEO Public File Reports*** – All *radio* and *television* stations *with five (5) or more full-time employees* located in **Delaware**, **Indiana**, **Kentucky**, **Pennsylvania**, **Tennessee** and **Texas** must place EEO Public File Reports in their public inspection files. TV stations must upload the reports to the online public file. For all stations with websites, the report must be posted there as well. Per announced FCC policy, the reporting period may end ten days before the report is due, and the reporting period for the next year will begin on the following day.

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

**April 10, 2015**

***Children's Television Programming Reports*** – For all *commercial television* and *Class A television* stations, the first quarter 2015 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.

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*(Continued from page 16)*


**April 13, 2015**

***Additional Steps to Improve Data Collection on Minority and Female Media Ownership*** – Reply Comments are due with regard to the Commission's *Second Further Notice of Proposed Rulemaking and Seventh Further Notice of Proposed Rulemaking* in MB Docket 07-294 in which the Commission has sought comment with regard to its policies regarding the FCC Registration Numbers (FRN's) authorized for use in biennial ownership reports for commercial and noncommercial stations, and the possible impacts of such FRN policies on the FCC's media ownership data collection efforts.

**April 14, 2015**

***Extension of Online Public File Requirements to Radio and Satellite*** – Reply comments are due with regard to the Commission's proposal to expand to broadcast radio licensees, satellite radio licensees, satellite TV providers, and cable providers the requirement that public inspection files be posted to the FCC's online database.

**June 1, 2015**

***EEO Mid-Term Reports*** – All *radio* station employment units *with eleven (11) or more full-time employees* and located in the **District of Columbia**, **Maryland**, **Virginia** and **West Virginia** must file EEO Mid-Term Reports electronically on FCC Form 397.

***EEO Public File Reports*** – All *radio* and *television* stations *with five (5) or more full-time employees* located in **Arizona**, the **District of Columbia**, **Idaho**, **Maryland**, **Michigan**, **Nevada**, **New Mexico**, **Ohio**, **Utah**, **Virginia**, **West Virginia** and **Wyoming** 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 **Michigan** and **Ohio** 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 the **Arizona**, **Idaho**, **District of Columbia**, **Maryland**, **Nevada**, **New Mexico**, **Virginia**, **West Virginia** and **Wyoming** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323-E.

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clearly afford more than $7K.

Putting all these factors together, the Commission magically concludes that the appropriate upward adjustment happens to be a 46-fold increase. The FCC doesn't explain the precise mathematics by which it arrives at the $325K mark. It's probably a good guess that the Commission figured that, as long as Congress had given it fining authority up to that dollar value, the Commission might as well use all that authority.

As mentioned above, the FCC seems to be trying to send some kind of signal to the broadcast industry here. The FCC obviously wants to remind us all that it can and will penalize fleeting, unintentional instances of arguable indecency, even when those instances occur during newscasts. And it wants to let everybody know that it can and will exercise its authority to dole out $325K+ fines.

To be clear, this writer is ***not*** advocating or defending the broadcast of graphic sexual activity (or any other programming, for that matter). But I am suggesting that any effort by the FCC to penalize *any* licensee because of the content of its broadcasts should be undertaken with extraordinary clarity and with extreme sensitivity to overriding First Amendment considerations. In view of the murky history of the FCC's indecency policy, and the questionable constitutionality and somewhat chameleon-like nature of that policy, does it really make sense for the Commission to impose a maximum $325K penalty on a station guilty only of minor carelessness that led to an unintended, purely incidental, three-second miscue? If the Roanoke licensee chooses to fight the fine, we may find out.

# Brrr - The Auction 98 FM Freeze is On

With Auction 98 now in the works (*see* the related article on page 7), the Commission has frozen, ***effective immediately*** (*i.e.*, as of March 16, 2015):

- All applications proposing to modify any of the 131 vacant non-reserved band FM allotments scheduled for Auction 98 (currently slated to kick off on next July 23);
- All petitions and counterproposals that propose a change in channel, class, community, or reference coordinates for any of the Auction 98 allotments; and
- All applications, petitions and counterproposals that fail to fully protect any Auction 98 Allotment.

Filings in any of the above categories that happen to be submitted after the release of the FCC's public notice will be dismissed. (Can't remember what channels are up for grabs in Auction 98? Click here for the current list.) This freeze will remain in effect until the day after the deadline for Auction 98 long form applications – which will likely be sometime in late Summer/early Fall, 2015, at the earliest.

The freeze notice does ***not*** impose a freeze on any and all minor mod applications (for commercial *or* noncommercial stations) during the filing window for short form (Form 175) applications for Auction 98. (The Form 175 filing window hasn't been announced yet – look for that announcement in a month or two.) Such blanket freezes barring ***all*** minor mods during the Short Form window have been standard operating procedure in the last several FM auctions. Given that precedent, if you have a minor mod you'd like to file that doesn't fit into any of the three freeze categories noted above, you might want to plan on getting it filed before the opening of the Form 175 filing period, just to be on the safe side. Otherwise, your ability to file could be delayed by a month or more. Check back here for updates on the auction schedule.

*(Continued from page 5)*

latter rates are set according to a "willing buyer/willing seller" standard. The CO prefers that standard, or something akin to it which takes into account the "fair market value" of the copyrighted work being licensed.

*Consider ratesetting distinction between custom and noncustom radio*: The CO notes that, since a 2009 case involving Yahoo's Launchcast service, the statutory license applicable to webcasting treats so-called "custom" webcasters like Launchcast, Pandora and others the same as radio stations. The "custom" services provide individualized programming to individual listeners based on those listeners' individual preferences, while broadcasters simply stream their programming to their entire audience at once. The CO proposes giving the Copyright Royalty Board the ability to effectively create a new classification of non-interactive webcaster that covers custom services.

*Creation of MROs*: Consistent with the proposal to bundle mechanical and performance rights, the CO suggests restructuring the PROs into various "MROs" (Music Rights Organizations). An MRO would be "any entity representing the musical works of publishers and songwriters with a market share in the mechanical and/or performance market above a certain minimum threshold." That would include not only ASCAP, BMI, SESAC – all of whom already clear performance rights – as well as others that don't, like the Harry Fox Agency (which deals primarily in mechanical rights). While this could consolidate more power in the already-powerful PROs, it also offers the possibility for streamlining the process of clearing multiple rights and the promise of more transparency (as suggested by the CO in the report).

*Creation of GMRO*: Overseeing those MROs would be a "GMRO" (General Music Rights Organization). The GMRO would be a non-profit entity designated and regulated by the government, essentially the equivalent of SoundExchange (the CO actually suggests the name "SongExchange"). Again, this could help streamline and regulate the process of licensing musical works by coordinating licensing and royalty payments across the various MROs (and the increasingly growing number of independent publishers). But it also might result in a slightly higher royalty rate for use of musical works, as the CO contemplates funding the GMRO via a separate licensing surcharge determined by the Copyright Royalty Board.

Again, this is just the tip of the iceberg. The CO itself warns that its "recommendations should be understood as high-level and preliminary in nature – more of a sketch than a completed picture". But since a number of influential members of Congress have already signaled their intention to act in this area as well, this sketch could quickly develop into a framed work of art.

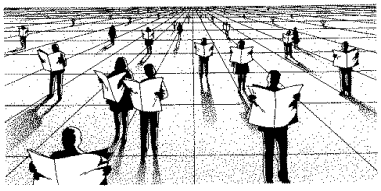
Check back here for updates.

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

# Updates On The News

***TIS Tweaks Tweaked*** — *Technical Content Alert!!! The rule changes discussed below are highly technical. If you're OK with stuff like "attenuation [must be] greater than the attenuation at 1 kHz by at least: 60 $\log_{10}(f/3)$ decibels, where 'f' is the audio frequency in kHz", you should have no problem. Others should proceed with caution.*

A couple of years ago we reported on a number of changes made by the FCC to its rules governing Travelers' Information Stations (TIS), the first changes to the TIS rules since TIS were established in 1977. Now those changes have been tweaked, although not as much as some might have liked.



As noted above, the tweaks are highly technical, so much so that we won't go into detail here. (There's a reason we chose law school rather than a career in engineering.) TIS *cognoscenti* should take a close look at the FCC's decision for the real nitty-gritty. To summarize:

The filtering requirement for TIS has been changed from 3 kHz to 5 kHz. The expectation is that this should improve the quality of TIS signals to match commercial AM station signals – but TIS operators who might prefer, for whatever reason, to continue to use 3 kHz filters may do so. (The Commission declined to eliminate the filtering requirement entirely.)

The roll-off curve relative to signal attenuation has been adjusted in light of the changed filtering requirement.

TIS audio filters may now be placed either ahead of the transmitter or between the modulation limiter and the modulated stage. Existing gear can be retrofitted by deactivating the old 3 kHz filter (which, under previous rules, had to be placed at the last stage of the audio chain) and adding an outboard 5 kHz filter at the transmitter audio input. Alternatively, manufacturers may redesign their gear to insert a 5 kHz filter in conformity with the revised rules.

Manufacturers who retrofit their equipment will have to file a Class II permissive change request with the Commission for each model to be retrofitted. The request should list all filters to be used and provide "clear and concise" instructions for TIS operators who wish to perform the retrofit themselves. A licensee may retrofit its own system as long as the licensee has determined that (a) its equipment model has received a Class II permissive change grant and (b) only approved filters are used. Equipment newly designed in accordance with the revised filtering rules will need new FCC certification, as will use of an audio processor to perform the 5 kHz filtering (absent a dedicated 5 kHz filter).

Did we mention that these are all highly technical?

On the non-technical front, the Commission took this opportunity to underscore two separate limits relative to TIS program content.

With respect to weather information, TIS operators are permitted to integrate into their feeds weather information, but only "during times of hazardous or potentially hazardous conditions". A number of folks thought that it would be a good idea if TIS operators could include weather reports – such as routine NOAA weather broadcasts – into their programming. The Commission had previously rejected this notion, mainly because there are plenty of other available sources of normal, non-emergency weather reporting. However, the FCC has now observed that TIS licensees have "substantial discretion to determine what information is relevant to 'hazardous or potentially hazardous conditions' under the Commission's rules", which seems to provide some leeway on this front. The Comission helpfully offered the following non-exclusive list of conditions that might justify tapping into NOAA weathercasts: "snow, ice, mudslides, fog, flash floods, thunderstorms, wildfires, tornados and hurricanes".

And music lovers take note. Responding to anecdotal reports of TIS-transmitted music, the Commission reminded TIS licensees that "music content of any kind is not permitted".