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Memorandum to Clients

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NEWS AND ANALYSIS OF RECENT DEVELOPMENTS IN COMMUNICATIONS LAW

No. 15-07

Audio overkill

New AM and FM Licenses Conditioned on Continuous Operation

By Davina Sashkin
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What a difference a day makes! That is, if the day in question is July 2, 2015 and you happen to be a radio broadcaster waiting for grant of a license application.

That's because all but one of the commercial and noncommercial FM and AM licenses (both new licenses and mods of old licenses) granted on or after July 2 have included the following condition:

> Grant of this license application is conditioned on continuous operations of the licensed facility for the twelve-month period following grant. Failure to do so will result in the rescission of this grant, dismissal of the license application and the forfeiture of the associated construction permit pursuant to 47 C.F.R. § 73.3598(c) unless licensee rebuts presumption that authorized facilities were temporarily constructed.

Radio licenses granted on or before July 1 don't appear to have contained that condition.

It's likely a good bet that the new condition will grace all AM and FM, commercial and noncommercial, licenses going forward. (Our conclusion here is based on review of all the AM and FM licenses granted between June 29 and July 21, according to CDBS. Admittedly we're speculating, but there is no obvious reason why 21 licenses granted on or after July 2 should suddenly have all been subject to a condition that does not appear on licenses granted prior to July 1. As discussed below, the Audio Division has thus far shed no light on this at all.)

Inside this issue . . .

Take a close look at the language the Audio Division has added there. It says that, if the station fails to operate "continuous[ly] … for the twelve-month period following grant" of the license, the grant will be rescinded, the license application will be dismissed, and the underlying construction permit will be toast. Sure, the licensee will apparently be given some opportunity to "rebut[ ] presumption [sic] that authorized facilities were temporarily constructed" – but exactly how and when that opportunity will be provided isn't stated.

So, for example, suppose you receive a license just before (choose one: the hurricane; the earthquake; the tornado; the blizzard; the lightning storm; the terrorist attack; the tragic plane accident; the massive unexplained county-wide power outage; etc.) occurs. That event knocks you off the air for a couple of days, maybe even a couple of weeks. You have just failed to comply with the condition, and the construction permit and license on which you relied are, under the terms of the condition, history. You can apparently try to get the breath of life breathed back into them, but really, under those circumstances would your time be better spent getting back on the air or rebutting a bogus presumption?

We'd like to explain this development, but we can't. That's because the Audio Division hasn't bothered to clue us all in about what it's doing and why. Instead, it has simply started to tack on the condition.

If this strikes you as, um, unusual, get in line.

What's up with that?

In view of the timing, we're guessing that this new language is part of the Division's effort to stamp out "temporary construction". We reported last May on a Division decision in which it frowned on the construction of less-than-permanent facilities. In particular, that decision cautioned that facilities authorized in a construction permit should be

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Hold that tiger!

Eleven Field Offices Culled in Reorganization

By Laura Stefani
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A few months ago, we reported on Chairman Wheeler's then-rumored plan to eliminate 16 of the Commission's 24 Field Offices. (The plan, as described by Wheeler himself in testimony on Capitol Hill, would have replaced the decommissioned offices with "Tiger Teams" that would fly around the country to respond to unlawful interference.) Reports of the plan triggered considerable controversy which in turn triggered some old-fashioned D.C. lobbying (by both regulatees and field office employees) which then prompted Congressional intervention.

The result? In a terse order long on bureaucratese and short on detail, the FCC has announced that 11 of the 24 Field Offices (down from the 16 originally proposed) will be shuttered.

Surviving the cuts will be the offices in NYC, LA, San Francisco, Chicago, Atlanta, Miami, Dallas, and Columbia, MD – all of which were previously said to have been on the safe list. The five saved from the anticipated elimination are Boston, Denver, Honolulu, New Orleans and Portland. (The Atlanta, San Francisco and Columbia offices will be moved to different FCC-owned properties in or near their respective cities.)

Which means that you can kiss good-bye to the offices in Anchorage, Buffalo, Detroit, Houston, Kansas City (MO), Norfolk, Philadelphia, San Diego, San Juan, Seattle and Tampa. All is not lost for Alaska and Puerto Rico, though: the Commission has committed to "maintain[ing] a field presence" there by "contract[ing] with local personnel". The FCC assures that it "will also periodically dispatch field agents to Kansas City". What's not clear is when and why such "dispatches" will occur – or who might be included in them, or why Kansas City gets them but no other cities apparently do.

According to the FCC's Order, the goal here is to "refocus[ ]" the Field Offices on "enforcement of our radio frequency spectrum rules and other key regulations in a high impact and cost effective manner that is better aligned with the priorities of the Commission and the Bureau as a whole".While that whizbang elocution may seem impressive at first glance, on closer inspection it fails to indicate precisely how the offices had become unfocused, what other "key regulations" might be on the field offices' new watch list, or what "priorities" will affect the "align[ment]" of things. Thus, for example, we can't say for sure whether broadcasters and tower owners may rest a little easier thinking that there will be fewer inspections and fines for any facility violations.

Also among the FCC's goals here: "updat[ing] [the Field Offices'] equipment and employee skillset to address the likely issues that will accompany new and expanded uses of spectrum." On the equipment side, we can apparently look for "the expanded use of remotely operated monitoring equipment" as well as the "identification and use of portable devices capable of assessing interference issues in bands expected to experience heavy spectrum use". Again, we're left wondering what frequency bands in the FCC's view are in need of better interference monitoring.

While it's not certain what aspects of the "employee skillset" need to be updated, one somewhat specific change adopted by the FCC involves the qualifications for Field Office agents: they must now all have "electrical engineering backgrounds". Precisely what might qualify as such a "background" is left unstated. However, according to Commissioner O'Rielly, as a result of this new requirement six current field agents will find themselves without a job. (Though the Order does provide for outplacement assistance for these and other downsized employees, Commissioner O'Rielly laments that these six were not grandfathered into their positions.)

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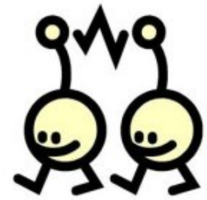
FCC Announces Upcoming Webinar on TV Channel Sharing



~~Everything~~, um, ~~a lot of things~~, er, ~~several things~~, uh, stuff
you always wanted to know about channel sharing but were afraid to ask

By Harry F. Cole
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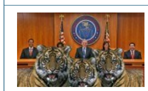
If your station happens to be on the FCC's Eligibility List for the upcoming reverse spectrum auction, listen up. The Incentive Auction Task Force and the Media Bureau are teaming up to present a one-hour webinar to go over various aspects of the channel sharing bid option. That's the option that could let folks sell their current spectrum back to the Feds while staying in the broadcast business by bunking up with another licensee on that other licensee's channel. (If you've been trapped in your sensory deprivation chamber for the last, oh, year or two and aren't au courant about channel-sharing, check out some of our posts on the subject here.)

Channel-sharing promises to be an attractive opportunity for some broadcasters, but it's not by any means a simple proposition. As with many aspects of the incentive auction, the Commission is venturing into previously unexplored turf here. As a result, the rules and policies that will govern the process are still a work in progress. Because of that, it would be a good idea to listen in to get updated on the latest and greatest thinking on the topic from the FCC's Brain Trust. They've promised to address the revised channel sharing rules, FCC Channel Sharing Agreement requirements, the bidding process for licensees interested in channel sharing, and the post-auction licensing process. And they'll be taking questions, too!

The rules and policies that will govern the process are still a work in progress.

The party's scheduled to run from ***Thursday, August 13, 2015 from 3:00 pm to 4:00 pm EST***. (Heads up: this date is different from the date originally announced for the webinar. The show was postponed the day before the date first announced.) To attend, all you'll need is an Internet connection. Click on this link, enter your name and email address, enter the password "fcc123" and click on "Join". (We don't know for sure whether the password is case sensitive; we're showing it here as provided by the FCC when it announced the postponement. The original password was slightly different, but we won't tell you what it was because we don't want to confuse things.) You'll be able to send in your questions through learn@fcc.gov. You'll also be able to score a set of the slides off the Commission's LEARN website.

And while we're on the topic of channel sharing, the comment deadlines for the FCC's most recent Notice of Proposed Rulemaking (*NPRM*) about channel sharing have now been set. (We reported on the *NPRM* last month.) If you want to file comments, you've got until ***August 13, 2015***; reply comments are due by ***August 28***. Both comments and replies may be filed through the FCC's ECFS online filing system; refer to ***Proceeding Nos. 12-268 and 15-137***.



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The FCC did commit to a quick time frame – six short weeks (happy summer plans to the staff assigned to that project!) – within which it will issue new procedures addressing how complaints can be "escalated through the field offices". But wait a minute – what does "escalating complaints through the field offices" mean, anyway? And if "escalating" here is just a fancy way of saying "speeding up disposition of", why does it take a reorganization of the Field Offices to get that done? In any event, check back here in, say, seven weeks and we may be able to shed some more light on this.

The order includes two other specific commitments. First, the net savings derived from the reorganization will first be applied to the upgrading of Field Office equipment and employee skillsets before any of that cash is applied to the FCC's general fund. And second, "net savings [from the reorganization] will not be used to increase the number of full-time non-field-related employees in the headquarters office of the Enforcement Bureau". This is presumably a provision designed to address concerns that the Field Office shut-down is simply a means by which the Commission can expand the "front office" in the Bureau's Washington office. In recent months that office has attracted attention for imposing multiple headline-making multi-million dollar fines. Some observers speculated that, by closing down Field Offices (which don't generate that kind of forfeiture), the Bureau could fund more full-time slots in D.C. to beef up its already beefy activities there.

The mere fact that these terms were included at all suggests that they were the subject of some internal debate leading up to the Order.

One thing we can say with some confidence: the reorganization will almost certainly herald a new era for outside the Beltway spectrum bandits. Time will tell whether the FCC can maintain control of what is happening out there.

Aereo's unsuccessful Plan B, re-cycled

FilmOn Takes a Big Step Closer to Section 111 Eligibility

By Kevin Goldberg
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Sometimes, getting there first doesn't mean that you're the winner. Just look at Aereo, whose innovative technology was going to revolutionize the delivery of video programming.

Although supposedly embraced by the consuming public, Aereo was sued for copyright infringement by lots of broadcasters (including all the major networks). It won a string of victories in several lower courts, but ultimately lost the Big One in the Supreme Court, which held that Aereo's system did indeed infringe on the broadcasters' copyrights, including particularly their exclusive right to publicly perform their programs. (Anyone fuzzy on the Aereo saga may want to take a look through our posts on the topic on CommLawBlog.com.)

According to Aereo's Plan A, Aereo was entitled to retransmit, without copyright liability, programming it received through its over-the-air antennas. The Supreme Court, however, viewed Aereo's system to be more akin to cable systems, whose retransmissions of broadcast material are subject to copyright obligations. As we reported, following its loss in the Supremes, Aereo moved to Plan B: it argued that it was a cable system and offered to pay copyright royalties to participate in the cable compulsory license. The Copyright Office (from which Aereo sought a favorable determination) didn't buy it. Aereo filed for bankruptcy, sold off most of its assets and is now, for all intents and purposes, dead.

Wu's opinion is less than kind to FilmOn X in a number of respects.

Ironically, "FilmOn X" lives on, and may be on the verge of winning the fight that Aereo could not.

FilmOn X offers a video delivery system technologically similar to Aereo's. Its continued existence is ironic because, when it debuted, it called itself "AereoKiller" and utilized the domain name "BarryDriller.com", an obviously unsubtle reference to Aereo bigwig Barry Diller. (It dropped those and adopted "FilmOnX" and "FilmOn.com" in their place when sued by Aereo and Diller.) While FilmOn X did not "kill" Aereo, it has outlived Aereo and seems positioned to fulfill the promise that Aereo wasn't able to.

FilmOn X was not always an Aereo clone. It was originally created to be an online-based cable system. Sued by the major networks, FilmOn (as it was then known) was subjected to a temporary restraining order imposed by a federal judge in New York. It immediately ceased retransmission of over-the-air network television, although it continued to offer programming for which it had negotiated licenses, including programming from several independent broadcast television channels.

That happened in 2012, just when Aereo was making its big splash. FilmOn promptly pivoted to an Aereo-style system dubbed FilmOn X (née AereoKiller). Like Aereo, FilmOn X was sued, but in California, not New York. That distinction is important, because while Aereo was winning in federal courts in New York (first the Southern District of New York and then the United States Court of Appeals for the Second Circuit), on the West Coast FilmOn X was losing: District Judge George Wu shut FilmOn X down with a preliminary injunction barring it from operating in the Ninth Circuit. FilmOn X appealed to the U.S. Court of Appeals for the Ninth Circuit. But while that appeal was pending, two big things happened: (1) the Supreme Court agreed to hear the Aereo case and (2) a federal district judge in D.C. preliminarily enjoined FilmOn X from operating anywhere in the nation other than the Second Circuit states of New York, Vermont and Connecticut. FilmOn X was stalled.

You know what happened next. The networks prevailed in the Supreme Court, Aereo tried its Plan B back in the District Court (arguing that it's entitled to treatment as a cable system) but ran out of money and that was that, right?

Nope. Not by a longshot. In the wake of the Supreme Court's *Aereo* decision, the Ninth Circuit sent FilmOn X's case back to Judge Wu, where the parties filed cross motions for summary judgment. The broadcasters argued that FilmOn X is not entitled to a cable compulsory license under Section 111 of the Copyright Act; FilmOn X argued that it is. And what do you know? Notwithstanding a contrary conclusion by the federal district judge in New York in the Aereo case, Judge Wu has concluded that FilmOn X is at least "potentially" entitled to a compulsory license under the Copyright Act.

That conclusion is a bit surprising, since Wu's opinion is less than kind to FilmOn X in a number of respects. He starts off with a detailed description of FilmOn X's technical system, noting that a number of the features which FilmOn X has touted in its own defense have not been shown to work as advertised; in some instances, they haven't even been developed yet. Wu does note in FilmOn X's favor that the company had filed with the Copyright Office the paperwork ordinarily required of a cable

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system for each six month period between August 2012 and July 2014, and it had paid the corresponding fees. But that plus is tempered by a serious minus: it turns out that FilmOn X omitted from its Copyright Office filings reference to "some" stations, an omission that wasn't corrected until very late in the game. The omitted stations included the ABC, CBS, FOX and NBC stations in LA, San Francisco, Seattle and Phoenix. In other words, FilmOn X "managed not to pay the required royalties for the very network with whom they were then in litigation." Quite an oversight – and one that seemed to impress Judge Wu, but not favorably.

So how did Wu end up siding with FilmOn X?

Through a thorough review of (1) the evolution of Section 111 and other Copyright Act provisions relating to the right of cable systems to retransmit broadcast signals, (2) relevant court cases (including, of course, *Aereo*), and (3) other materials from sources including the Copyright Office and the FCC.

The earliest Supreme Court cases – *Fortnightly* from 1968 and *Teleprompter* from 1974 – prompted Congress to create the Section 111 Cable Compulsory License in 1976, which generally provides a cable operator a copyright license for its retransmission of the programming of local television stations as long as the operator adheres to certain requirements, including the payment of governmentally-set royalty rates. In that provision Congress defined a cable system as

> a facility, located in any State, territory, trust territory, or possession of the United States, that in whole or in part receives signals transmitted or programs broadcast by one or more television broadcast stations licensed by the Federal Communications Commission and makes secondary transmissions of such signals or programs by wires, cables, microwave, or other communications channels to subscribing members of the public who pay for such service.

As Wu noted, the precise interpretation of what constitutes a cable system for these purposes has been adjusted over the years to address changing technology. For instance, satellite systems were very quickly declared by the courts not to be cable systems, prompting the creation of the Satellite Home Viewer Act in Section 119 of the Copyright Act (followed later by Section 122), which provides satellite services a compulsory copyright license covering transmission of broadcast programming back into the local market.

In Judge Wu's view, the Supreme Court's *Aereo* decision – which was based in large part of the similarity between Aereo and a cable system – reflected that definitional flexibility. And while he declined to hold that the *Aereo* decision compelled the conclusion that FilmOn X should be deemed a cable service, he acknowledged that *Aereo* is

> about as close a statement directly in the [FilmOn X's] favor as could be made, and the decision's reasoning continues the trajectory started in *Fortnightly* and seen again in the satellite decisions: courts consistently reject the argument that technological changes affect the balance of rights as between broadcasters and retransmitters in the wake of technological innovation. Instead, courts have left such rebalancing to Congress.

He also observed that, while the Copyright Office has on several occasions stated that it does not believe that Internet retransmission services (such as FilmOn X's) qualify for the Cable Compulsory License, the Copyright Office is not the final authority on the subject, especially as the Copyright Office seems to disagree with Congress on this issue.

In Wu's view, Aereo is "about as close a statement directly in the [FilmOn X's] favor as could be made."

Judge Wu was similarly unimpressed by the ivi, Inc. decisions from the Second Circuit. There the Second Circuit concluded that an Internet-based system cannot be a cable system under Section 111 because there is no "facility" involved; the Internet, the Second Circuit held, "is neither a physical nor a tangible entity." But, as Judge Wu concluded, FilmOn X ***does*** have "a facility":

> The signals are not received by "the Internet." They are received by antennas, located in particular buildings wholly within particular states. They are then retransmitted out of those facilities on "wires, cables, microwave or other communications channels."

As far as the FCC goes, Judge Wu acknowledged both the Commission's role in defining a cable system and the fact that the Commission is currently engaged in a rulemaking on this very point. But be that as it may, he also noted that the broadcasters had not identified any ways in which FilmOn X might be violating any FCC regulations regarding cable systems. Further, there is, in Judge Wu's view, a high likelihood that the FCC's proceeding to redefine the notion of "MVPD" will include Internet-based systems.

It should not surprise you that Judge Wu believes that questions concerning the retransmission of broadcast programming must ultimately be resolved by Congress. But for the time being, in the absence of any clear Congressional direction, he has granted FilmOn

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Like waiting for Godot …

Restoring Vitality to the AM Revitalization Effort

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[*Editor's Note: The following piece first appeared in Radio and Television Business Report – you may know it better as RBR+TVBR – which has been reporting on the broadcasting industry for nearly 30 years. The folks at RBR+TVBR have kindly consented to our reproducing the piece here.*]

The radio industry has been waiting for the FCC to finally release its long-awaited AM revitalization order. However, much of the optimism that was felt when the AM revitalization proceeding was initiated years ago appears to be screeching to a halt. Within the world of AM revitalization, nothing appears to outshine the ever-increasing reliance upon FM translators by AM stations. The FCC's rule change in 2009 allowing AM stations to have their signals retransmitted on qualifying FM translators was a huge step forward. Approximately 900 AM stations use FM translators to fill-in coverage of their local communities, which is frequently compromised (in the AM band) by interference from LED lighting, computer monitors, and other interference sources that continue to multiply. Translators also allow AM stations to maintain coverage of their audiences as market boundaries and population centers shift. Most striking, translators have enabled many AM stations to broadcast during nighttime hours for the very first time, providing live, on-the-scene coverage of high school sports, local political debates, and other events that usually occur at night, not to mention school closings, weather conditions, and traffic reports for early morning and late evening commuters.

Contrary to Chairman Wheeler's view, there are not enough translators to meet the needs of AM stations and their listeners.

However, the challenge is that FM translators frequently are not located where the AM stations need them, and when they are, they're incredibly expensive. In fact, as demand for FM translators has increased, so has their price. Acknowledging this, the FCC had at one time seemed willing to relax its current prohibitions on the ability to relocate FM translators to move them closer to AM stations by granting "Mattoon" waivers, which allowed a move with one long "hop" that would normally be a prohibited major change or that would require equally-discouraged multiple short hops. In addition, there were rumors being kicked around of a possible filing window for FM translators, limited to just AM stations owners.

However, time passed and no AM revitalization order was adopted and no filing window was opened. During this period in 2013 and 2014 the FCC delayed consideration of an AM-only filing window for FM translators for more than a year, while nonetheless working aggressively to process the 2,800 applications for LPFM applications filed during the 2013 LPFM filing window.

Then on the week of the NAB convention, with the LPFM process almost complete, FCC Chairman Wheeler released a blog post stating that the FCC would finally move forward with AM revitalization, but without the most promising proposal for AM stations and their listeners: an AM-only filing window for FM translators. Chairman Wheeler stated two concerns: (1) whether there are already enough translators available for AM stations; and (2) whether it is fair to give AM stations an "exclusive" FM translator window. Meanwhile, members of the FCC's Media Bureau have echoed this by telling us that they think there are already too many translators out there.

AM broadcasters are confused and surprised by the Chairman's doubts about expanding the universe of FM translators available for AM stations. For six years, the FCC has patted itself on the back for the success of its decision to allow AM stations to use FM translators. So what went wrong? Why is the FCC pulling back on its efforts to provide FM translators as a partial solution to AM revitalization? Was the AM revitalization stalled because of concerns about translator supply and fairness, or was it to preserve more FM frequencies for LPFM stations which may be allowed to increase their coverage?

Contrary to Chairman Wheeler's view contained in his blog, there are not enough translators to meet the needs of AM stations and their listeners. Currently, 719 AM stations do not have any FM translators within protected service contours – in other words, these stations can't buy or lease a translator at any price. Of the remaining 3,065 AM stations (that don't already have a translator), 553 stations must fight among themselves to obtain one of only 379 translators within their overlapping contours, leaving another 174 AM stations out of luck. All told, 893 AM stations have zero chance to obtain an eligible FM translator.

While these figures would improve a bit if you count translators that could be moved a few miles under a "Mattoon" waiver, the FCC has now cracked down on these waivers in recent months, making it increasingly

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difficult for AM stations to find a useable translator. In fact, earlier this year the FCC denied a Mattoon waiver that was similar to earlier granted long-hops, signaling a roll back of that new policy.

And this analysis does not reflect the fact that most of these potentially available translators are already being used by FM radio stations, further reducing supply. Hence the skyrocketing prices for FM translators, which have recently sold for tens of thousands of dollars in small markets, hundreds of thousands in mid-sized markets, and even a million dollars in one large market. Any FCC decision to reverse course and not open an AM-only window will push translator prices even further out of reach for AM broadcasters, most of whom already struggle to remain economically viable.

The Chairman's concerns about the exclusivity of an AM-only translator window are unfounded. Consider the 2013 LPFM-only filing window that will launch almost 2,000 LPFM new stations, and the earlier FM-only translator window that opened in 2003. Far from an exclusive opportunity, an AM-only window is nothing more than AM broadcasters finally reaching the front of the queue.

In the 1980s when I began my legal career representing Spanish language broadcasters, AM was the service with a low barrier to entry that allowed Hispanic broadcasters enter the market. Three decades later, those early Hispanic broadcasters grew to become some of the largest and most successful broadcasting companies in the country. Likewise, today AM remains a gateway service allowing new entrants and new ethnic and foreign-language services to break into broadcasting. In 2013, the FCC promised to help AM broadcasters overcome the significant technical and economic challenges that AM stations face, given the importance of local AM radio service. While my confidence has been shaken I sincerely hope that Chairman follows through.

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X's motion for summary judgment, holding that FilmOn X is *potentially* eligible for a Section 111 license. The fact that that ruling is issued merely on a "potential[ ]" basis is significant. Recognizing that his conclusion drastically changes the broadcasting and cable landscape, Judge Wu has authorized an immediate *interlocutory* appeal of his ruling to the Ninth Circuit. Meanwhile, his preliminary injunction against FilmOn X remains in effect pending the outcome of that appeal.

And what is the actual effect of Judge Wu's decision on the broadcasting and cable landscape, you're probably asking? Well, it could be nothing. This case is clearly going to be appealed. From all appearances, thanks to its billionaire owner, Alki David, FilmOn X seems to have almost limitless cash to fight in court as long as it takes. If the Ninth Circuit reverses Wu's decision, it's a good bet that FilmOn X will seek Supreme Court review; and if the Circuit affirms, you could expect the broadcasters to do the same. Either way, the split between the Second and Ninth Circuits with respect to the definition of an Internet-based "cable" system would present an apparent "circuit split" ripe for Supreme Court resolution.

Then again, what happens if Judge Wu's FilmOn X-friendly views carry the day? Hard to tell, but the effect could clearly be profound. Just about anybody *could* become a cable system for purposes of Section 111 without a significantly expensive cable transmission facility. But it seems pretty clear that there must be some kind of facility – I'm not sure that Judge Wu would allow a completely Internet-based system without any physical structure whatsoever (à la the earlier, 2010 version of FilmOn X and the ivi, Inc. type system) to claim eligibility for Section 111.

But the more interesting wrinkle is what happens if Judge Wu's ruling stands *but* the FCC's current proceeding does not change the definition of an MVPD *and* Congress does not step in to address the issue. In that instance, a "Kevin's Cable System" might be pretty easy to set up. Importantly, since I would not be a cable system (at least in the FCC's eyes), it does not appear that the FCC's current must-carry and retransmission consent rules would apply to me. I'd have some expenses but they're certainly not as high as they would be for a traditional cable system. There's a good argument to be made that I wouldn't have to negotiate retransmission fees with every single station I carry – I could just carry and pay copyright royalty fees set under Section 111 directly to the Copyright Office. Imagine the possibilities.

An alternate scenario, though, could see an effort by broadcasters *and* cable operators to get Congress to statutorily redefine "MVPD" to include Internet-based retransmission systems. While the broadcast and the cable industries might have different reasons for seeking that particular legislative solution, they might both benefit from it. And if the lobbying forces of these two traditional foes were to be aligned toward a common goal, it's not unrealistic to think that Congress might be persuaded.

Intern-al Affairs IV

The Employer Strikes Back

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Who says that unpaid internships don't teach interns anything? Why, just recently a number of unpaid interns learned an important lesson: what a trial judge giveth, an appeals court can taketh away. The U.S. Court of Appeals for the Second Circuit has vacated an intern-friendly decision in *Glatt v. Fox Searchlight Pictures, Inc.*, better known (to some, at least) as the "Black Swan Interns Case".

Glatt, of course, is one of several lawsuits filed by former interns. The targets of these suits have tended to be big media companies with deep pockets – think Fox, NBCUniversal, Hearst and the like. The interns had presumably been tickled pink to have gotten to work in connection with the production of a major motion picture (*e.g.*, The Black Swan) or prominent television shows (*e.g.*, The Charlie Rose Show, Saturday Night Live) even without pay. But, eventually, they apparently came to realize the gross unfairness of not getting paid, possibly when they got in touch with a law firm that happens to specialize in suing big media companies on behalf of unpaid interns. (You can check that firm's website for yourself; it's loaded with information about the various lawsuits for which they're responsible.)

As I reported a couple of years ago, the interns won a couple of important rulings in the *Glatt* case, but another U.S. District Judge in another case (involving Hearst) went the other way. I followed up shortly thereafter with a post on another intern victory (with respect to the issue of class certification) in a lawsuit against Gawker media. Some settlements in other cases, possibly inspired by the *Glatt* decision, came next, although (also as I chronicled) at least one of those settlements may be in question thanks to a dramatic opt-out by one former intern.

But all those decisions were at the trial court level. And now the Second Circuit has weighed in on Glatt, the first of the intern cases to reach it.

To recap, the Black Swan Case involved plaintiffs who had interned, for free, for Fox Searchlight between 2005-2010. The trial judge (that would be Judge William Pauley) had held that two of the named plaintiffs should have been deemed "employees" and, thus, were entitled to have been paid for their work. Pauley also concluded that all interns who worked for Fox Searchlight in New York between 2005-2010 should be considered a single class for purposes of the lawsuit, and that a separate class – consisting of other interns who worked for Fox Searchlight anywhere in the country between 2005-2010 – should also be conditionally certified.

Fox Searchlight asked for, and was granted, leave to appeal Judge Pauley's decision immediately, even though some issues remained to be litigated before the trial judge. And when the dust had settled, Judge Pauley's decision had been vacated on all points, with the case sent back down to him for further proceedings.

As a technical matter, the case involves the Fair Labor Standards Act (FLSA), which generally requires that employees be paid a specified minimum wage and time-and-a-half for overtime. There is no FLSA requirement that interns be paid diddly-squat. Judge Pauley's conclusion that the plaintiffs were "employees" – and, thus, entitled to be paid – was based on his analysis of the Department of Labor's Fact Sheet #71. In that 2010 document, DOL had identified six criteria to be considered in determining whether a person is an "intern" or an "employee". Those six DOL-identified criteria are:

The Court emphasized that no single factor is dispositive, nor is it an all or nothing situation.

- The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;
- The internship experience is for the benefit of the intern;
- The intern does not displace regular employees, but works under close supervision of existing staff;
- The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;
- The intern is not necessarily entitled to a job at the conclusion of the internship; and
- The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

In the District Court, Judge Pauley concluded that four of the criteria favored the intern-plaintiffs as did the remaining two, although less conclusively. In his analysis he expressly declined to take the "primary beneficiary" approach, which assigns considerable importance to the determination of which party is "the primary recipient of benefits from the relationship".

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And that, in the Second Circuit's view, was a mistake. According to the Circuit, "the proper question is whether the intern or the employer is the primary beneficiary of the relationship". And to answer that question, a court should not necessarily be limited to consideration of only the six DOL Fact Sheet factors. While not a perfect standard, the Circuit's more flexible approach permits a court to examine "[t]he economic reality as it exists between the intern and the employer".

(Interestingly, DOL appeared as an amicus in the Second Circuit, arguing that its six-criteria test was derived directly from a Supreme Court case and that all six criteria must be found to be present before a program can be deemed to be a legitimate internship. In making this argument, DOL claimed that the court should defer to DOL's interpretation, because DOL is in charge of administering the FLSA. The Circuit rejected DOL's suggestion, pointing out that the six-criteria test derives from a Supreme Court decision, and DOL's interpretation of judicial decisions is entitled to only limited, if any, deference.)

As a helpful guide, the Circuit provided its own list of seven separate factors to be considered in resolving the question of internship vs. employment:

- ☑ The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa.
- ☑ The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.
- ☑ The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.
- ☑ The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.
- ☑ The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.
- ☑ The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.
- ☑ The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship

The Court emphasized that no single factor is dispositive, nor is it an all or nothing situation. Courts are supposed to balance these – and other factors that may be presented in any given case – to come to a conclusion. The Circuit somewhat summarized that the main theme of all these factors is the relationship between the internship and the intern's formal education:

The purpose of a bona fide internship is to integrate classroom learning with practical skill development in a real-world setting and, unlike the brakemen at issue in Portland Terminal, all of the plaintiffs were enrolled in or had recently completed a formal course of post-secondary education. By focusing on the educational aspects of the internship, our approach better reflects the role of internships in today's economy than the DOL factors, which were derived from a 68-year old Supreme Court decision that dealt with a single training course offered to prospective railroad brakemen

Having set out its seven-factor test, the Court stopped short of declaring a winner in *Glatt*. Instead, it remanded the case back to the District Court so that Judge Pauley could apply the new standard based on the evidence of record.

Many companies that rely on interns will breathe a sigh of relief with this decision. It does not tip the balance in favor of interns, as Judge Pauley's approach seemed to. Rather, it affords each party the opportunity to present evidence in support of its position.

And over and above this disposition of the core issue – *i.e.*, were the plaintiffs "interns" or "employees" – the Circuit also concluded that Judge Pauley was wrong in holding that any certifiable "class" existed for class action purposes. To establish a "class", a plaintiff must demonstrate (among other things) that the questions of fact and law relative to the whole class "predominate" over questions that might apply only to individual members of the class. As the Circuit saw it, the determination that any particular individual might be entitled to "employee" status is a "highly individualized inquiry" requiring analysis of facts particular to that individual. That being the case, class status was inappropriate here.

So where does this leave us? As always, the plaintiffs could petition the Court of Appeals for rehearing by the three-judge panel or rehearing *en banc* before all of the Second Circuit judges. Or they could ask the Supreme Court to take the case. (FWIW, I think the latter is unlikely because factors that usually warrant Supreme Court review (*e.g.*, a conflict between decisions from different circuits) are absent here.)

For the time being, things are in flux. Employers should remain cautious, but they have reason to be at least cautiously optimistic. First, rejection of class certification is a big win for Fox Searchlight and other big companies. If a class is certified, that means that lots of individual

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No performance rights for pre-1972 records in the Sunshine State

Flo & Eddie Hit a Florida Sinkhole

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It probably seemed like a good idea at the time. Flo & Eddie were suing Sirius XM in California and New York, so why not do the same in Florida? What could possibly go wrong? What could go wrong would be U.S. District Judge Darrin P. Gayles, who has declined to follow the Flo & Eddie-friendly lead of courts in Cali and the Big Apple. Instead, Judge Gayles summarily tossed their suit, ruling that Florida does not provide pre-1972 recordings the exclusive public performance rights that his brethren in New York and California had found.

(If you're not familiar with the issue of pre-1972 recording performance rights, then you haven't been reading our blog enough. We've covered in some detail the bevy of lawsuits filed by Flo & Eddie and various record labels – and newcomer Zenbu magazines – against Sirius XM and Pandora. To date, the plaintiffs have won in federal courts in California (Flo & Eddie over Sirius XM) and New York (Flo & Eddie over Sirius XM). And in state court in California (record labels vs. Sirius XM), the parties recently wrapped the case up with a settlement putting 210 million of Sirius XM's dollars into the record labels' pockets.

Judge Gayles was particularly sensitive to the fact that he is a Federal, not a state, judge.

The arguments in Florida were pretty much the same as those that had been successful elsewhere. Flo & Eddie alleged copyright infringement, unfair competition, conversion and civil theft, all based on claims that Sirius had infringed on their exclusive rights to public performance and reproduction of their pre-1972 sound recordings. (The reproduction claim was based on the fact that Sirius XM's operations involve the creation of backup and buffer copies of recordings it transmits.) In response, Sirius XM argued that there is no public performance right in the sound recordings and that the backup and buffer copies it makes don't violate any of Flo and Eddie's rights.

So how come Judge Gayles didn't join the pro-Flo and Eddie parade?

Judge Gayles agreed with the New York and California judges that, historically, federal copyright laws did not prevent individual states from guaranteeing copyright protections to sound recordings under common law. And when in 1971 Congress created any copyright for sound recordings made after February 15, 1972, it didn't prevent the states from regulating such copyright interests – via statute or common law – in recordings made before that date. (While pre-1972 recordings will come within the protection of the federal Copyright Act as of February 15, 2047, until then the states are free to act.)

But, as Judge Gayles was quick to observe, Florida is different from New York and California. In particular, the Florida code does not create a public performance right in sound recordings and does not prevent the creation of the type of backup or buffer copies at issue here. Thus, unlike Judges Gutierrez and Strobel in California, he had no state statute to interpret. Judge McMahon in New York didn't either, but he at least did have several New York state law cases that touched on the question.

Judge Gayles wasn't surprised by the fact that New York and California law addressed such copyright issues. In fact, he said, it makes sense, because California and New York are "creative centers of the Nation's art world".

In arguing its position, Flo & Eddie could point only to New York common law and one district court case arising out of the Middle District of Florida – which also relied extensively on New York law. According to Flo & Eddie, this wasn't a problem because Florida defines the concept of property broadly, so (at least in their view) Florida copyright law has got to include an exclusive right of public performance.

But Judge Gayles declined to join Flo & Eddie in that logical leap. As he sees it, by endorsing the notion of such an exclusive right, he would be creating an unqualified property right that didn't exist previously and that even owners of post-1972 recordings don't have. Under that new right, Flo & Eddie would control every aspect of their pre-1972 sound recordings, a broader entitlement than owners of post-1972 recordings have.

And then there are the additional practical issues that would have to be addressed if Gayles were, in effect, to create a right that didn't exist previously. For instance: (1) who would set and administers royalty rates at the state level; (2) who would determine the owner of a sound recording when the recording artist dies or the record company goes out of business; and (3) what, if any, exceptions exist to the public performance right? Faced with all these questions, Judge Gayles was particularly sensitive to the fact that he is a Federal, not a state, judge:

> [I]t is not the Court's place to expand Florida law by creating new causes of action. Federal courts are entrusted to apply state law, not make it....The Court finds that the issue of whether copyright protection for pre-1972 sound recordings should include the exclusive right to public performance is for the Florida legislature

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Bottom line: Since neither the Florida legislature nor the Florida judiciary had thus far established the public performance right that Flo & Eddie were asserting, that right simply didn't exist in Florida.

Judge Gayles also ruled against Flo & Eddie on the reproduction issue, finding that buffer and back-up copies aren't unlawful reproductions mainly because they aren't accessible to public, they're discarded after use, and they don't even constitute complete copies of the recordings.

So what's the impact? While this may be an outlier case – as noted, unlike in the California and New York cases, Judge Gayles found no Florida statutes or case law to rely on – it's still got to give (a) Sirius XM (and, presumably, Pandora) some hope and (b) Flo & Eddie some cause for concern. After all, maybe it's California and New York who are the outlier states here – being the nation's "creative centers" and all (at least according to Gayles) – and Florida is closer to the norm. At a minimum, this case establishes that not all states are like California and New York, so Flo & Eddie shouldn't necessarily expect that their successes in those states will be duplicated everywhere else: when it comes to picking the venue for Flo & Eddie's next appearance, their counsel will presumably be paying close attention to the availability of relevant statutes and case law. And it's also possible that any uncertainty that Judge Gayle's decision may have injected into the overall mix of litigation considerations may cause the parties to be more open to settlement. (As we have reported, just a few days before Gayle's decision was issued, Sirius XM settled with the record labels in their California suit, thereby demonstrating that settlement is possible.)

Meanwhile, one of the California cases and the New York case are on appeal. While it's doubtful a ruling rooted in Florida law will have much impact there, you never know. Check back for updates at CommLawBlog.com.

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plaintiffs can join in a consolidated attack against a common defendant. Losing class status forces each "little guy" to sue individually, a far pricier and demanding – and, therefore, less attractive – alternative.

And with regard to the core issue, it's not hard to read the Circuit's analysis (and list of seven factors) and conclude that there's a reasonable chance that the Court is understands and, possibly, approves the current concept of "internships": that internships undertaken for course credit in an area relating to one's secondary or post-secondary studies do not require payment of the minimum wage or overtime pay under the FLSA. As I see it, most of the internships at issue in the various pending lawsuits could qualify as legitimate internships under most, if not all, of the seven factors laid out by the Circuit.

In my very first post on this subject, I talked about my internship at a local television station. It was pretty typical for the times and, from what I understand in discussing these things with college students I've taught over the past decade, for today as well.

I knew I wouldn't be paid. But I was happy to do it because I could get real life experience related to my major that I couldn't get in the classroom. And I'd get credit toward my degree. (BTW, my school had to sign off on my internship, thus further integrating it into the formal education program. Plus, I had to write up a summary of the internship at the end of the summer). It was going to last for one summer and nothing more (though I did like it so much I went back the next summer). While I was probably taking the pressure off full-time employees, it wasn't like I was reporting on-air by myself, nor was I expecting that my writing was going on air without significant review and editing. And there was no promise of a job after I was done.

Under the Second Circuit's seven factors I would clearly have been on the "intern" side.

But make no mistake: the Second Circuit's decision is by no means the last word. The *Glatt* case now has to go back to the District Court for further proceedings (if it doesn't first go back to the Circuit for rehearing or up to the Supremes). A second District Court decision then will be subject to further possible appeals.

And in any event, as set out by the Circuit, the test is extremely fact-based, meaning that the outcome of any particular case will depend on the particular facts of that case. If you have any doubt on that score, check out what Mr. Glatt's attorney had to say after the Circuit's decision came down: "Many of the most abusive internships involving low-level tasks and grunt-type work are plainly illegal under this standard." She still thinks her clients will prevail, presumably because the chores her clients were called upon to perform in their internships included "grunt-type work", like making copies, filing, taking out trash, taking lunch orders, etc. etc. It may be difficult for a court to find any real educational component to such tasks. But under the Circuit's standard, the interns will have a chance to make their showing, and the defendant companies will have a chance to counter that showing with their own demonstration that, on balance, the intern was the primary beneficiary of the relationship.

At a minimum, going forward any company offering an unpaid "intern" program should be careful to design the program in a way that insures that the intern can legitimately be said to be the "primary beneficiary". Unfortunately, we can't know exactly how to do that with any confidence until more cases get litigated. We'll just have to wait and see for the time being.

The FCC's Tower Approval Process: Round and Round It Goes, When Will It Stop? Nobody Knows!

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Getting governmental approval to build a tower can take a long time. As a recent FCC decision demonstrates, it can take a lot longer when the government can't decide when the approval process has come to an end.

If you wanted to build a radio tower at any time in the last decade, you presumably ran into the "Nationwide Programmatic Agreement" (NPA). That's an agreement – official full name: "the Nationwide Programmatic Agreement for the Review of Effects on Historic Properties for Certain Undertakings Approved by the Federal Communications Commission" – entered into by the Commission, the Advisory Council on Historic Preservation and the National Conference of State Historic Preservation Officers. (A copy of the NPA may be found here; related information may be found here.) As its name suggests, the NPA was adopted to avoid construction that would cause unacceptable disruption to historical or cultural interests.

Complete" means "complete," WPI argued. The FCC was not convinced.

The approval process imposed by the NPA is complicated for towers that come within its reach. Among other things, the NPA requires applicants to give the relevant State Historic Preservation Officer (SHPO) notice of the project. That notice must include (among other things): (a) a list of properties near the proposed tower site that are listed on (or eligible for listing on) the National Register; and (b) an evaluation of whether the proposed construction would adversely affect any such properties. If the SHPO "concurs in writing" that no historic properties would be affected, then, according to Section VII of the NPA, the process is "complete, and the Applicant may proceed with the project".

That may look clear. Looks can be deceiving.

Back in 2006, Wireless Properties, Inc. (WPI) started the process to obtain approval for a new tower in Tennessee. Things went smoothly at first: WPI submitted the necessary paperwork (i.e., a completed FCC Form 620) to the Tennessee SHPO and, by March, 2006, the SHPO had concurred in writing that the proposal would not be a problem. WPI's paperwork included a letter from a local historic expert who concluded that the tower would not have any adverse effect.

But nine months later, that expert notified the SHPO that there was a problem. The proposed site was near the Bragg Reservation, which is part of a national park near Chattanooga; the proposed construction would, in the expert's view, adversely affect the Reservation (and a second National Register-listed site). Apparently, the expert hadn't flagged this problem earlier because WPI hadn't mentioned the Reservation in the materials it had submitted. (The expert also attributed his failure to his own "lack of familiarity with the area and inexperience in the job".)

In light of this development, in December, 2006, the Tennessee SHPO rescinded its March, 2006 finding of no adverse effect, re-opened the matter, and concluded that the proposed tower would adversely affect the area.

WPI then sought an expedited ruling from the folks in the Wireless Telecommunications Bureau that the SHPO could not rescind a determination. WPI argued that, once the SHPO had concurred in writing (in March, 2006) that the tower would have no adverse effect, the review process was complete under Section VII of the NPA and the SHPO had no authority under the NPA to re-open that determination.

In response the Bureau did act expeditiously – by denying the requested ruling and, instead, re-opening its own review process to consider the effects of the proposed tower on the Bragg Reservation. In June, 2007, WPI asked the full Commission to review that ruling.

And there things sat for eight years.

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Why did it take the Commission so long to resolve an ostensibly simple case? It may be the Commission's seeming lack of interest in reviewing adjudicatory actions by its delegated authorities. Such actions, which may be of vital importance to the parties but of little (if any) importance to the public at large, tend to capture the Commissioners' attention only seldom. So they just sit there. Alternatively, the delay may have arisen because the case presented a not-so-simple issue of deciding when the historic review process is "final."

FCC actions – like most administrative actions – become final when they are no longer subject to reconsideration or review by the agency or the courts. This "finality" concept is important for the applicants themselves, who want to know for sure that they can safely proceed with the time, effort and expense of construction. But it's also important both for lenders, who want to know that administrative actions are permanent and can't be changed, and for courts, who will not review an agency action until the action has achieved some measure of finality at the agency level. And more fundamentally, it's important for everyone involved to be sure that something has been "decided" one way or another so they can move on with their lives.

The decision impairs an important interest for both regulators and regulates alike.

Here there is no question that WPI failed to list an important potentially affected historic site in the materials it submitted to the SHPO, so when the SHPO made its decision, it did not have the full picture to consider. But WPI argued that it had described its project to the SHPO and that, with the SHPO's March, 2006 written concurrence, the historic review process was "complete" under the terms of the NPA. Recall that Section VII of the NPA provides in relevant part that, "[i]f the SHPO] concurs in writing with the Applicant's determination of no adverse effect, the Facility is deemed to have no adverse effect on Historic Properties. The Section 106 process is then complete and the Applicant may proceed with the project …." "Complete" means "complete," WPI argued, despite the fact that it had omitted a key fact in what it had told the SHPO.

The FCC was not convinced. It repeatedly pointed to another section of the NPA which provides:

> Any member of the public may notify the Commission of concerns it has regarding the application of this Nationwide Agreement within a State or with regard to the review of individual Undertakings covered or excluded under the terms of this Agreement…. The Commission will consider public comments and following consultation with the SHPO/THPO, potentially affected Indian tribes and NHOs, or Council, where appropriate, take appropriate actions.

The Commission held that this vague and broad language authorized it to "take appropriate actions" before, during, or after the review process upon the receipt of "public comment". That, in turn, gave the Commission – and, thus, the Bureau, but not the Tennessee SHPO – the authority to re-open the review process here.

To be sure, the FCC emphasized that a SHPO's written determination will be invalidated only by "a material error or omission [in the tower proponent's submissions] that precludes effective review of the potential effects of the proposed tower on historic properties". While the Commission's decision is understandable – applicants should not be rewarded for sneaking through the review process by providing wrong or incomplete information – it does impair another important interest for both regulators and regulates alike: the need to bring matters to a final close.

We should note that the FCC's own procedures in other contexts deal with this kind of situation in a way that could have worked well here. If the FCC grants a license and that grant becomes "final" under the rules, the FCC cannot re-open or disturb the original grant. What it can do if circumstances come to its attention that would have caused the original application not to have been granted in the first place is to open a revocation proceeding in which the applicant is given the opportunity to show cause why the license should not be revoked. In other words, a new proceeding is opened to consider the effect of the misinformation. This preserves the principle of finality but allows the agency to address grants that were clearly erroneous. No such mechanism is available under the historic review process. So as is so often the case, we end up with a decision that does rough justice but opens the procedural door to endless litigation in the future.

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built to "endure beyond the *de minimis* period necessary … to file a license to cover" the permit. The Division followed that up with a second decision a few weeks later. In that latter decision, it elaborated that permittees who dismantle the facilities (or otherwise cease operation) of a station while an application for a covering license is pending must notify the Commission promptly when they do so.

Perhaps figuring that those admonitions wouldn't stop a station from getting its license application grant and ***then*** turning the station off and dismantling its facilities, the Division has gone a large step further. Now the constructed facilities must remain up and running not only while the license application is pending, but for a continuous 12-month period ***after*** the application has been granted.

This can't be legal, can it?

As far as we can see, the legality of this move is, at best, dubious.

First, the Division's condition effectively creates a new regulatory requirement that is inconsistent with existing rules. The rules have long recognized that some interruptions in station operation may occur from time to time. In fact, a station can be off the air for up to 30 days without asking the Commission for its permission (and up to 10 days without even having to tell the Commission). Moreover, the Communications Act provides that a station may be off the air for more than 11 months without facing automatic expiration of its license. The Audio Division's new condition runs counter to those provisions. Where, exactly, does the Division get off imposing a standard that is considerably stricter than standards imposed by Congress and the full Commission? Moreover, to the extent that the Division appears to be staking out a regulatory position not previously endorsed by the Commission, it's not clear that the Division (or the Media Bureau, for that matter) has the necessary delegated authority.

Where does the Division get off imposing a standard that is stricter than standards imposed by Congress and the full Commission?

Second, if the Division has decided that it does have the authority to do what Congress and the Commission have chosen not to do, shouldn't the Division provide at least some general heads-up about that decision? A public notice, for example, or maybe a policy statement putting all current and future radio license applicants on notice that they will be required to operate for one-year continuously, and maybe even offering something akin to an explanation. No such notice or statement has been issued. Instead, recipients of licenses granted after July 1 have found out the hard way – by reading the condition at the bottom of their licenses. That hardly seems right.

Third, the condition itself appears to be based on a plainly indefensible "presumption". According to the D.C. Circuit, a presumption is valid only "when proof of one fact renders the existence of another fact so probable that it is sensible and timesaving to assume the truth of [the inferred] fact…." That emphatically does ***not*** describe the Division's presumption here.

According to the Division's new condition, a failure to operate continuously for 12 months following grant gives rise to a presumption that the facilities built were "temporarily constructed". As we have noted in a previous post, the term "temporarily constructed" hasn't been defined by the Division, which raises immediate questions about the validity of this presumption. But that's by no means the only problem here. To meet the Circuit's standard, the mere fact that a station might have failed to operate continuously for 12 months would mean that it is very probable that that station's facilities had been temporarily constructed, so probable that it would be sensible to assume such temporary construction to be the case unless and until proven otherwise.

There is zero basis for such a conclusion.

To the contrary, in our experience the overwhelming majority of license applicants build facilities which they intend to – and do in fact – use indefinitely. That intent, however, is not a guarantee that the operation of those facilities may not be interrupted by factors beyond the licensee's control: the full range of natural and man-made disasters, or simple mechanical malfunction, or inadvertent operator error. When such factors cause the discontinuance of operation, that does ***not*** mean that the station's facilities were "temporarily constructed". And yet, that is precisely the assumption on which the Division's presumption is erroneously based.

Fourth, the condition provides for not only the rescission of the license, but also the dismissal of the license application at any time during the first 12 months following grant. Under normal circumstances, once the Division has taken action on an application, it has only 30 days (from the date of public notice of the action) to modify or set aside that action on its own motion. (The full Commission would have an additional 10 days beyond that to jump in.) So if the presumptively fatal discontinuance of operation were to occur more than 40 days after public notice of the grant of the license application, neither the Division nor the Commission would have the authority to declare, long after the fact, that the grant should be rescinded and the application dismissed. It's not clear how that limitation squares with the Division's condition.

On that last point, we suspect that the Division believes that, by including the condition in the license, it is able to side-step the 30-day limitation by shifting responsibility to the licensee. That is, by accepting the license with the condition, the licensee is (so the theory would go) effec-

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NTIA Schedules Drone Stakeholder Confabs

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In the race to see what agency will get gets its arms around drone management first, it looks like the dark horse is moving out in front. The FAA might ordinarily have been figured to be the odds-on favorite – it does regulate air traffic, after all, and it's been subject to Congressional direction to deal with drones for several years already. And the FCC would have been in the running, too, since some drones use spectrum for video transmissions and communication. But the FAA has been very slow out of the gate and the FCC hasn't even gotten started.

Which leaves (wait for it) the National Telecommunications and Information Administration (NTIA)! And sure enough, there's NTIA prancing out ahead of the pack.

As we reported a couple of months ago, NTIA had opened a proceeding looking at "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. Now, having received more than 50 responses to its initial request for comments, NTIA has scheduled a series of four meetings "of a multistakeholder process concerning privacy, transparency, and accountability issues regarding commercial and private use" of drones.

The first of these meetings is set for August 3, 2015. The rest are scheduled for September 24, October 21 and November 20. All will run from 1:00 – 5:00 p.m. (ET) in the Boardroom of the American Institute of Architects at 1735 New York Avenue, N.W., in Washington.

The meetings will focus on the general areas addressed in NTIA's March request for comments. But don't expect NTIA itself to announce its own rules. Rather, it's looking to build consensus among the various interested parties (dubbed "stakeholders" by NTIA). NTIA does figure, though, that it can "help the parties reach clarity on what their positions are and whether there are options for compromise toward consensus".

So if you're interested in participating in an "open, transparent, consensus-driven process to develop best practices for privacy, accountability, and transparency issues" regarding commercial and private drone use in the national airspace system, mark your calendar and plan on coming to D.C. (or plan on catching the meetings via webcast). Since all the specifics of the meetings are subject to change, be sure to check with the NTIA's website for updates.

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tively agreeing to abide by that condition notwithstanding any contrary regulatory limitations on the Division. And lest the Division be seen to be holding a gun to the licensee's head, we expect that the Division would point to Section 1.110 of the rules. That section provides that, if a licensee isn't happy with any condition imposed in a license which it is granted, the licensee may opt to reject the grant as made. Upon such a rejection, the Commission vacates the grant and sets the application for hearing.

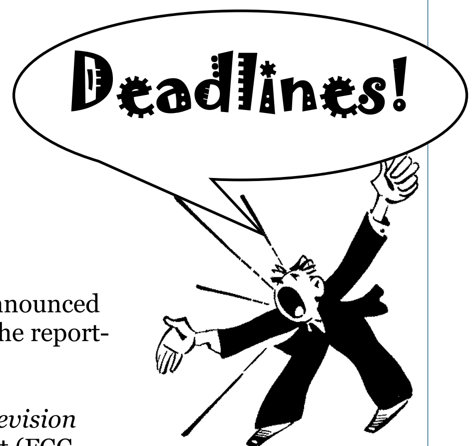
In other words, the unhappy licensee isn't forced to accept a condition it doesn't like – but the alternative is to lose the grant and get stuck in a hearing. (Truth be told, extremely few grantees choose this course.) Whether the Division's 12-month-continuous-operation condition is really the kind of thing for which the partial grant rule was adopted is far from clear, but that doesn't appear to have deterred the Division.

The Division might also be thinking that folks who construct solid, permanent facilities need not worry, since they will presumably be operating continuously for the first year and, thus, the condition won't kick in. And even if stuff happens and operation is discontinued temporarily, a couple of Polaroids of the big honking tower and fancy transmitter building should be enough to satisfy the Division's staff that this was not a "temporary construction".

But why should licenses issued to such folks be under any cloud at all? And let's not forget that banks and other lenders may be very reluctant to finance construction of facilities if they know that the license covering those facilities is subject to a condition that, on its face, does not bode well for the licensee. And why should such licensees be forced to take extra steps when they happen to be forced off the air through no fault of their own?

We can all agree that, when the Commission issues a license, it expects that the licensee will in fact use that license to provide service to the public. And when stations don't operate for extended periods of time, they are obviously not serving the public. And it may also be that the Division has encountered more non-operators than it would like. But does any of that justify an approach that seems to say that everybody who files for a radio license is presumed to be a likely non-operator?

August 3, 2015



EEO Mid-Term Reports **–** All *radio* station employment units *with eleven (11) or more full-time employees* and located in the **North Carolina** and **South Carolina** 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 **California**, **Illinois**, **North Carolina**, **South Carolina** and **Wisconsin** must place EEO Public File Reports in their public inspection files. TV stations must upload the reports to the online public file. For all stations with websites, the report must be posted there as well. Per announced FCC policy, the reporting period may end ten days before the report is due, and the reporting period for the next year will begin on the following day.

Noncommercial Television Ownership Reports **–** All *noncommercial television* stations located in **Illinois** or **Wisconsin** 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 **California**, **North Carolina** or **South Carolina** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323-E.

October 1, 2015

EEO Mid-Term Reports **–** All *radio* station employment units *with eleven (11) or more full-time employees* and located in the **Florida**, **Puerto Rico**, and the **Virgin Islands** 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 **Alaska**, **American Samoa**, **Florida**, **Guam**, **Hawaii**, **Iowa**, **Mariana Islands**, **Missouri**, **Oregon**, **Puerto Rico**, the **Virgin Islands** and **Washington** 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 **Iowa** or **Missouri** 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 **Alaska**, **American Samoa**, **Florida**, **Guam**, **Hawaii**, **Mariana Islands**, **Oregon**, **Puerto Rico**, the **Virgin Islands** and **Washington** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323-E.

August 13, 2015

Channel Sharing Agreements **–** Comments are due with regard to the FCC's First Order on Reconsideration and Notice of Proposed Rulemaking modifying rules governing channel sharing agreements established in the June 2014 Incentive Auction *Report & Order* and in the preceding April 2012 *Channel Sharing Report & Order*.

August 28, 2015

Channel Sharing Agreements **–** Reply Comments are due with regard to the FCC's First Order on Reconsideration and Notice of Proposed Rulemaking modifying rules governing channel sharing agreements established in the June 2014 Incentive Auction *Report & Order* and in the preceding April 2012 *Channel Sharing Report & Order*.

October 13, 2015

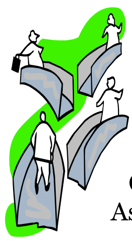
Children's Television Programming Reports **–** For all *commercial television* and *Class A television* stations, the third quarter 2015 reports on FCC Form 398 must be filed electronically with the Commission. These reports then should be automatically included in the online public inspection file, but we would recommend checking, as

(Continued on page 17)

Wilkommen, Bienvenue, Welcome!

Ashley Ludlow Joins FHH

Fletcher, Heald & Hildreth is pleased to announce that Ashley Ludlow has joined our team as an associate attorney effective July 14, 2015. Ashley is a 2013 graduate from the Washington and Lee School of Law, where she ran the table in law school competitions, participating not only in appellate and trial moot courts but a client counseling competition as well. She got her undergraduate degree (a B.A. in English and Sociology) from Southern Methodist University. Most recently she has been practicing in a small civil litigation firm, but is now making her move into communications law, and we're happy about that. Ashley is a runner, which is good because she's also into chocolate. A Scrabble® aficionado, she lives in Georgetown with her dog, Rex the Wondermutt.



FHH - On the Job, On the Go

Be on the lookout for Radio Ink's annual *40 Most Powerful People in Radio* – when it hits the stands, it should be featuring an article by **Frank Montero** recapping the most important legal/regulatory issues in radio.

On August 6, **Davina Sashkin** will be in Austin for the 2015 Convention and Trade Show of the Texas Association of Broadcasters. She'll be appearing on the D.C. Regulatory Update panel.

On August 12, **Frank Jazzo** will be on the "Blending Law, Legislation and Politics" panel at the Annual Conference of the Tennessee Association of Broadcasters in Murfreesboro. He'll also be moderating the "Copyright Refresher Panel" the same day – a session that will feature none other than our own **Kevin Goldberg**.

And speaking of **Kevin**, he'll be doing double-duty at the Alabama Broadcasters Association 2015 Annual Conference in Birmingham. On August 15 he'll be on a panel on music licensing (where he will be joined by RMLC director Bill Velez) in the morning, and in the afternoon he's wax eloquent on copyright and trademark matters. Just before the music licensing panel, **Scott Johnson** will be the sole presenter for the FCC and Legislative Issues session.

Meanwhile, back in Washington, **Steve Lovelady** has been appointed Co-Chair of the Transactional Committee of the Federal Communications Bar Association, while **Davina** has been named Co-Chair of the Mass Media Committee. Let's hear a big *Memo to Clients* shout-out to Their Furnitureships!

(Continued from page 16)

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.

RMLC on a (successful) mission

SESAC Suit Settled

By Kevin Goldberg
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703-812-0462

Bill Velez and the gang at the Radio Music License Committee (RMLC) have struck again. Having targeted SESAC in an antitrust suit in 2012, they have now used the leverage of that suit to gain a settlement with SESAC that should prove extremely beneficial to radio broadcasters.

Under Bill's able and dedicated leadership, RMLC has certainly fulfilled its mission to "achieve fair and reasonable license fees with the music licensing organizations (such as ASCAP and BMI) on behalf of radio stations." In a settlement announced on July 23, 2015 the two organizations seem to have achieved significant certainty surrounding the SESAC radio licenses for years to come. The full Settlement Agreement is 33 pages of legal jargon; that's why we're happy that the press release hits the high points – and makes it evident that radio stations are not only getting certainty out of this deal but also relief on some key aspects of the SESAC licensing system that have frustrated broadcasters for years.

Radio stations are getting certainty and also relief on some key aspects of the SESAC licensing system

Among the most interesting aspects of the settlement are (with my commentary in parenthesis):

> SESAC's license fees will be subject to determination by a third-party arbitration panel if the two sides cannot reach agreement on reasonable fees. (This voluntary resort to third-party resolution of differences is different from the judicial oversight imposed on ASCAP and BMI by a decades-old court order. Still, the RMLC approach should provide a significant backstop against attempts by SESAC to increase royalty rates by an unreasonable amount.)
>
> SESAC's rates will be frozen at existing 2015 levels, with no further rate changes until the parties' negotiations or arbitration are concluded covering rates for the license term 2016 through 2018. (Bottom line: No rate increase in the near term!)
>
> SESAC will continue to offer its existing All-Talk Amendment discount of 75%. (This has been a cornerstone of the ASCAP/BMI agreements as well and is necessary to ensure that talk/news/sports radio pay royalties that are reasonably proportional to their uses of copyrighted music.)
>
> SESAC will enhance its online repertory search offerings in order to support more user-friendly identification of SESAC works. (This is intended to resolve a key complaint about SESAC and one of the motivating factors for RMLC's lawsuit: historically, SESAC's repertoire has been so hidden that it was impossible to know what music was in fact subject to SESAC licensing. This has be a vexing problem for all broadcasters, and especially talk/news/sports stations that make very limited use of music.)
>
> The scope of rights to be covered under future SESAC licenses will mirror the coverage that traditional operators currently enjoy with ASCAP and BMI. Moreover, SESAC is committing to consolidate (as of 2016) its licensing structure. As matters now stand, you need three separate SESAC licenses to cover, respectively, over-the-air, HD radio and streaming transmissions. Starting in 2016, new SESAC licenses will cover all three in a single license, like ASCAP and BMI licenses already do.)
>
> The RMLC will be reimbursed by SESAC for the legal fees it incurred in prosecuting the antitrust case against SESAC. (This is not small potatoes. According to the Settlement Agreement itself, the RMLC will be reimbursed $3,564,087.39. That they were willing to put themselves out there to that extent demonstrates that the RMLC really does have the radio industry's best interests at heart.).

Coming on the heels of the recent settlement of the TVMLC/SESAC lawsuit, the settlement negotiated by RMLC means that SESAC, like ASCAP and BMI, will now, at last, be subject to some significant independent oversight with regard to all broadcast media. As I opined in a post last year regarding the DOJ's (still pending) review of the ASCAP and BMI Consent Decrees, the court-imposed constraints on ASCAP and BMI have greatly benefitted the broadcast industry by keeping royalty fees at a more or less reasonable level. Radio and television broadcasters should realize the same benefits from the SESAC settlements as well.