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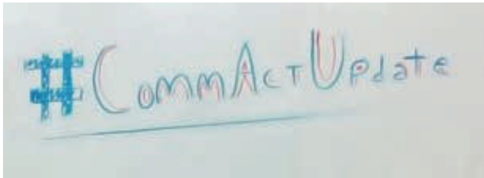
Memorandum to Members

January 2014

News and Analysis of Recent Developments in Communications Law

No. 14-01



Overhaul over the long haul

Comm Act Overhaul Underway . . . Sort of

By Howard M. Weiss
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It's generally acknowledged that the Communications Act – first enacted four score years ago and not substantially updated in nearly 20 years – is ill-suited for regulation of the 21st Century communications landscape. And now two well-placed members of Congress have announced the start of an effort to update the Act and perhaps restructure the FCC itself.

Given the prominence of the folks making that announcement, anyone subject to the FCC's regulatory reach should pay attention. But before you get overcome with visions of sweeping change just around the corner, it's important to temper your expectations with a healthy splash of reality: any significant change to the Act that may occur isn't likely to happen in the immediate future, if at all.

The two gentlemen responsible for the latest initiative are Fred Upton (R-MI) and Greg Walden (R-OR), the Chairs of, respectively, the House Energy and Commerce Committee and that Committee's Communications and Technology Subcommittee. You can see them explain their plans in a 13-minute video posted on the Committee's website. To summarize: Noting that (a) the FCC first opened its doors in the Great Depression and (b) the last time the Act was amended, 56 kb/s by dial-up modem was the state of the art, Upton and Walden sensibly feel that it's time to talk about an update.

The emphasis, though, is more on the "talk" part than the "update" part.

Rather than advance any proposals, specific or otherwise, they advise that they are "prepared in essence to talk about a launch of a number of hearings". That suggests that they're at least four long steps away from any actual legislation, since they are (1) "prepar[ing]" to (2) "talk about" (3) "a launch" of (4) "hearings" – all of which would have to occur before any amendment could occur. They also plan to generate a "number of white papers examining a whole number of different issues".

The goal of all this is to "begin to actually launch an update beginning in 2015". So the actual "launch" of any actual legislative activity is at least a year away. And since all Members of the House face elections in the meantime, it's pretty clear that the 2015 date is optimistic, to say the least.

And did we mention that Messrs. Upton and Walden are both Republicans? While Democrats – and anybody in the Senate, for that matter – may very well share the Upton/Walden view that a revised Act is desirable, it's not entirely clear how many of their colleagues on Capitol Hill support the Upton/Walden effort. The Energy and Commerce Committee website now features a "one-stop-shop" for information about "the committee's plans for a #CommActUpdate", but the last time we checked there was no evidence on that site reflecting any formal Committee action.

The site does include a link to the first promised white paper. Running three pages (not including a number of questions, described below) and titled "Modernizing the Communications Act", the white paper is essentially an historical outline of the evolution of communications regulations since 1934. It points out that, besides the 1996 overhaul of the Act, other efforts to modify the Act have been piecemeal and, like the Act itself, segmented (or, to use the white paper's term, "siloed") according to technological sector – *e.g.*, telephone, cable, broadcast. While that approach made sense in the beginning, it doesn't work as well in the modern era of convergence and "intermodal competition".

Of course, none of this is a surprise to anyone who has observed the communications industries for very long. But the

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Opportunities south of the border

Mexico Announces Auctions for TV, Satellite Authorizations

By Mario Piana, Guest Contributor
López Velarde, Heftye y Soria, S.C.

[*Editor's Introduction: We welcome a new guest contributor, Mario Piana, an attorney with the Mexican firm of López Velarde, Heftye y Soria, S.C. Mario is familiar with Mexico's regulatory activities vis-à-vis its telecommunications industries. He has provided us with the following recap of recent announcements from Ifetel, Mexico's new telecommunications regulatory body. As outlined below, those announcements signal upcoming opportunities – for both Mexican citizens and foreign investors – to participate in Mexico's telecom industries.*]

Two opportunities for acquiring communications interests in Mexico have recently been announced, one involving nationwide digital broadcast television networks, the other involving commercial satellite services.

Digital TV Networks

On December 20, 2013, the Instituto Federal de Telecomunicaciones (also known as Ifetel) – created by a law enacted last year – formally announced the bidding process to be used for the awarding of licenses for the operation of two national digital broadcasting television networks through auctions. [*Editor's note: Licenses are referred to as "concession titles" in Mexico*.] The process is set out in a Program of Bidding Processes to Grant Licenses of Frequencies for Digital Broadcasting Television (the "TV Bidding Process Program") published in the Diario Oficial de la Federación [*i.e.*, the Mexican equivalent of the Federal Register].

This begins the implementation of a new regulatory framework arising from recent fundamental reforms to the regulation of Mexico's telecommunications industries. According to the Federal Constitution, the bidding processes for the two national digital broadcasting networks shall be called no later than March 10, 2014.

The recent constitutional amendments recognize as fundamental human rights the rights to information, freedom of expression and access to information and communication technologies. According to the amendments, in order to fully protect those rights the government must afford the public with multiple different sources of information while encouraging the maximum dissemination of information (as long as the transmitted information does not adversely affect third parties' interests or rights). Consistent with these principles, through the upcoming auction process Ifetel will allocate new frequencies and thereby increase access to additional information resources, new voices and a plurality of opinions.

The reforms are designed to encourage the entrance of new competitors into the marketplace by opening new allocations, protecting new investments, and reducing market concentration. According to the TV Bidding Process Program, the process will be carried out under a safe, transparent and fair environment for every interested bidder, and will be subject to the following conditions and considerations:

Foreign Investment Allowed. Direct foreign investment in the broadcasting industry is allowed up to 49% of the bidder's corporate capital, but that limit may be subject to lower limits depending on the percentage level of investments permitted to be made by Mexican nationals in the investor's home country.

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Our annual reminder about NFL trademark enforcement

The Bong Bowl, the Super Bowl® and Mr. Joel Rodgers

By Kevin M. Goldberg
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This year's Roy Fox "I Coulda Been Somebody" Award goes to (drum roll, please) – Joel Douglas Rodgers of Tampa, Florida. Our readers will recall that, last year about this time, I reported that one Roy Fox had applied for a trademark registration covering the mark "Harbowl", a mark which – had he obtained it – could have been a gold mine for him once the teams for last year's Super Bowl® were set. (I'm still waiting for ESPN to call to apologize for not giving me and CommLawBlog our due credit for breaking the story.) Both of last year's teams – the Niners and the Ravens, for those of you with short-term memory about such things – were coached by gentlemen named Harbaugh, so the desirability and commercial potential of "Harbowl" was obvious.

Also as I reported, though, the NFL made a bunch of threatening noise about Mr. Fox's application and thereby convinced him to abandon it. My point was to remind one and all that the NFL is super-aggressive when it comes to asserting control over anything that could conceivably be related to the Super Bowl®. (Don't forget that R-in-a-circle!) Because of the NFL's strong-arm approach, we annually warn folks to avoid using the term "Super Bowl®" in any way that might likely create an impression that their product or event is authorized or endorsed by the NFL. (Check out a collection of our Big Game-related posts on CommLawBlog.com here.)

So who is Joel Douglas Rodgers?

It turns out that, in June, 2012, Mr. Rodgers applied to register the trademark "Bong Bowl". So what? So this: The teams in this year's Super Bowl® – the Seattle Seahawks and the Denver Broncos – both happen to hail from states which have recently legalized marijuana. As a result, multiple drug-related nicknames for the Big Game have been suggested by members of the Great Unwashed: Weed Bowl, Stoner Bowl, Reefer Bowl, Super Oobie Doobie Bowl, Smoke-a-Bowl, etc., etc. You get the idea.

We don't know whether his application had anything at all to do with the NFL's premier event. But "Bong Bowl" could have been a major league money-maker, particularly since Mr. Rodgers, in his application, proposed to use the term on "athletic apparel", including sweat shirts (hooded and otherwise), tee shirts, hats, caps and other such merch. Who wouldn't be proud to sport a Bong Bowl hoodie to the nearest sports bar on Game Day?

The good news is that, at least as far as USPTO records show, the NFL didn't oppose Rodgers's application, maybe because the possibility of a Dope Bowl pitting two weed-approving venues against each other wasn't on the NFL's radar back in 2012.

The bad news is that that possibility apparently wasn't on Rodgers's radar, either: he abandoned his application in August, 2013, just before the current season cranked up.

> *Had he tried to market "Bong Bowl" merchandise, the NFL would have been in a difficult spot.*

Had he toughed it out and then tried to market "Bong Bowl" merchandise, the NFL would have been in a difficult spot.

On the one hand, in view of its historical tendency to bogart any and all terms even mildly reflective of the Super Bowl®, the NFL might have been all over Rodgers like a cheap suit, insisting he back off and let the NFL reap the profits.

But on the other, the NFL's substance abuse policy prohibits pot use, so the League might not have wanted to get hooked up with a product that could be seen as promoting just such use. (That may also be why the National Anthem at this year's Super Bowl® is being sung by opera superstar Renée Fleming and not the Doobie Brothers, and why the half-time entertainment is Bruno Mars and not James Blunt or Snoop Dogg/Lion, joined by a hologram of Bob Marley, singing the scat improvisation from Frank Sinatra's "Strangers in the Night".)

In any event, our message this year is the same as last year: Don't be a dope and risk having your hard-earned revenues go to pot. We don't even have to get into the weeds of trademark law to avoid making a hash of this situation. Before you use the words "Super Bowl", any NFL team names, any NFL team logos, or any NFL trademarks of any kind – or anything resembling them – between now and the game, ask yourself this one question: Am I using it in a way that is likely to create an impression that my product or event is authorized or endorsed by the NFL?

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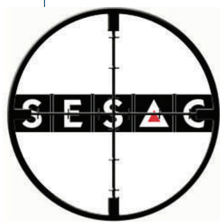

Signs of hope despite 2014 raise

RMLC v. SESAC 2014: Nothing Changes on (This) New Year's Day

By Kevin M. Goldberg
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The New Year.

A time for reflection and looking forward. When some give thanks for the blessings they have been given and others look to make a clean start.

In the world of contracts, it's an important time, as many annual agreements renew, often with previously-specified modifications automatically kicking in.

Which brings us to the Radio Music License Committee (RMLC) and its effort to stop SESAC from jacking up its 2014 royalty rates for radio licensees. While, as we shall see, that effort was unsuccessful (at least for the time being), there is some cause for optimism with respect to RMLC's long-term chances of bringing SESAC under the same type of judicial control as ASCAP and BMI are subject to.

As 2014 approached and an anticipated increase in SESAC's rates loomed, RMLC sought a preliminary injunction.

SESAC, ASCAP and BMI, of course, are the three major performing rights organizations (PROs), *i.e.*, organizations which represent song composers and to which broadcasters must pay royalties for the right to perform the musical works of SESAC-affiliated composers over the air and online.

In late 2012 the RMLC sued SESAC, alleging violations of federal antitrust laws. I wrote about the lawsuit when it was filed. The RMLC asked the court to rein in SESAC under a consent decree – similar to decrees to which ASCAP and BMI are already subject – which would require SESAC's activities to be reviewed and approved by a federal court.

As litigation often does, RMLC's lawsuit has ground on at a seeming snail's pace. But as 2014 approached and an anticipated increase in SESAC's rates loomed, RMLC sought a preliminary injunction barring such an increase until the suit was resolved. In a December 23 report and recommendation, U.S. Magistrate Judge Lynne Sitarski rebuffed RMLC, but in so doing also gave it hope that, even though RMLC may have lost this battle, it stands a reasonable chance of winning the war.

Anyone who has read our coverage of the Aereo litigation knows that a party seeking a preliminary injunction must demonstrate, among other things, that (a) there is a likelihood that it will succeed on the merits of its underlying lawsuit and (b) it will suffer irreparable harm if the injunction is not imposed. Judge Sitarski concluded that RMLC fell short on the "irreparable harm" element, so she recommended against enjoining SESAC . . . ***BUT*** – and this is a potentially big "but" – she also found that there is a likelihood that RMLC could ultimately prevail on the merits of its substantive antitrust claims.

The "irreparable harm" aspect of her decision isn't surprising. Generally, if the harm being claimed can be compensated by an award of money damages, it's not "irreparable". This makes perfect sense here: if SESAC is ultimately found to be violating antitrust laws and told to reduce its rates, it can refund overpayments to radio broadcasters, just like ASCAP and BMI did after they recently reached new rate deals with the RMLC.

What's getting most press attention, though, is the "likelihood of success" component of Sitarski's decision.

Her analysis of the substantive antitrust issues is extensive and detailed, leading her to the conclusion that SESAC's practice of offering only blanket licenses with no alternatives for more limited, direct licensees "shifts the balance too far" in the direction of impermissible anticompetitive behavior. That's the gist of most broadcasters' unhappiness with SESAC, and the core of RMLC's case.

As she sees it, radio broadcasters are often compelled by circumstances beyond their control to play various songs. For instance, a license is required to perform music that is contained in a commercial (but let's be very clear: your ASCAP, BMI and SESAC licenses do ***not*** give you the right to utilize any song into a commercial you may be producing – please contact me for clarification on that important issue). So if an advertiser insists on airing a spot with SESAC-licensed music in the background, the station's got to have a SESAC license. Similarly, a station may carry a live event with "ambient music" in the background (such as the marching band at a high school football game); that requires a license as well.

As a result, in order to protect themselves from inadvertently airing a song for which they have no license, broadcasters are forced to deal with SESAC. But SESAC offers ***only*** blanket licenses for ***all*** the works it represents, preventing broadcasters from picking and choosing the songs they can license.

Further, even if a station were inclined to try to avoid airing SESAC-licensed songs, SESAC is, um, rather opaque with regard to its music library, making it extremely difficult to know what songs to avoid. While SESAC does claim to provide an online searchable database of its repertory, Sitarski found that SESAC "expressly disclaims that its repertory database is accurate". And SESAC apparently isn't even clear how many songs it represents: its CEO could provide

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Back to bid-ness in May

Update: AM Auction Moves Ahead

By R. J. Quianzon
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The FCC has announced the final rules for its upcoming auction of 22 AM radio construction pemits.

As we reported in last November's *Memo to Clients*, the auction – which is set for a May, 2014 start date – involves applications filed a decade or so ago. In November, the FCC announced the eligible applications, the markets involved, and the proposed minimum bids for each market. It also solicited comments on those minimum bids and the auction procedures to be used.

In response, two applicants asked the Commission to remove their respective MX groups from the auction. Another applicant asked that the deadline for successful bidders to pony up their initial payments be delayed until the bidders can be reasonably sure that their proposed facilities will in fact be grantable – not an unreasonable concern. You can check out all the comments here. (Disclosure: a couple of our FHH colleagues, acting on behalf of one applicant, opposed the notion of removing its particular MX group from the auction.)

Tossing the various comments aside, the FCC declined to engage in any market carve-outs or payment postponements; instead, it's full speed ahead toward the May auction.

The suggestion that the down payment deadline be postponed serves as a reminder to potential bidders of the FCC's rigid "Buyer Beware" policy. If you bid on a license that turns out to be useless, the FCC does not let you off the hook. As is customary in broadcast auction notices, seven paragraphs of the FCC's most recent notice caution bidders – twice in bold type – that bidders are expected to do their own due diligence. Bidders are warned that they are "solely responsible" and that "the FCC makes no representations or warranties" about the permits on the block. If you're a bidder, consider yourself warned.

The opening bids for markets in the forthcoming auction range from $1,000 to $25,000. The window for filing Short Form Applications (Form 175), along with "minor change" remedial amendments, will be open from February 19, 2014 at noon until March 4 at 6:00 p.m. ET. Upfront payments are due in the FCC's hands (by wire transfer) no later than April 7 at 6:00 p.m. ET. The auction will begin on May 6 and continue until the last bid is made.

Bidders are reminded that strict FCC rules against collusion apply to auctions. The Cone of Silence prohibiting bidders from discussing the auction with one another has been in place for years already, and will remain in place until the down payment deadline (which won't be announced until after the close of the auction).

(Continued from page 4)

only an incredibly imprecise range of 250,000-400,000 songs.

So stations find themselves in a "take it or leave it situation" that, according to Sitarski, was no accident: SESAC engaged in concerted action to create that situation. And that concerted action, while containing some benefits (mainly the reduction of transaction costs and increased efficiency in the music licensing industry), is ultimately anti-competitive because: "SESAC's blanket license is the user's *only* choice."

This, obviously, can be read as an excellent omen for RMLC's ultimate prospects, putting SESAC on its back foot. But let's not go popping the champagne just yet.

Sitarski's decision is only a recommendation made to the U.S. District Judge presiding over the case – so it isn't necessarily the final word as to the injunction.

Also, as Sitarski repeatedly emphasizes in her decision, the "likelihood of success" standard measures only whether RMLC *could* win, ***not*** whether it *will* win. In this context, "likelihood" means a "reasonable probability of success" on the merits; in Sitarski's words, it does ***not*** rise to the level of "more likely than not". After all, the evidentiary record – witness testimony, documents, etc. – compiled in the preliminary injunction process may not, and often does not, include all the evidence that will eventually come to the surface in the full trial phase of the litigation. Plenty of information could still emerge that could change the overall picture entirely. Sitarski herself mentioned the long evidentiary road ahead when she cautioned that, while the RMLC had established a likelihood of success, its showing "certainly was not 'overwhelming'".

In the meantime, since Sitarski has recommended against RMLC's request for a preliminary injunction, SESAC will be able to increase the rates it imposes on radio broadcasters (which are calculated via the use of a matrix that applies a particular rate based on a combination of a station's population coverage area and highest one minute spot rate).

So while broadcasters and the RMLC clearly have cause for optimism, any optimism must be greatly tempered: there's still a long way to go before we can put wraps on this case. At the very least, we could be discussing this case again at the beginning of 2015. Maybe even 2016 and beyond.

Scrutiny alert

Size Still Matters to M&A Regulators

By R. J. Quianzon
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As the recovery from the economic turmoil of the late oughts gathers steam, the federal government has performed its annual ritual of gazing into its crystal ball, furrowing its regulatory brow, and announcing the thresholds it will use for automatic federal review of mergers and acquisitions for the coming year.

The FCC, of course, can choose to review, or *not* to review many, if not most, communications-related transactions in detail before issuing an approval. On the other hand, Congress long ago deemed that the Department of Justice and the Federal Trade Commission ***must*** review transactions that cross certain dollar amount thresholds. The dollar amounts of those thresholds for the rest of 2014 have now been announced. They are set to take effect as of ***February 24, 2014***. Readers considering a merger or acquisition should bear in mind that the administration automatically will be sending at least two agencies to take a closer look at transactions where either:

- the total value of the transaction exceeds $303,400,000; or
- the total value of the transaction exceeds $75.9 million and one party to the deal has total assets of at least $15.2 million (or, if a manufacturer, has $15.2 million in annual net sales) and the other party has net sales or total assets of at least $151.7 million.

The new thresholds also affect the filing fees that parties to a deal have to pay the government for the pleasure of going through the review process. (Fees are split between the FTC and the Department of Justice.) For the rest of 2014, any deal subject to review and valued at less than $151.7 million will pay a $45,000 fee. (Used to be that deals coming in at a mere $100 million got to pay that.) For deals valued at more than $151.7 million but less than $758.6 million, the review fee will be $125,000. And if you're proposing a deal valued at more than $758.6 million, get set to fork over a tidy $280,000.

When negotiating deals, all parties would be well-advised to bear these thresholds in mind. Once those lines are crossed, the prospect of additional (and considerable) time, expense and hassle to navigate the federal review process is a virtual certainty.

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process of change has got to start somewhere.

Perhaps best illustrating the very long road ahead for this project are the questions which the white paper poses for "stakeholder comment". They include such fundamental, open-ended queries as:

> Around what structures or principles should the titles of the Communications Act revolve?
>
> What should a modern Communications Act look like?
>
> How should the structure and jurisdiction of the FCC be tailored to address systemic change in communications?
>
> How do we create a set of laws flexible enough to have staying power in the face of rapidly evolving technology? How can the laws be more technology-neutral?
>
> Does the distinction between information and telecommunications services continue to serve a purpose? If not, how should the two be rationalized?

Obviously, we're starting at the very, very beginning.

While the Upton/Walden announcement – and related website, Twitter feed and white paper – seem sincerely aimed at starting an important inquiry, there are at least some indications that the effort may be less serious than it appears. Take, for example, the "#CommActUpdate" legend scrawled on the white board behind Upton and Walden in their video. (*See* the graphic at the top of this article.) It looks more like a high schooler's graffiti than the emblem of a landmark Congressional initiative.

Another example: while the white paper invites comments about any or all of the sprawling questions that it asks, the deadline for those comments was January 31, 2014 – barely three weeks after they were first announced. Such an appallingly abbreviated turn-around time for comments on such vast and – thus far, at least – unanswerable questions seems to send the wrong message.

An interesting question for broadcasters is what might emerge from a re-write of the Act by a Congress and FCC plainly focused on the telecommunications industry, not broadcasting (which, we all must admit, is viewed in some quarters as a fossil technology). Some hope on this score is offered by the involvement of Walden, who is a prominent former broadcaster. But he doesn't dwell on broadcasting's virtues in the posted video, or suggest how it might be regulated, or deregulated, in an overhaul of the Act.

A lot of roadblocks to the modernization effort remain on the road to the promised land. Perhaps the trip has started; perhaps not. Check back with CommLawBlog.com for updates.

Annual webcaster wake-up call!

SoundExchange Reports and Payments Due January 31

By Kevin M. Goldberg
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[*Editor's note: This piece originally appeared on CommLawBlog.com on January 20. We're re-printing it here to remind everyone even at this late date of their possible obligations.*]

Webcasters take note: like last year, and the year before that – in fact, like every year starting back in 2009 – the ***annual January 31 SoundExchange deadline*** is once again upon us.

This should not be news to anybody. We've provided an annual reminder about the deadline and all that it entails since 2009. And yet, every year, some webcasters don't pay attention and miss the filing date. As a result, they may lose the ability to claim the "small broadcaster" or "noncommercial microcaster" status that reduces their obligations for the rest of the year. Worse, they could open themselves up to a very sharply worded letter from SoundExchange advising of potentially significant monetary penalties. Sure, those penalties may not reach the worst-case scenario ($150K per copyrighted work), but they will almost certainly exceed by a long shot what it would cost simply to comply with filing requirements on time.

Anyone not sure of their classification should contact a knowledgeable attorney immediately.

So this year, let's try not to be the guy who sleeps through the deadline.

The chores should be old hat to anyone who's been webcasting for more than a year. The principal item of business is the submission of the Annual Minimum Fee Statement of Account form. That will require you to confirm the webcasting classification that applies to you. There are several classifications to choose from; if you're a broadcaster who happens to be webcasting too, you will almost certainly fall into one of six categories:

1. commercial broadcaster;
2. small commercial broadcaster;
3. noncommercial webcaster subject to the Copyright Royalty Board's Webcaster III decision;
4. noncommercial webcaster subject to the Webcaster Settlement Agreement (WSA);
5. noncommercial microcaster; or
6. noncommercial educational broadcaster.

If you're a noncommercial educational microcaster, you file the general "noncommercial educational" Statement of Account and simply request the reporting waiver on that form. (Note that some public radio stations may belong to a separate classification whose filings are made through Public Radio Interactive.)

When you file your Annual Minimum Fee Statement of Account form – again, it's due by January 31 – don't forget to include the minimum fee along with (that's $500 per channel).

If the classification you choose makes you eligible for waiver of the Playlist Report of Use requirement, make that election on the Annual Minimum Fee Statement of Account form. You'll have to pay an additional $100 "proxy fee" per service or per channel, depending on your classification. Unlike previous years, this year you will be asked to provide SoundExchange a separate email notification of your waiver election. (Previously, folks claiming the waiver had to file a separate election form.)

Anyone who is not sure which classification they fall into should contact a knowledgeable attorney immediately: once a choice is made and the Annual Minimum Fee Statement of Account Form has been filed, you're stuck with classification you have selected and there's no going back until next year.

While completing those chores should get you through the January 31 deadline, that's not the end of the story.

Most webcasters will also have to file Monthly Statement of Account forms (sometimes called the "report of use" form). These report either (a) the number of performances the webcaster incurred during the reporting month or (b) whether the allowable threshold of 159,140 "aggregate tuning hours" was exceeded in the month. As the name implies, that's a ***monthly*** form. It can be filed as soon as the month ends, but it must be filed no later than 45 days after the end of the month.

Folks who did not opt for the reporting waiver mentioned above (that's the waiver that requires payment of a $100 "proxy fee") will normally have to file monthly Playlist Reports of Use. Like the Monthly Statements of Account, these can be filed as soon as the month ends, but they must be filed within 45 days of the end of the month.

(Note that some rare exceptions to the monthly reporting requirements are available. If you're not sure whether you qualify, it's best to confer with an attorney who can help determine whether those exceptions apply in any particular case.)

Dealing with SoundExchange can be a complex and not-necessarily-intuitive process. Again, you should contact an attorney if you need more information about the licensing scheme in general or advice regarding your options, obligations, and/or the procedures for compliance.

Raising the curtain on Web IV

The Future of Webcasting Royalty Rates for 2016-2020 Starts Now

By Kevin M. Goldberg
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The Copyright Royalty Board (CRB) has started on its quinquennial chore of establishing copyright royalty rates applicable to various non-interactive webcasters. While the to-be-determined rates won't kick in for another two years – they will apply to the period January 1, 2016-December 31, 2020 – the CRB is required by Congress to get the ball rolling by January 5, 2014, and the CRB has gotten itself in under the wire with a notice in the January 3 Federal Register inviting public participation in a new proceeding (dubbed "Web IV" by the CRB).

Web IV will set the rates for eligible nonsubscription and new subscription services (most of our readers, including just about all broadcasters engaged in webcasting, fall into the former). And while the rate structure currently in place for the 2011-2015 term has been relatively complaint- and controversy-free, the CRB's notice suggests that the CRB may be looking to take rate calculations in a different direction. Rather than simply hit "repeat" and stick with the per-performance basis for rates all players have lived with for more than five years already, the CRB appears to have a percentage-of-revenue model in mind. At least that's one possible reading of the questions laid out for comment by the CRB.

> *Sorting through the relevant factors is what Web IV is all about.*

It seems like just yesterday that I was writing about the issuance of a Copyright Royalty Board decision on March 2, 2007 (commonly referred to as the Web II decision), which significantly increased the royalty rates applicable to various non-interactive webcasters. Web II was a messy affair, leading to multiple court challenges. Ultimately, matters were resolved through several webcaster settlement agreements in which webcasters and SoundExchange crafted their own royalty arrangements in lieu of the CRB's Web II construct. Those agreements created subcategories among the various classifications of non-interactive nonsubscription webcasters, including eligible subscription and non-subscription services, and further sub-subcategories, including pureplay webcasters, commercial webcasters, commercial broadcasters and noncommercial webcasters. Perhaps more importantly, they were all based on an elaborate per-performance calculation method.

When Web III time rolled around in 2009 (looking ahead to the 2011-2015 term), the CRB took the path of least resistance and effectively adopted the terms set out in the various private deals that had been struck in connection with Web II. Foreshadowing that approach, in its 2009 invitation for participation in Web III the CRB gave no indication of any interest in upsetting the status quo. That's clearly not the case this time around.

In its latest invitation for participation, the CRB lays out a series of questions seemingly pointing in a new direction:

> What is the importance, if any, of the presence of economic variations among buyers and sellers?
>
> Should royalty rates embody any form of economic "price discrimination" in order to reflect the statutory hypothetical marketplace?
>
> What are the potential disadvantages of establishing a statutory royalty rate not based on a per performance royalty rate?

And if that third question doesn't make it clear that a shift from "per performance" to "percentage of royalties" is on the table, consider the following sub-questions posed by the CRB:

> Is it prohibitively difficult to identify webcaster revenues for the purpose of calculating a percentage-of-revenue based royalty rate?
>
> Is there an "intrinsic" value to a performance of a sound recording that is omitted if a percentage of revenue royalty rate were to be adopted?
>
> Would a royalty rate calculated as a percentage of webcasters' revenue be "disproportionate" to webcasters' use of sound recordings?

Of course, just because the CRB is asking these questions does *not* necessarily mean that anything has already been decided. Sorting through the relevant factors is what Web IV is all about. And the actual method by which a webcaster calculates its rates – whether per performance, percentage of revenues, a combination thereof, or something else – must still be reasonable within the Congressionally-imposed "willing buyer/willing seller" standard used to determine these webcasting rates. So the resolution of Web IV is far from a foregone conclusion.

But the CRB's invitation clearly signals a potential major shift.

Further complicating matters, as regular readers will know, is the possibility of further Congressional direction, perhaps in the form of the Internet Radio Fairness Act. That could impose a new standard by which royalty rates are determined.

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FHH - On the Job, On the Go

That's ***Professor*** Victory. . . **Kathleen Victory** will be teaching a session on contract negotiation at the NAB Broadcast Leadership Training Program on February 23.

Not to be outdone, **Harry Martin** will be participating on an FCC regulatory review panel at the annual NRB International Christian Media Convention in Nashville on February 25. Also traveling down to Music City for the festivities will be **Frank Jazzo** and **Davina Sashkin**.

It'll be a short stay in Tennessee for **Frank J** because he'll also be attending the NAB State Leadership Conference in D.C. on February 24-26. He'll be joined by **Frank Montero**, **Matt McCormick** and **Scott Johnson**.

The following month **Frank M** will be heading out West to the Hispanic Radio Conference and the Sports Radio Conference in San Diego from March 10-11. He'll be moderating a panel discussion (Title: "Investment Strategy: The View from Wall Street and Main Street").

Oh yeah, and this past month **Frank M** was interviewed by Time Magazine for an article on whether the FCC uses a different indecency standard for Spanish media.

And who's got a gal in Kalamazoo? *We* do, of course. FHH's **Kathy Kleiman** was interviewed by WMUK, the NPR affiliate in Kalamazoo, about the women who helped program the ENIAC computer shortly after WWII. **Kathy** is the founder of the ENIAC Programmers Project and executive producer of a forthcoming documentary about the ENIAC programmers. You can catch the interview on the WMUK website.

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If you're confident that your use is more rationally related to reporting on or about the game, you should be OK – but understand that the NFL is likely to be skeptical about your claim, so be "super" sure.

Of course, everything – including those too-cute variations on "Super Bowl®" – has to be analyzed in its own context, so you may want to discuss any potential uses with your attorney beforehand. An understanding of how the law might apply to any ideas you may come up with should help. We're just trying to help you stay on the high side of the law.

And remember, it's ***not*** just the NFL you have to be worried about. Every year, people get tripped up by their unauthorized use of "March Madness". Every two years it's "Olympics" (most often by simply throwing "-lympics" on just about anything). And every four – including this year – FIFA gets pretty darned protective about "World Cup".

So when it comes to ads or promotions that might violate these strongly protected marks, take a tip from Nancy Reagan: Just Say No!

P.S. – Because I'm the Swami and I make predictions, I'll go ahead and provide my annual prognostication about "The Big Game". My Gold Medal prediction for the Meadowlands: Denver 37, Seattle 24.

P.P.S. – You should know that my record in picking NFL games this season was pretty mediocre (about 48% correct). I haven't done much better in the post-season, boasting a 4-5-1 record. But last year I accurately picked the winner ***and*** predicted the three-point spread right on the button. And if you've ever been lucky enough to hit the FHH home page at the right time, you'll know I've correctly picked the winners of the last three World Cup tournaments. Bonus unofficial prediction: with the caveat that it's early, things can change and I have to see just how the various teams look closer to the tournament in Brazil, I'm leaning toward Argentina.

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So there's a lot to watch for here. But you can do more than watch. As noted above, the CRB's notice invites public participation in Web IV. For the low, low price of $150, sent with the proper paperwork (a Petition to Participate) in the proper format (a hard copy original with five paper copies and an electronic copy in PDF format) to the proper place (which will vary depending on whether you file via hand delivery, hand delivery using a courier service, US mail, or overnight delivery), you can have your say in the matter!

We would, however, expect that major trade associations such as the National Association of Broadcasters, the National Religious Broadcasters Music License Committee, the Intercollegiate Broadcast System and others that participated in Webcasting III will do so again, so you might find it easier and cheaper to express your concerns directly to those likely to represent your interests. If you're not satisfied that your views will be satisfactorily repped in Web IV, you've got until ***February 3, 2014*** to get your paperwork (and $150) in to the CRB.

We'll definitely keep you posted as the Web IV proceeding moves along.

Image obtained from www.aereo.com

Showdown on First Street in D.C.

Aereo: Supreme Court Bound!

By Harry F. Cole
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The Supreme Court has decided that now would be a good time to consider the arguments arising from the Second Circuit's *Aereo* decisions to date – so the Supremes have granted the petition for certiorari filed by the broadcaster parties to the Second Circuit case. While this could ordinarily bode well for the broadcasters – after all, if the Supreme Court thought the Second Circuit got it right, they could just deny cert and let the Second Circuit's action stand – you can probably expect Aereo to claim something of a victory here because, as we reported in last month's *Memo to Clients*, Aereo itself urged the Court to take the case.

As of this writing the briefing and argument schedules haven't been posted on the Supreme Court's website. Since the Court will be hearing arguments until the end of April, it seems reasonably likely that the Aereo case will be briefed and argued this term, which would mean that a decision from the Court by the end of June would be a near certainty.

Three interesting tidbits may or may not come into play down the line.

From the scant information that is currently available, it's impossible to say how the Court is likely to rule. There are, however, three interesting tidbits that may or may not come into play down the line.

First, Justice Alito recused himself from consideration of the cert petition. As is customary, no reason for his recusal was given, nor did the Court's order disclose whether he would be recused from the merits end of the case – although recusal there would seem more than likely. If he's out, that would reduce the number of justices hearing the case to eight, giving rise to the possibility of a 4-4 split. In that case the decision of the lower court – *i.e.*, the Second Circuit's order upholding the denial of a preliminary injunction against Aereo – would remain in place.

Second, Justice Kagan did *not* recuse herself.

While there is no reason that she should have, her involvement in the Court's deliberations could prove particularly important. Why? Because Aereo's case – indeed, some would say its whole system design – is based on the Second Circuit's 2008 *Cablevision* case in which the Circuit concluded that Cablevision's Remote Storage-DVR system did not infringe on copyrights held by various program producers whose works were recorded and transmitted through that system. Having lost at the Second Circuit, the copyright holders asked the Supreme Court to take a look at the case, just like the broadcast parties have done in the Aereo case.

In considering whether or not to take the *Cablevision* case, the Supremes asked the U.S. Department of Justice for its views on the subject. In May, 2009, the Solicitor General weighed in with a recommendation *against* Supreme Court review. ***BUT*** that recommendation was guarded and hedged. In particular, the SG noted that "some aspects of the Second Circuit's reasoning on the public-performance issue are problematic". For example,

> Some language in the [Second Circuit's] opinion could be read to suggest that a performance is not made available "to the public" unless more than one person is capable of receiving a particular transmission. . . . Such a construction could threaten to undermine copyright protection in circumstances far beyond those presented here, including with respect to [video-on-demand] services or situations in which a party streams copyrighted material on an individualized basis over the Internet.

In other words, at least in the SG's view, *Cablevision* was not necessarily the most persuasive case on a number of fronts, including its interpretation of the Copyright Act's Transmit Clause. But interpretation of that clause was absolutely crucial to the Second Circuit's *Aereo* decisions, and there the Circuit relied extensively on *Cablevision*. So if *Cablevision* is really "problematic", that may not be a good sign for Aereo.

Did we mention that the Solicitor General who signed the *Cablevision* brief – the brief that characterized the Second Circuit's *Cablevision* opinion as "problematic" – was (drum roll, please) Elena Kagan?

And third, there's the Question Presented.

The rules of appellate litigation call for each party to specify the "question presented" for the court's consideration. Litigators routinely take that opportunity to try to get the court to view the case from their respective clients' viewpoint from the get-go. It's a subtle thing, the actual utility of which is difficult, if not impossible, to assess. But in big-time appellate law – especially in a venue like the Supreme Court – you don't pass on any opportunity to grab a possible advantage, no matter how slim the odds that it'll really help.

Not surprisingly, in their respective certiorari pleadings, the broadcasters and Aereo pitched markedly different questions to the Court. The possibly good news for the broadcasters: the Court has announced that the question

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Channels & Coverage. The national digital television networks to be auctioned are currently designed each to consist of 246 digital television channels operating from 123 different locations (but serving at least 234 cities and communities). The goal is that the new networks will have the same reach as the current licensed TV operators.

The coverage radius of each channel will be between 15 km-100 km. Channels 7-13 will be subject to minimum (f (50,90)) field strength of 43 dBu; Channels 14-51 will be subject to minimum field strength of 48 dB. However, once the digital television transition is completed, Ifetel may reorganize the spectrum frequencies to increase competition. Specific regulations allowing digital television stations to offer multiplex, high definition and mobile television may also be adopted to permit optimal use of digital channels.

Lack of access to spectrum has represented a major barrier to the entry of new competitors in the Mexican TV industry.

The TV Bidding Process Program lists the frequencies and coverage areas which Ifetel has identified for auction. However, interested parties may request the inclusion of additional and/or modified frequencies or coverage areas. Such requests must have been submitted by ***January 19, 2014***. Changes that may result from such requests will be published in an amendment to the TV Bidding Process Program.

The digital television transition in México is expected to be completed by December 31, 2015, as set forth in the Federal Constitution.

Elimination of Market Barriers. Lack of access to spectrum has represented a major barrier to the entry of new competitors in the TV industry. To help remove that market barrier, the TV Bidding Process Program prohibits companies currently holding broadcasting licenses for 12 MHz or more from participating in the bidding processes for the two new national TV networks.

Commercial Satellite Services

On December 30, 2013, Ifetel announced the approval of the Bidding Program of Geostationary Orbital Positions for Commercial Use (the "Satellite Services Bidding Program"). This will make available for auction the Geostationary Orbital Positions 113° West and 116.8° West, and their associated C and Ku extended bands.

The Satellite Services Bidding Program is intended to encourage private investment, increase employment and provide a wider offer of telecommunications services by opening the market to new competitors.

The specific terms and conditions governing the bidding process have not yet been established. In general terms, though, that process will be subject to the following general principles:

Foreign Investment Allowed. Foreign investors can participate directly up to 100%, with no restrictions.

Multiple Services. The licenses to be granted will allow the provision of fixed satellite service (FSS), including intracorporate communications, data communications, and Direct-to-Home (DTH) satellite television, among others.

National and International Coverage. The current service coverage area is the Mexican national territory. However, through satisfactory completion of appropriate coordination proceedings established by the International Telecommunications Union, the coverage area might be extended to the whole American continent.

Telephone Services. According to the Cuadro Nacional de Atribución de Frecuencias (National Schedule of Frequency Bands Allocation), the extended C band in the space-Earth segment can also be used for the provision of fixed and mobile telephone services. Therefore, Ifetel must make sure that any necessary coordination measures are taken in order to avoid harmful interference with previously licensed fixed network carriers currently operating in the same band.

[*Editor's End-note: Should you have any questions regarding Mexico's new telecommunications reforms, you can use these links to contact our contributor, Mario Piana, or FHH's own Francisco Montero*.]

Image obtained from www.aereo.com

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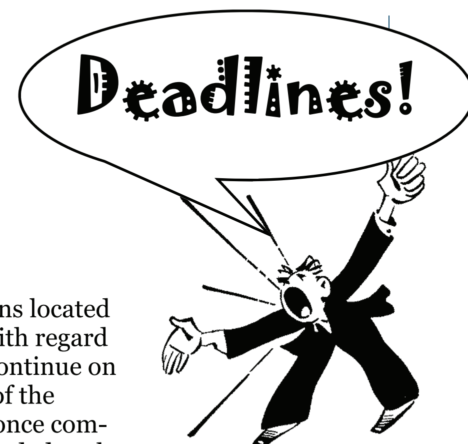
they'll be considering is the question as posed by the broadcasters.

That seems like good news for the broadcasters because it suggests at least an initial willingness on the Court's part to see things the way the broadcasters see them. Of course, lots can happen between now and the Court's ultimate decision, and the "question presented" may prove to be of no consequence. This is, after all, just another tea leaf; maybe it means something, maybe it doesn't. But the parties' lawyers presumably think it's significant: they did, after all, bother to advance their respective versions, an effort they probably wouldn't have made if they didn't think it would make any difference.

So if you're sizing up the odds before placing your bets on the case, be sure to consider all these factors, but don't be surprised if others crop up between now and the oral argument (probably sometime in late April).

In any event, we're off to the Supremes! Check back here for updates.

February 1, 2014



Radio Post-Filing Announcements – *Radio* stations located in **New Jersey** and **New York** must begin their post-filing announcements with regard to their license renewal applications on February 1. These announcements then must continue on February 16, March 1, March 16, April 1 and April 16. Once complete, a certification of broadcast, with a copy of the announcement's text, must be placed in the public file within seven days.

Television Post-Filing Announcements – *Television* and *Class A television* stations located in **Kansas**, **Nebraska** and **Oklahoma** must begin their post-filing announcements with regard to their license renewal applications on February 1. These announcements then must continue on February 16, March 1, March 16, April 1 and April 16. Please note that with the advent of the online public file, the prescribed text of the announcement has changed slightly. 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.

Radio License Renewal Pre-Filing Announcements – *Radio* stations located in **Delaware** and **Pennsylvania** must begin their pre-filing announcements with regard to their applications for renewal of licenses on February 1. These announcements then must be continued on February 16, March 1, and March 16.

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

February 3, 2014

Radio License Renewal Applications – *Radio* stations located in **New Jersey** and **New York** must file their license renewal applications. These applications must be accompanied by FCC Form 396, the Broadcast EEO Program Report, regardless of the number of full-time employees.

Television License Renewal Applications – *Television* stations located in **Kansas**, **Nebraska** or **Oklahoma** 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.

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

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

February 18, 2014

AM Revitalization – Reply Comments are due with regard to the Commission's Notice of Proposed Rule Making aimed at revitalizing the AM radio service.

April 1, 2014

Radio License Renewal Applications – *Radio* stations located in **Delaware** and **Pennsylvania** must file their

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license renewal applications. These applications must be accompanied by FCC Form 396, the Broadcast EEO Program Report, regardless of the number of full-time employees.

Television License Renewal Applications – *Television* stations located in **Texas** must file their license renewal applications. These applications must be accompanied by FCC Form 396, the Broadcast EEO Program Report, regardless of the number of full-time employees.

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

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

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

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

Noncommercial Television Ownership Reports – All *noncommercial television* stations located in **Texas** must file a biennial Ownership Report (FCC Form 323-E). All reports must be filed electronically.

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

April 10, 2014

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

Commercial Compliance Certifications – For all *commercial television* and *Class A television* stations, a certification of compliance with the limits on commercials during programming for children ages 12 and under, or other evidence to substantiate compliance with those limits, must be uploaded to the public inspection file.

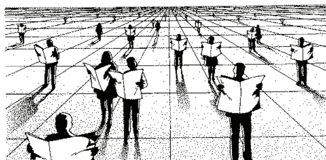
Website Compliance Information – *Television* and *Class A televisio*n station licensees must upload and retain in their online public inspection files records sufficient to substantiate a certification of compliance with the restrictions on display of website addresses during programming directed to children ages 12 and under.

Issues/Programs Lists – For all *radio*, *television* and *Class A television* stations, a listing of each station's most significant treatment of community issues during the past quarter must be placed in the station's public inspection file. Radio stations will continue to place hard copies in the file, while television and Class A television stations must upload them to the online file. The list should include a brief narrative describing the issues covered and the programs which provided the coverage, with information concerning the time, date, duration, and title of each program.

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

Updates On The News

Comment deadlines set in Sports Blackout proceeding — In last month's *Memo to Clients* we reported on a Notice of Proposed Rulemaking (NPRM) casting considerable doubt on the future prospects of the sports blackout rule. The NPRM has made it into the Federal Register, so we now know the deadlines for comments and replies. If you want to toss your two cents' worth in on the issues raised in the NPRM, you've got until February 24, 2014 to file comments and March 25 to file replies. You can do so by surfing over to the FCC's ECFS electronic filing site and submitting them in Proceeding Number 12-3.



LPFM: Sticking to the road map – Last month, shortly after the long-awaited LPFM window had closed, we reported on the Audio Division's road map for addressing the 2,800 (or so) applications that came in during the window. The goal was to identify the non-MX singletons ASAP, get them out on public notice, and be ready to promptly wield the "grant" stamp for those that made it through the petition to deny period unscathed. Turns out the Division is sticking to its game plan. Already nearly 400 LPFM applications have been granted. And word is that nearly 1,400 (or so) more singletons have been identified and are awaiting processing. At the target rate of 500 grants per month – ambitious, to be sure, but not out of the question, given the Division's success so far – those could all be granted by early spring. Meanwhile, the settlement process continues apace, which is likely to lead to the resolution of bunches of MX groups resulting in even more grants. Kudos to the Audio Division for their incredibly efficient handling of a boatload of applications.

FHH Tops in Media Deals, Again — Another year, another Number One rating. According to SNL Kagan, recognized as one of the preeminent sources of financial analysis in the media business, in 2013 Fletcher, Heald and Hildreth advised in more media/entertainment/new media transactions than any other law firm – by a long shot. Hey, isn't this the same achievement we wrote about last year . . . and the year before . . . and the year before that? You betcha. And while the total number of transactions that got FHH to the top of the charts this year was "only" 112 – down a couple dozen or so from last year – that was still nearly twice the number of the First Runner Up.

This year did show something different: in the communications deals category, we were also tops in the number of deals on which we advised. (That's up from Number Seven last year.)

Through the worst of some very rugged economic times, our clients continued to thrive and remain active on the transactions front. And they have continued to call on us to provide guidance and counsel in structuring their deals and navigating them through the regulatory process.

As we have in past years, we congratulate our clients for their successes, we thank them for the confidence they have placed in us, and we look forward to providing the same quality representation to clients, old and new, that we have been providing for more than 75 years.