Colorado Broadcasters Association

# Memorandum to Members

June 2016

*News and Analysis of Recent Developments in Communications Law*

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Fletcher, Heald & Hildreth

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*Gearing up for the next nationwide test*

## EAS Test Reporting System Now Open for Business

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Attention, all you EAS participants. The Commission has formally opened up its new EAS Test Reporting System (ETRS), which means that you've got until ***August 26, 2016*** to get into the site and complete Form One. And while you're at it, you might also want to take a gander at the draft of a New and Improved 2016 EAS Operating Handbook that the Communications Security, Reliability, and Interoperability Council (CSRIC) has developed. It's still a work in progress, but the FCC wants to know what you think about it.

Some explanation.

First, ETRS. As we reported last year, following up on its First-Of-A-Kind 2011 Nationwide EAS Test, the Commission decided that it needed a better mechanism for getting feedback on the effectiveness of its tests. Thus was born the ETRS. First announced back in June of last year, the new system wasn't ready for preview until April of this year. The preview consisted of a public notice full of screen grabs showing what the ETRS site would look like if it were up and running, which it wasn't, because the site itself didn't go live until June 27.

## Inside this issue . . .



Now that it's live, all EAS participants are required to access it. There you'll be able to obtain your own ETRS account credentials, with which you will then get into the system and complete Form One. Simply go to the ETRS page on the FCC's website where you will find a link to the ETRA Registration Page (or you can cut to the chase and go straight to the Registration Page at this link). At the Registration Page you'll be asked for identifying information (including name, address, phone numbers, FRN and FRN password). When you submit all that, you'll receive an email with your ETRS account credentials and a link to the ETRS log-in page. Once you have headed to that link and logged in, you'll find instructions for completing Form One.

The Commission cautions that care should be taken in accurately providing the EAS participant's legal name during the registration process. It also instructs that any EAS participant "owned by a larger entity should accurately enter the owning entity's legal name in the Owner of EAS Participant field in Form One". Participants with multiple facilities will also be able to appoint a "coordinator" who would be able to access and revise data for all filers using the same FRN.

Since we here in the *Memo to Clients* bunker aren't EAS participants, we haven't tried to finagle our own ETRS account credentials, so we can't tell you exactly what the log-in page and Form One look like. But presumably the screen grabs provided by the Commission last April are accurate.

One reminder, though. Among the various data you'll be asked to fill in in Form One will be the geographic coordinates of your station ... in NAD83, ***not*** NAD27. That distinction is important, because unlike pretty much any other FCC database, CDBS provides coordinates in NAD27. (If you're fuzzy on the whole NAD83/NAD27 question, check out our post from a couple of years ago for some background; the situation has not changed since then.) If you have NAD27 coordinates, you can convert them to NAD83 by using a tool available at the National Geodetic Survey website. (This tool is approved by the FCC's Audio Division, whose own website provides a link to the GDS page.) But heads up: a reader has advised that, before you enter NAD83 longitude coordinates into the ETRS Form One blank, you should put a minus sign in front of it; otherwise, ETRS will assume your tower is somewhere in China or thereabouts.

Bottom line, ETRS-wise: If you're an EAS participant, you've got until August 26 to get your Form One completed and

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*Student discount*

# FOIA "Educational Institution" Fee Exemption Available to Students

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The federal Freedom of Information Act (FOIA) and its state equivalents remain a useful tool for anyone wishing to keep an eye on our governments' activities. FOIA requests have led to the exposure of waste, fraud and abuse in government programs. Such revelations, in turn, have effected change that has saved not only money but lives. Don't believe me? Check out the "FOIA Files", an amazing trove of stories – a *searchable* trove, at that – reflecting the power of the federal FOIA to benefit all of us. (FOIA Files was compiled by the Sunshine in Government Initiative. Full disclosure: two of my clients are among the nine members of SGI.)

But effecting change through FOIA has gotten harder and harder in the face of many impediments. These include not only the various exemptions, which provide justifications – some valid, some not so much – for withholding information, but also other, more "procedural", impediments. For example, increasingly long wait times for even an initial response to an FOIA request, followed by equally long waits before the requested records are released or, frequently, withheld. Another example: the imposition of high "processing fees" which can deter a party from pursuing its request in full. (Some of these fees may become less of a problem now that both the House and Senate have passed S. 337 – the FOIA Improvements Act of 2016 – and was signed into law by President Obama on June 30.)

These impediments have an especially negative impact on journalists, who may not have the time or money to fight an adverse decision. Journalists represent the third largest group of users of the federal FOIA, filing about 10% of all requests per year, despite the fact that they may not be able to wait for their request to be processed in the face of an impending deadline, or they may not even be able to pay the required processing fees. As to fees, though, the federal FOIA process does provide for partial exemption from fees for members of the news media.

And now, thanks to a decision from the U.S. Court of Appeals for the D.C. Circuit last month, it's quite possible that similar fee exemptions will be available for even more requesters.

Like journalists, educational institutions are among the noncommercial requesters who are eligible for reduced fees. The recent case – *Sack v. Department of Defense* – addressed the issue of how the policy of reduced processing fees for educational institutions should be applied.

The federal FOIA fee structure works like this. Agencies are allowed to charge fees for: (1) the time spent searching for records; (2) the time spent reviewing records to determine if exemptions apply; and (3) the cost of copying or producing the records. Most requesters must pay all these fees. However, the federal FOIA provides that ***non***commercial requesters – including educational institutions and noncommercial scientific institutions – and representatives of the news media need pay only reasonable standard charges for document duplication (or the cost of putting the records in a thumb drive or CD), but no fees for search and review. (The Act also permits waiver of fees where disclosure of the information is determined to be in the public interest because it is (1) likely to contribute significantly to public understanding of the operations or activities of the government and (2) not primarily in the commercial interest of the requester.)

Kathryn Sack was a Ph.D. student at the University of Virginia when she filed FOIA requests with the Department of Defense (DOD) and other agencies. She stated in her requests that she intended to use the sought-after information as part of her doctoral dissertation. Because of that obviously educational consider-

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*National security agencies would face 90-day shot clock*

# Alien Ownership: FCC Seeks Comment on "Streamlined" Review Process

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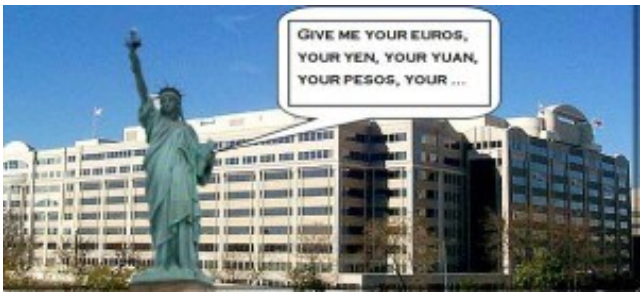
In an effort to facilitate foreign investment in U.S. common carrier and broadcast licensees, the FCC has proposed changes in the way it processes proposals involving reportable levels of foreign ownership. Historically, a major source of delay in the processing of such proposals has been the need for various Executive Branch agencies to review them with an eye toward national security concerns, review which has tended to drag on. Now, however, the FCC is suggesting that the review process can be abbreviated by: (a) requiring proponents to provide national security-related information in their applications and (b) giving Executive Branch agencies a 90-day deadline for giving a thumbs up or thumbs down as to each proposal.

It all sounds great at first blush. But a number of pesky details could prove problematic, particularly for broadcasters and applicants that don't propose foreign ownership.




Concern about foreign ownership of U.S. communications companies is the focus of Section 310(b) of the Communications Act. That section requires special FCC approval for ownership by non-U.S. citizens of more than 20% of the licensees of common carrier, broadcast, and certain aeronautical radio stations or more than 25% of the parent of a licensee entity. For decades FCC approval of more than 25% foreign control was difficult, if not impossible, to obtain. Recently, however, the FCC has been more receptive to foreign investment, at least in the common carrier context, where significant levels of foreign ownership of undersea cables, telephone companies, satellite earth stations, and wireless carriers are now commonplace. Broadcasters have not requested approval of foreign ownership to the extent that common carriers have, but the FCC has invited applications to break the ice and is waiting to receive them.

The Commission, of course, has the final say as to whether to grant any proposal to exceed the foreign ownership levels specified in Section 310(b). But the FCC has long acknowledged that other governmental agencies have particular expertise in certain areas of concern inherent in such proposals, including national security, law enforcement, foreign policy, and trade policy. Accordingly, a procedure for giving those agencies an opportunity to review the proposals before FCC action on them was developed.

Under that procedure, certain applications or proposals involving foreign ownership are referred to a number of federal agencies for their consideration. Those agencies include (take a deep breath): the Departments of Homeland Security, Justice (including the Federal Bureau of Investigation), Defense, State, and Commerce; the National Telecommunications and Information Administration (NTIA); the U.S. Trade Representative; and the White House's Office of Science and Technology Policy. Which proposals will be referred out? Proposals where one party who is not a U.S. citizen owns a 10% or greater direct or indirect voting or equity interest, including:

> [a]pplication[s] for: (1) international section 214 authority; (2) assignment or transfer of control of domestic or international section 214 authority; (3) a submarine cable landing license; and (4) assignment or transfer of control of a submarine cable landing license. [Additionally,] petitions seeking authority to exceed the [20-25%] section 310(b) foreign ownership limits for broadcast and common carrier wireless licensees, including common carrier satellite earth stations.

The various Executive Branch agencies then negotiate individual agreements with applicants to ensure accessibility to communications records in accordance with U.S. laws (including the ability to intercept communications for enforcement where permitted by law). In connection with those negotiations, at least some of those agencies also tend to insist that the proponent agree to keep their records in the U.S., where they are subject to subpoena in U.S. courts, and to maintain the physical presence of some responsible personnel in the U.S.

Completion of this review and negotiation process can take months or even years. As a result, the process discourages seeking foreign investment, because it might cause your deal to be held up for an unacceptable length of time.

Last month the NTIA suggested an alternate approach. It proposed that the FCC require that the information ordinarily sought by the Executive Branch agencies during their review and negotiation be submitted *to the FCC* as part of the initial application, and possibly to the Executive Branch agencies as well at the same time, perhaps in the form of answers to standardized questions. The FCC invited comments on NTIA's suggestion, which received widespread support. The Commission has now taken the next step by advancing the NTIA's suggestion (along with some of its

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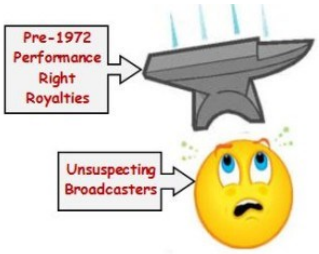


# Question: When is a Pre-1972 Recording Not a Pre-1972 Recording?

**[*Answer: Possibly more often that you might think.*]**

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In the ongoing litigation over whether recording artists are entitled to performance right royalties for the public performance of pre-February 15, 1972 recordings, we have a new wrinkle. A federal judge in the U.S. District Court for the Central District of California has determined that some recordings you might have thought to be pre-1972 recordings could actually lose that important status. This opens a whole new defense for broadcasters, satellite radio operators and webcasters who might otherwise have been sweating about potential liability galore. (How much "potential"? As I reported last June, Sirius XM figured it was the smart thing to do to settle out with four performance rights claimants for $210 million, rather than risk further litigation; and that amount didn't cover any potential royalties beyond next year.)

If you're fuzzy on just what the pre-1972 recording performance rights controversy is all about, take a minute to check out my earlier posts on the topic – this one and this one should help you out (or you can take your pick from my collection at this link). For today's lesson, here's what you need to know: in 1971, Congress created a "performance right" in recordings, but it applied that right ***only*** to recordings made on or after February 15, 1972. In the last several years, a number of recording artists (or their representatives) have relied on state laws (mainly in California and New York) to argue that transmissions of their ***pre***-2/15/72 recordings by, most notably, Sirius XM and Pandora trigger performance rights royalty obligations. Their arguments have gotten traction in a number of rulings against Sirius XM and Pandora.

*Many people scoffed at CBS's argument. Who's laughing now?*

In the most recent decision – which involves broadcast ***and*** online performances – the tide may have turned.

The case pitted CBS against four plaintiffs holding the rights to a bunch of pre-2/15/72 records. (The artists' whose recordings were at issue included the Everly Brothers, Ray Stevens, Andy Williams, the Chi-Lites and another couple dozen or so ranging from reasonably familiar to pretty obscure.) There apparently was little question that CBS stations had transmitted most of the songs in California (either over-the-air or through Internet streams), so under the earlier line of cases it looked like CBS might be on the hook for royalties.

But CBS came up with a new defense and Judge Percy Anderson was persuaded.

CBS's argument is that it had broadcast only "digitally re-mastered or re-issued recordings which were created *after* February 15, 1972". In CBS's view, the original analog recordings had been modified sufficiently through the digitization/remastering process that, by the time they got to CBS, they had become "derivative works" separate and distinct (for copyright purposes, at least) from the originals.

Many people scoffed at CBS's argument, by the way. Who's laughing now?

The argument is best explained in a couple of publications from the Copyright Office: "Circular 56", in which the term "derivative work" is defined, and Section 803.9(F)(3) of the Office's Compendium of U.S. Copyright Office Practices, in which that definition is fleshed out a bit. According to the former, a derivative work "incorporates some preexisting sounds that were previously registered or published, or sounds that were fixed, before February 15, 1972", but those preexisting sounds must have been "rearranged, remixed, or otherwise altered in sequence or character, or there must be some additional new sounds".

According to the Office, re-mastering old recordings can produce a "derivative work" if the re-mastering involves "multiple kinds of creative authorship, such as adjustments of equalization, sound editing, and channel assignment". But if the re-mastering involves only "[m]echanical changes or processes", such as "a change in format, declicking, and noise reduction", that does *not* create a "derivative work" separate from the original recording. In its Compendium the Office elaborates, somewhat unhelpfully, that post-recording contributions involving "'equalization', 'reverberation,' 'reprocessing,' and 're-engineering'" may be enough to give rise to a derivative work, or not – depending on whether the changes are merely "mechanical in nature" or "too minimal". Importantly, a derivative work represents a separate copyrightable

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work, distinct from the original on which it is based.

You can probably see where this is going.

All recordings made prior to February 15, 1972 were made in analog format, because that's the only technology that was available back then. But nowadays, virtually all recordings used by broadcasters, satellite radio folks and webcasters are digital. So somewhere along the line the original recordings were transformed from analog to digital. If that process involved sufficient changes to make the digital version its own "derivative work", the fact that that separate work became "fixed" as a recording after February 15, 1972 – as would be the case for any digital recording – would mean that it would be subject to federal, not state, copyright law. That in turn would mean that broadcasters would be exempt from any performance royalties, and other performances (by, *e.g.*, satellite distributors and webcasters) would be subject to statutorily-set royalties.

So CBS argued that the versions of the recordings which it broadcast were sufficiently different from the original versions of those recordings to constitute derivative works. To prove that, they brought in their experts to compare the two different versions – to the extent that the two different versions could be reliably identified. (As it turns out, there are lots of different versions of oldies available, and figuring out precisely which is the original and which happened to have been aired in the relatively recent past can be tricky.)

CBS's experts – sound engineers and producers, including some who had remastered some of the recordings at issue – emphasized that the remastering process involves the "personal aesthetic" of the sound engineer performing the process. In their view, it's not a mere "drag and drop" process to convert a sound recording from analog to digital format: adjustments to various characteristics such as the bass, treble, midrange and other frequencies can and possibly must be made to, *e.g.*, emphasize certain instruments and deemphasize others. One expert said that the remastering process involves "subjectivity, originality and ultimately produces works of art".

The plaintiffs, of course, countered with their own experts, who characterized the remastering process as a purely mechanical practice without any creativity involved at all – essentially the 21st Century equivalent of dubbing a cut from an album onto a cassette so you could listen to it on your Walkman. (We hope that our younger readers will appreciate the links we have provided to pictures of each of these, in case you are unfamiliar with these prehistoric music delivery media and products.)

In Judge Anderson's view, CBS got the better of the argument. He was satisfied that remastering can leave a work technically unedited even though it subjectively and artistically alters the work's timbre, spatial imagery, sound balance and loudness range; when such alterations occur, the remastered work is entitled to federal copyright protection separate from the original work. And he concluded that there were "perceptible changes" between the original versions of the songs at issue and the versions aired by CBS, although on that point he seems to have taken the experts' word. It does not appear that Anderson in fact personally listened to any of the recordings to see just how "perceptible" the changes might have been to his own ear.

*As radical as this decision is, it does **not** get broadcasters and digital performers completely off the hook.*

And with that, Judge Anderson dismissed the plaintiffs' complaint.

As radical as this decision is, it's important to recognize that it does ***not*** get broadcasters and digital performers (*e.g.*, webcasters) completely off the hook for potential performance royalties for the transmission of pre-2/15/72 recordings. Whether such liability exists in the first place is the $640,000,000 question for the broadcast industry in some sense. As I've discussed time and time again, even though broadcasters do not have to pay a royalty for per formance of sound recordings under federal law, a finding that there is a state-law-based performance right in pre-1972 sound recordings could require payment of royalties for performance of those older sound recordings in certain states – royalties that could run into the hundreds of millions of dollars. And as I've reported in earlier posts, at least a couple of courts have concluded that such a state-law-based performance right does indeed exist. Judge Anderson seems to have tacitly accepted the premise of those earlier decisions.

But his decision does afford broadcasters and others a very useful workaround to avoid liability – or even a defense against any such claims in the event they are sued. Under Judge Anderson's view, if performance rights royalties for pre-2/15/72 recordings are claimed by artists or labels, the targeted defendant (be it a broadcaster, webcaster, etc.) can counter by arguing that any recordings that happen to been transmitted were remastered versions perceptibly different from the original pre-2/15/72 recordings. If CBS's experts are correct, it appears likely that pretty much ***any*** remastered recording can be shown to differ in enough respects to be deemed a derivative work. And,

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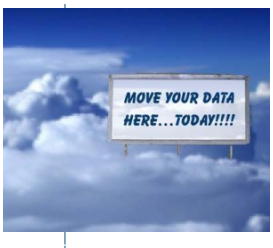


*There's room to negotiate – and plenty of reasons to do so*

# Moving to the Cloud? Some Tips on Negotiating the Deal

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Have you been thinking about moving some, maybe all, of your services or data to the Cloud? The push to get you to do just that is on, spurred by Amazon, Google and various other providers whose advertising is designed to convince us all that Cloud-based operations are an essential element of any sane 21st Century business.

They may be right – but what they often don't tell you is that their Cloud Customers (*i.e.*, possibly, you) can put themselves at substantial legal and business risk by signing on to the boilerplate, provider-friendly service agreement drafted by, and for the benefit of, the provider. Such agreements invariably include vendor-favoring provisions that can and should be modified through negotiation.

This is a matter of particular concern for broadcasters, telecommunications companies and other businesses operating in a regulated environment. Provider-friendly service provisions can, and often do, hinder – and possibly prevent – the Cloud Customer from complying with regulatory and other legal requirements to which they are subject. At a minimum, prospective Cloud Customers should conduct an initial review of all Cloud-related contract documents to identify and mitigate, to the extent practicable, such potential problems.

The following is intended to provide a cautionary glimpse of key issues and pitfalls businesses face when negotiating contracts for Cloud services.

***Defining your particular cloud***

The notion of "Cloud services" is not monolithic. To the contrary, a wide assortment of separate and distinct Cloud services are available: they may be individually-provided or individually-hosted and may entail the processing and/or storage and/or transport of data. Cloud providers generally rely on shared platforms and resource pooling, and offer measured service and various pricing models. These lead to the essential characteristics of Cloud services: on-demand availability and scalability through broad network access across multiple user devices.

Typical Cloud offerings include: Software as a Service (SaaS); Platform as a Service (PaaS); and Infrastructure as a Service (IaaS). These may be deployed as a public Cloud, community Cloud, private Cloud, or hybrid Cloud. For purposes of our discussion here, we will focus on "public Cloud" service, *i.e.*, arrangements through which a private organization sells generic Cloud services to a Customer and the general public. This differs from on-premises computing, data center, and so-called "private Cloud" offerings, where Cloud infrastructure is managed solely for the Customer by a third party on the Customer's behalf.

***Don't let yourself be pushed into signing***

Cloud providers often present prospective Cloud Customers with a "form contract" whose terms, according to the provider, cannot (with very limited exceptions) be modified. In law school, this is known as a "contract of adhesion"; you may think of it as a "Take it or leave it"/ "My way or the highway" type of offer. Don't be browbeaten into accepting a deal that includes terms you cannot and should not live with. Raise objections, offer alternative language, and stick to your guns. A Cloud provider's sales representative may try to ignore your requests for changes, or may simply delay any response *ad infinitum* in order to put time pressure on you to sign the provider's preferred contract. Stand fast!

*Do NOT accept terms that can be changed unilaterally by the vendor .*

As a practical matter, it is not unusual for a vendor to have a fallback provision for the most draconian or Customer-unfavorable terms. So even if your bargaining power may be relatively small, there is no reason not to push for better terms than the initial boilerplate offer entails.

And another tip for your general review of the initial terms offered by the Cloud provider: Do NOT accept terms that can be changed unilaterally by the vendor (by, *e.g.*, simply posting the revised terms on its web site and incorporating them by reference into the executed contract long after the contract has been signed). Such terms normally enable the provider to change the deal in important ways without any prior consent by you.

***Don't forget your obligations under privacy and other data regulations***

Many Customers, particularly regulated entities, are subject to data security obligations that are not delegable/assignable to the Cloud computing services provider (or anyone else, for that matter). As a prospective Cloud Customer, you must understand both the obligations to which you are subject ***and*** the unique data security risks inherent in the public Cloud environment.

Data security obligations arise from a range of sources,

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including particularly industry-specific federal regulations and state laws. These requirements relate to the security of the information and data of the regulated entity regardless of where the information and data are stored. So if the regulated entity opts for a Cloud environment for such storage, that entity remains subject to the security requirements. Such requirements can arise from, for example, HIPAA (Healthcare), GLBA (Consumer Financial Services), FTC Section 5 (Consumer Protection), FCC privacy rules and/or state laws addressing security and notification concerns, particularly when breaches occur that involve social security numbers, credit card information, bank account information, and other financial and related information. Laws related to personally identifiable information ("PII") likewise apply both generally and specifically to each of these areas/industries.

And let's face it: Data and information maintained in the Cloud are under constant threat. How? Consider the following factors:

- The "multitenant" nature of a shared computer server environment. Your data could be sharing a hardware and software universe with many other businesses. That increases risks of infection of your data through malware and viruses from other user applications.

*Data and information maintained in the Cloud are under constant threat.*

- The limited knowledge of a Customer with regard to actual location of the server or "server farms" that store its data. If you don't know where or how your data are being stored, you will have a hard time demonstrating that you have taken effective steps to ensure the data's security.

- The Cloud Customer's limited control over actions that can mitigate improper disclosures and/or damages in the event of breach or data compromise. Again, if you are not in a position to control at all the disclosure of your data, you will not be in a position to take effective steps in the event that an improper disclosure occurs.

- The fact that Cloud service providers are "ideal targets" for hackers due to the volume of information located in a single "virtual environment". In the 1920s and '30s, renowned criminal Willie Sutton reportedly remarked that he robbed banks because "that's where the money is". In the current day and age, data may be more valuable than money in the hands of some malefactors, so those malefactors can be expected to aim for targets of maximum opportunity, which obviously include server farms maintained by Cloud providers.

As you consider these factors, you should also be prepared to get straight with your prospective Cloud provider about related considerations, like:

- Who owns what in the system/service/data resident in the Cloud? In other words, what are your intellectual property and data control rights? It is important that you ***NOT*** surrender any rights you will need to fulfill your legal and regulatory responsibilities and operate your business.

- How, when and for what purposes do you have access to your data? You may be faced with judicial or regulatory requests for e-discovery and the like – in which case you will need to be able to get to your data. Similarly, if you eventually opt to move your operations to a different provider, you will want to be able to move your data at your convenience, not your soon-to-be-former provider's.

All of this means that Customers should be sure that any Cloud computing solutions they embrace will be compatible with the privacy and data security laws applicable to the industry in which they operate. And that, in turn, means that the Customer must, as a starting point, analyze (a) the specific type and nature of the PII and other potentially sensitive data it stores and (b) any regulatory requirements to which that storage is subject. Such analysis is essential ***before*** a Cloud computing contract can be entered into confidently.

***Quality of service, liability and other considerations***

A Cloud services arrangement normally stretches over an extended period of time. As we all know, things change – especially when it comes to digital technology. That being the case, it's prudent to be clear how change is to be addressed over the course of the arrangement. For example, what happens if the vendor's technology changes during your long term contract? Will you have to conform at your potentially substantial own expense? Are you locked in, or can you terminate your contract or require your vendor to continue to support your original system?

What about if the service quality deteriorates? What are your remedies? In this connection, it's safe to say that detailed and enforceable Service Level Agreements (SLAs) are a must in any Cloud computing agreement.

Another consideration to bear in mind: what is your potential exposure if your data get hacked or subjected to inappropriate use. What are your third party indem-

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nification requirements? What is the governing law for any breach? Most vendor-drafted Cloud contracts impose substantial liabilities on Customers for both their own and third party breaches. Cloud providers also typically require disputes to be heard in a forum friendly to the vendor – either through arbitration or in the courts of the vendor's home jurisdiction.

To the maximum extent possible, one-sided terms in these (and other) regards that heavily favor the Cloud provider and equally heavily ***dis***favor the Cloud Customer should be mitigated. Similarly, you should be clear on what remedies will be available to you if hacking, inappropriate use or other problems arise because of the provider's fault. Not surprisingly, most Cloud vendors insert broad exculpatory clauses in their favor to limit their own liability while, again, requiring that disputes be heard in a forum that is inconvenient to the Customer. Asymmetric (*i.e.*, hopelessly lop-sided) obligations in such clauses need to be negotiated, the goal being balanced reciprocal provisions.

***When you're ready to move to the Cloud ...***

Once you have done all your homework and have a solid sense of what you will need in a Cloud service agreement, let the negotiations begin! From our experience, such agreements can, through negotiation, be modified to include the following:

- Objective and enforceable – ***not*** merely aspirational – SLAs that clearly reflect the level of service quality to which the Cloud Customer will be contractually entitled.
- Data security requirements that are specifically defined and implemented in accordance with applicable industry regulations and legal requirements.
- Prohibitions preventing the provider from re-using and/or disclosing Customer data to third parties.
- Breach notification rules that go beyond what is required by applicable laws and regulations to allow lead time for the Customer to notify data subjects and regulatory authorities, and to formulate an action plan following a breach.
- Liability and indemnification provisions to mitigate Customer exposure and maximize remedies. Governing law and venue may also be negotiable depending upon the Customer's bargaining power.
- Audit rights and other mechanisms (including software applications) to monitor the performance of the Provider.

Finally, give yourself plenty of time to get all this done. We recommend that Customers engage with Cloud vendors sufficiently in advance of the Customer's business deadlines to provide the lead time necessary to address the above issues. That, in turn, means that the preparatory work necessary to get up to speed for the negotiation must start even earlier.

If you want more information about, or assistance with, these matters, please contact David Janet or Bob Butler at FHH.

*(Continued from page 5)*

since digital remastering was unavailable prior to 2/15/72, any such remastered recordings would by definition be subject to federal, not state, copyright law. The broadcast of such remastered "derivative works" would be exempt from any performance right royalties (and performance royalties for the digital transmission of such works would be determined not by state law, but by the federal Copyright Act).

So it would be a good idea to check your libraries to confirm that, for any pre-2/15/72 music you're playing, you're using digitally remastered versions.

There is an interesting further implication, involving a perhaps unintended consequence of Judge Anderson's ruling: it could result in endless extension of copyright protections as owners of sound recordings periodically remaster their works, effectively renewing their original date of copyright. In a footnote, he dismisses this concern as "unwarranted because the Court's finding of copyrightable originality is based not on a mere conversion between formats, but on the original expression added by a sound engineer during the remastering process". True enough, but since the experts certainly made it sound like remastering is in and of itself almost invariably a matter of personal aesthetics, presumably it would not be hard for the copyright holder to insure that each and every remastering could be legitimately deemed a distinct – and copyrightable – "derivative work".

At the very least this poses an interesting question – one of several interesting questions – and the reason that I think this case of all of them is the one the Supreme Court might be most interested in taking. Stay tuned.

*(Continued from page 2)*
ation, she requested that the agencies treat her as an educational institution requester.

DOD refused to do so, assessing about $900 in search, review and copying fees for one request and additional fees for another search which turned up documents that DOD then withheld under one of the routine FOIA provisions. Sack sued, arguing both that (a) she is entitled to be classified as an educational institution requester for fee exemption purposes and (b) DOD improperly withheld the documents. The District Court ruled against her on both issues; she appealed. The appellate panel affirmed the lower court relative to whether the documents had been properly withheld, but reversed on the fee question. To my mind, the fee aspect of the case is by far the more significant.

The crux of Ms. Sack's common sense argument is that a request made by a student to further his or her coursework or other school-sponsored activity is effectively a request made by the institution itself, and thus entitled to the fee exemption. The three-judge panel of the D.C. Circuit agreed.

*The crux of the argument: a request made by a student to further her coursework is effectively a request made by the institution itself.*

As Judge Brett Kavanaugh (who authored the opinion) observed, DOD's regulations don't define which individuals within an educational institution are eligible for the "educational institution" exemption. But DOD does follow general guidance from the Office of Management and Budget (OMB) that calls for a demonstration that

> the request [for exemption] is from an institution that is within the category, that the institution has a program of scholarly research, and that the documents sought are in furtherance of the institution's program of scholarly research and not for a commercial use.

OMB's guidelines also direct agencies presented with an exemption request to ensure that it is "apparent from the nature of the request that it serves a scholarly research goal of the institution, rather than an individual goal".

Those OMB guidelines suggest at one point that students as well as faculty may qualify for the educational institution exemption. But then, elsewhere, they indicate that the exemption does ***not*** apply to student requests that are filed solely to further coursework goals because the student is carrying out an individual research goal, not an institutional one. As Judge Kavanaugh noted, this would appear to exclude Ms. Sack's request.

But Kavanaugh decided that that approach is inconsistent with the purpose of FOIA. After all, the folks in an "educational institution" most likely to submit FOIA requests in pursuit of scholarly research are "obviously not the president, provost, or dean", but rather the teachers and students at the school. So while the guidelines indicate that FOIA fees may be reduced under the "educational institutions" exemption can be granted to *teachers* but not *students*, that just doesn't make sense. Students do research and file FOIA requests in pursuit of that research, just like teachers. Further, students (perhaps more than teachers) lack the resources to pay full processing fees:

> It would be a strange reading of this broad and general statutory language – which draws no distinction between teachers and students – to exempt teachers from paying full FOIA fees but to force students with presumably fewer financial means to pay full freight.

Or, to put it another way:

> The Guideline says that a geology teacher seeking information about soil erosion to support her research is entitled to reduced fees. But why not the geology student seeking the same information for the same reason? Crickets. We discern no meaningful distinction for purposes of this statute between the geology teacher and the geology student.

Pretty persuasive, even if I'd have used a biology teacher and student in my example, rather than a geology teacher and student, if I were making the "crickets" joke.

Kavanaugh did draw a line between, on the one hand, a student filing an FOIA request in connection with his or her role at the educational institution and, on the other, a student filing a request for his or her own personal or commercial use. The former would qualify for reduced fees; the latter would not. For that reason, an agency presented with a fee exemption request from a student can request proof that the student is indeed eligible for the exemption. Such proof could include a student ID, letter from a professor, copy of a syllabus, etc. However, he also warned that an agency should not impose so high a burden or require such specific proof that it turns away an otherwise deserving requester.

This decision is a clear win for student requesters. Its benefits may also extend beyond students. Other beneficiaries could include, for instance, scholastic/private sector partnerships making FOIA requests which clearly relate to the scholastic side of that partnership but which could also be useful to the private sector component as well.

Educational institutions – and those who work with such institutions, especially institutions offering communications or journalism programs – should welcome this ruling.

# FHH Participating in IURISGAL, a Global Network of Spanish-Speaking Law Firms

Fletcher Heald & Hildreth is proud to announce that it has become affiliated with the IURISGAL International Network of Law Firms, an independent network – the first and only network – of law firms capable of providing legal services to their clients in the Spanish language. IURISGAL presently includes nearly 40 firms located across four continents. Through its affiliation with IURISGAL, FHH will have access to firms in more than 30 countries worldwide when FHH clients requiring Spanish-language legal assistance need referrals to counsel in any one of those countries.

*IURISGAL attendees at the Supreme Court of Spain*

On June 3-4, FHH co-managing member Francisco Montero travelled to Madrid to attend a series of meetings of IURISGAL participating firms. Attendees met with an association of Spanish entrepreneurs and businesses, attended a meeting of the Consejo General de la Abogacia Española (Spain's Bar Association), and toured the impressive offices of the Tribunal Supremo de España (Spain's Supreme Court). (How impressive? Check out the photo – that's our Frank in the front row.)

FHH represents many Spanish-speaking clients in the U.S., Mexico, Venezuela, Ecuador, Spain and Puerto Rico, among others. We expect that our affiliation with IURISGAL will broaden our ability to offer all our clients assistance in identifying law firms around the globe capable of assisting them in Spanish.

*(Continued from page 1)*

filed. (You'll have until September 26 to make any corrections, should that be necessary.) And remember, the next nationwide EAS test is currently scheduled for September 28.

Now, about that draft EAS Operating Handbook.

The Handbook is an FCC publication designed to provide guidance to the folks on duty about what they're supposed to do when an alert rolls through. The Commission's rules require that each EAS participant have a copy of the Handbook at "normal duty positions" (or wherever a station's EAS gear is located).

The problem, though, is that the Handbook has not kept up with the times. (CSRIC concluded, somewhat harshly, that "[t]he current handbook is obsolete and contains inaccurate instructions". Ouch.) Recognizing this, the FCC delegated to CSRIC the chore of recommending "textual and visual modifications" to make the Handbook "suitable" for all EAS participants, including particularly those that are "rural, smaller and less resourced".

CSRIC has come up with a draft revision of the Handbook that would be customizable for each individual EAS participant. A copy of CSRIC's handiwork may be found at Appendices A and B of its Final Report on the project (at PDF pages 12-46). As envisioned by CSRIC, the Handbook would be available online for download, with various blanks to be filled in by the responsible person at each EAS participant. The idea is that the Handbook would include information to guide ALL types of EAS participants – and that each individual participant would be responsible for customizing its own Handbook to address that participant's particular circumstances.

This is obviously a novel approach, but one that might well serve all EAS participants. The Commission has not yet signed on to it, though. Instead, it's looking for comments from the EAS universe. We encourage one and all to take a close look at what CSRIC has proposed and to let the FCC know your thoughts. As an indication of the speed with which the FCC is moving on this item, the public notice inviting comments on the proposed draft was published in the Federal Register less than a week after it was released by the Commission. As a result, the deadline for comments will be ***July 20, 2016***. Presumably in keeping with the hustle-hustle approach here, no opportunity for reply comments is indicated, so if you've got something to say, say it by July 20 or be prepared to forever hold your peace. You can submit your comments at this FCC website; enter Proceeding Number 15-94.

## FHH - On the Job, On the Go

*Toward the Finnish line* – As June wrapped up, **Kathy Kleiman** was off to Helsinki to participate in ICANN 56, the 56th public meeting of the Internet Corporation for Assigned Names and Numbers. The confab, scheduled to run from June 27-30, was called to address policy formulation. **Kathy** was set to co-lead the sessions of the Rights Protection Mechanisms Working Group – no big surprise there, as she is the Co-chair of that Group. The focus of the sessions: whether ICANN's trademark protections in the Domain Name System are fair and balanced. In addition to her responsibilities as Co-chair, she was also going to be serving as a Mentor in ICANN's new "Mentor-Mentee Program".

*Extra, extra, read all about it!* **Mitchell Lazarus** began his professional life as an electrical engineer ... before taking a wrong turn and ending up in the law. But that hasn't tarnished his cred among the tech audience. Yet again, he has been published in the pages of *IEEE Spectrum*, the leading global magazine for electrical engineers. His by-line has graced those pages at least five times in the past few years. His latest offering, "What 5G Engineers Can Learn from Radio Interference's Troubled Past," explains how regulators (like the FCC) try to prevent radio interference, and how their techniques evolved along with advances in radio technology, and provides a look at possible new approaches for emerging 5G services.

*O! Say can you see* ... **Frank Montero**? Sure, our man **Frank** has made (and will be making) himself routinely visible, making a presentation on FCC-related issues at the New Jersey Broadcasters Association Board Meeting and Annual Conference (June 22-23), attending the Multicultural Media, Telecom and Internet Council (MMTC) Board of Directors meeting on July 13 and moderating a panel at the MMTC Access to Capital conference D.C. on July 13-14. (The panel is titled *The Impact of the FCC's Spectrum Auctions on Minority Ownership*.) But this month he'll be playing in the Big Leagues, literally: on July 19, he'll take the field at Nationals Park in Washington (home of the Washington Nationals, currently riding high atop the NL East) along with the Capital Men's Chorus to sing the national anthem.

*Deep in the heart of Texas* – **Kevin Goldberg** will be speaking at the Association of Alternative Newsmedia Conference in Austin. On July 7 he'll address copyright issues, and the following day he'll be fielding questions on a "Legal Hotline Live".

*Arkansas Traveler* – **Frank Jazzo** will be in Little Rock on July 14-15 to attend the Arkansas Broadcasters Association's Annual Convention. He'll be appearing on the FCC/Legal Update panel on July 15.

*Wilkommen, Bienvenue, Welcome!*


## Karyn Ablin Joins FHH

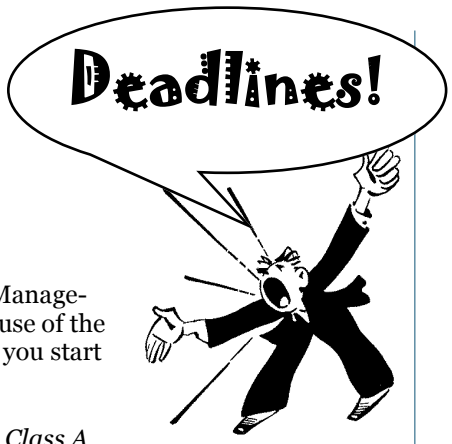
Fletcher, Heald & Hildreth is pleased to announce that Karyn K. Ablin has joined us as a member of the firm. Karyn has more than two decades of practice experience, with a particular focus on intellectual property issues. Where has she practiced? Where ***hasn't*** she practiced? She's spent a lot of time representing broadcasters and others before the Copyright Royalty Judges (as well as a predecessor Copyright Arbitration Royalty Panel); she's appeared before the ASCAP rate court, various other U.S. Courts (yes, including the Supremes) ... for crying out loud, she's even appeared before the London Court of International Arbitration. Just last year, The Legal 500 US touted her as a "recommended lawyer" in Copyright Law – and it then repeated that honor again this year. Enough said. She's also done her share of trademark and patent work and even a fair amount of FDA work.

Karyn received her law degree from the University of Virginia (where she was Executive Editor of the Law Review and graduated Order of the Coif) and two undergraduate degrees, *summa cum laude*, from Oral Roberts University, majoring in math and music. In addition to Charlottesville and Tulsa, her studies have taken her from Flagstaff (Northern Arizona University) to Paris (where she earned enough credits at the Sorbonne for a French major), with pit stops in Halle, Germany (Martin Luther University Halle-Wittenberg) and Maastricht, The Netherlands (International Institutes of Law and Social Change).

Her experience isn't merely global – it extends to the interplanetary: as a mathematician with the U.S. Geological Survey, Karyn led a team that mapped (we're not making this up) Mars.

And there's more. A gifted violinist and violist, as a mere teenager she played with the Flagstaff Symphony – and in her academic peregrinations she also picked up gigs with the Tulsa Philharmonic and the Oklahoma Sinfonia. She also once received a telegram from the President of the United States inviting her on an all-expense paid trip to the White House to receive a medal honoring her selection as a United States Presidential Scholar.

Karyn can be reached at ablin@fhhlaw.com or by phone at 703-812-0443.




**July 11, 2016**

***Children's Television Programming Reports*** – For all *commercial television* and *Class A television* stations, the second quarter 2016 children's television programming reports must be filed electronically with the Commission. These reports then should be automatically included in the online public inspection file, but we would recommend checking, as the FCC bases its initial judgments of filing compliance on the contents and dates shown in the online public file. Please note that, as was the case last quarter, use of the Licensing and Management System for the children's reports is mandatory, and this system requires the use of the licensee FRN to log in; 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. For the first time, *radio stations in the top 50 markets* and in an employment unit *with five or more employees* will have to place these reports in the new online public inspection file, while all other radio stations may continue to place hard copies in the file for the time being. *Television* and *Class A television* stations will continue 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.

***Class A Television Continuing Eligibility Documentation*** – The Commission requires that all Class A Television maintain in their online public inspection files documentation sufficient to demonstrate that the station is continuing to meet the eligibility requirements of broadcasting at least 18 hours per day and broadcasting an average of at least three hours per week of locally produced programming. While the Commission has given no guidance as to what this documentation must include or when it must be added to the public file, we believe that a quarterly certification which states that the station continues to broadcast at least 18 hours per day, that it broadcasts on average at least three hours per week of locally produced programming, and lists the titles of such locally produced programs should be sufficient.

**August 1, 2016**

***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 — and radio stations which are in both (a) a Top 50 market and (b) an employment unit with five or more full-time employees — 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.

***EEO Mid-Term Reports*** – All *radio* stations *with eleven or more full-time employees* in **Illinois** and **Wisconsin** and all *television* stations *with five or more full-time employees* in **North Carolina** and **South Carolina** must electronically file a mid-term EEO report on FCC Form 397, with the last two EEO public file reports attached.

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

***Noncommercial Radio Ownership Reports*** – All *noncommercial radio* stations located in **Illinois** and **Wisconsin** must file a biennial Ownership Report. All reports filed must be filed electronically on FCC Form 323-E.

*(Continued from page 3)*

own) in a Notice of Proposed Rulemaking (NPRM).

Under the FCC's new proposals, national security information would have to be filed along with each covered application, with a secure Internet portal available to receive confidential material. The various other agencies would have 90 days to say yea or nay. If they failed to do either by the 90th day, the FCC would deem there to be no national security issues standing in the way of a grant. If the agencies were to think they needed more time to decide, they would have to speak up by the 90th day, explaining to the FCC why more time is needed. If the FCC were satisfied, and if the agencies commit to providing status reports on their review every 30 days, they would get an additional 90 days. Ideally, the end result would put the FCC in a position to grant many applications without the need for an applicant to negotiate its own individual agreement with the Executive Branch (particularly because the FCC application would require the applicant to commit to various terms that such negotiations would ordinarily entail).

*The proposal would expand the amount of FCC-required information beyond what has historically been collected.*

In its NPRM the FCC asks what new information it should solicit in its applications. It notes that, if "standard" questions are adopted, they will likely vary for different types of applications. In general, applicants would have to provide:

- corporate structure with all 10% or greater voting and equity owners;
- a list of both voting and equity owners;
- any relationship with foreign entities;
- their financial condition; certification of compliance with U.S. laws and regulations; and
- information about their business operations, services, and network infrastructure.

Additionally, the NTIA suggested that proponents should be required to certify that they will:

- comply with applicable provisions of the Communications Assistance for Law Enforcement Act (CALEA);
- make communications to, from, or within the United States, as well as records thereof, available in a form and location that permits them to be subject to lawful request or valid legal process under U.S. law, for services covered under the requested Commission license or authorization;
- agree to designate a point of contact located in the United States who is a U.S. citizen or lawful permanent resident for the execution of lawful requests and/or legal process;
- agree to keep the information in the application up to date; and
- acknowledge that failure to comply with FCC conditions or supplying false information can lead to civil or criminal penalties.

(We omitted a few footnotes.) The Commission is looking for input as to whether all that is a good idea. We might observe that the list of the FCC's contemplated "standard" questions by themselves – leaving aside the answers – occupies three full pages in the NPRM, which says something about what the agency thinks qualifies as "streamlined".

It all sounds pretty good at first blush. But some commenters have already noted that the proposal would expand the amount of FCC-required information beyond what has historically been collected, and that the FCC might not need or make any use of the additional information. For example, many of the law enforcement concerns underlying the proposed mandatory commitment concerning availability of records of communications and the ability to intercept don't apply to the broadcast services. So broadcasters beware – requiring a broadcast proponent to commit to the various certifications proposed by NTIA would be unnecessary overkill.

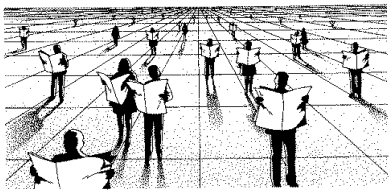
Some commenters have questioned whether the FCC needs detailed information in applications for *pro forma* license assignments and transfers (*i.e.*, applications in which a change in corporate structure but ***not*** in the ultimate human owners, is proposed) or from communications resellers that don't own any of their own facilities. And what about applicants that don't propose more than 25% aggregate foreign ownership – would they get sucked into the new regime? While an effort to streamline governmental red tape and thereby open up an alternate source of capital is obviously desirable, the fine print of the FCC's (and NTIA's) proposal will have to be scrutinized carefully to avoid any unintended consequences.

As the Obama Administration comes to a close – we're now less than five months from the election and seven months from installation of the next administration – we can expect the FCC to put some proceedings on a fast track in an effort to get them done in the remaining time. That's the case here: comments are due only 30 days after the NPRM appears in the *Federal Register* and reply comments only 15 days later. Watch CommLawBlog.com to find out when the comment periods are set.

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

# Updates On The News

***Effective date set for more wireless mic/white space device rules*** – Last August we reported on a number of changes in the rules governing wireless mics and white space devices, and last November we reported that the effective date of some, but not all, of those rule changes had been set. The rules not covered by that latter announcement included §§15.713(b)(2)(iv)-(v), (j)(4), (j)(10), and (j)(11), 15.715(n)-(q), 27.1320 and 95.1111(d). Those exceptions – concerning the operations and administration of white space databases – involve "information collections" that had to run past the Office of Management and Budget before they could kick in. But now the FCC has announced that OMB has given its thumbs up to all but one of those provisions. As a result, §§15.713(b)(2)(iv)-(v), (j)(4), (j)(10), and (j)(11), 15.715(n)-(q) and 27.1320 have taken effect as of ***June 15, 2016***.



That leaves only §95.1111(d) still hanging in OMB limbo. It reads in its entirety as follows:

(d) To receive interference protection, parties operating WMTS networks on channel 37 shall notify one of the white space database administrators of their operating location pursuant to §§15.713(j)(11) and 15.715(p) of this chapter.

WMTS is the Wireless Medical Telemetry Service, which operates at a few milliwatts in TV channel 37 – a channel not used for TV, but by radio astronomers to measure the expansion of the Universe. It's not clear what is holding up OMB approval. We'll keep our eyes out for any further announcements on that front.

***Comment deadlines set in Online Public Inspection File rulemaking*** – Last month we reported on an FCC proposal to ditch two vestiges of the old local public inspection file requirements. On the way out the door: first, the rule requiring broadcasters to make available for public inspection correspondence from audience members concerning station operation; and second, the obligation for cable operators to include in their public files a listing disclosing the location and designation of the system's principal headend. The FCC's Notice of Proposed Rulemaking has now made it into the Federal Register, which means we now know the deadlines for comments and reply comments relative to the proposals. Comments may be filed by ***July 22, 2016***, and replies by ***August 22***. Comments and replies can be submitted at this FCC website; enter Proceeding Number 16-161.

***LPTV/TV Translator channel-sharing rules now in effect*** – Slowly but surely the post-repack regulatory landscape for LPTVs and TV translators is getting established. Back in December, the Commission adopted a number of provisions addressing the predicaments likely to be faced by the LPTV/translator industries once the Broadcast Incentive Auction – and the consequent channel repack – and over and done with. As part of that regulatory package the Commission provided for channel sharing by LPTVs and translators. However, while the rest of the new rules took effect in March, Section 74.800 – the section governing channel sharing – did not, thanks to the hilariously-named Paperwork Reduction Act. Section 74.800, as it turns out, includes "information collection" requirements that had to be run past the Office of Management and Budget for its approval. We're pleased to report that, according to a notice published in the Federal Register, OMB has given the new rule the big thumbs up. As a result, Section 74.800 has become effective as of ***June 22, 2016***.