September 2018

Antenna™

An update on broadcasting law & issues from Donald E. Martin

Regulatory Fees Due September 25

In a *Report and Order* in Docket 18-175 (FCC 18-126), the FCC has adopted a schedule of regulatory fees for the fiscal year ending September 30, 2018. This year, Congress mandated the collection of about $322 million, which is approximately 12 percent less than was required for fiscal year 2017. This reduction is reflected in lower fees for broadcasters this year. The Commission adopted the same figures that were proposed for broadcast regulatory fees in the *Notice of Proposed Rulemaking* in this proceeding earlier this year. The chart at the end of this article lists the FY 2018 fees for most types of authorizations of interest to broadcasters. The FY 2017 fees are also shown for the sake of comparison.

The deadline for paying regulatory fees is 11:59 p.m. EDT on September 25, 2018. Filing and payment instructions are posted on the FCC's website at https://www.fcc.gov/licensing-databases/fees/regulatory-fees. Fees not timely paid will incur a 25 percent late charge, interest, and administrative processing fees. (Recent legislation prohibits the Commission from assessing its administrative costs of collecting delinquent debt. The agency is amending its rules to comply with this statute effective October 1, 2018). It is the Commission's policy to not process applications filed by parties who owe

continued on page 6

Nationwide EAS Test Postponed Until October 3

The Federal Emergency Management Agency ("FEMA") has announced that the nationwide test of the Emergency Alert System ("EAS") that had been scheduled for September 20, 2018, has been rescheduled for the backup date – October 3, 2018. This postponement has become necessary because of the continuing need to focus on the response to the emergency conditions resulting from Hurricane Florence.

The clock time schedule will remain unchanged. FEMA will initiate the transmission of a test message over the Wireless Emergency Alert System to wireless devices at 2:18 p.m. Eastern Time. The live test of the EAS will follow directly after that at 2:20 p.m., EDT, on October 3.

The new filing deadline for the Form Three report is November 19.

On Appeal, Remix of a Pre-1972 Sound Recording Is Not a New Work

State Copyright Law Controls

The U.S. Court of Appeals for the Ninth Circuit has ruled that a simple remastering of a pre-1972 musical sound recording does not create a derivative work entitled to new federal copyright protection after 1972. This decision reverses a summary judgment ruling rendered in the U.S. District Court in Los Angeles in which remastered recordings were found to be legitimate derivative works. The plaintiffs in this case were holders of copyrights in popular music recordings produced before February 15, 1972. They accused CBS Radio, Inc. of infringing their California state copyrights by broadcasting on its radio stations located in that state (which CBS has recently sold) more than 100 sound recordings of popular music produced prior to 1972.

The plaintiffs included (1) ABS Entertainment, Inc., owner of sound recordings made by Al Green, Willie Mitchell,

continued on page 7

IN THIS ISSUE

AM Nighttime Split Rejected 2
Website Solicitations Violate Ex Parte Rules 2
Station Fined $6K for Botched Transition from CP to License 3
Foreign Media Disclosure 3
Deadlines to Watch 4-5

For more information about or help with any of the items reported in ***Antenna™*** please contact:

Donald E. Martin, P.C.

P.O. Box 8433
Falls Church, Virginia 22041

Tel: (703) 642-2344
Fax: (703) 642-2357
E-mail: dempc@prodigy.net

AM Nighttime Split Rejected

The FCC's Media Bureau has issued a *Letter Decision* (DA 18-881) dismissing an application to relocate the secondary nighttime service of a Class D AM radio station to a site distant from the antenna site for the station's daytime service and from the station's community of license. The Bureau said such a move would violate the Commission's rules, would be without precedent and would be contrary to the public interest.

KTAE, Elgin, Texas, is a Class D AM station with 1,000 watts of daytime effective radiated power and 144 watts nighttime. Both signals originate from the station's transmitter site approximately 18 miles (29 kilometers) from Elgin, the community of license. Under the Commission's rules, KTAE's nighttime service is secondary, i.e., it is not protected from interference from other AM stations. Its nighttime interference-free ("NIF") contour does not currently cover any part of the community of license.

In 2014, the station's licensee applied for a construction permit to relocate the nighttime transmitter site to a location in the city of Austin, well outside of the station's 5 mV/m daytime principal community contour. The proposed new nighttime site would be approximately 48 kilometers from the daytime transmitter site, and more than five kilometers farther away from the community of license than the existing nighttime site. Approximately 40 percent of the proposed new NIF coverage area lies outside of the station's 2 mV/m daytime contour. The applicant asserted that this proposal would "maximize the service to Elgin and the surrounding market area," and "will provide an improved service to the community of Elgin and its market area." The Bureau observed that this was the first time it had ever received an application proposing to split the daytime and nighttime AM services from each other.

The back story to this case includes the fact that in 2009, the licensee of KTAE had applied to move Elgin's only radio station, co-owned KLVR(FM), to Sunset Valley. The Commission's policies prohibit the removal from a community of its sole radio service. To avoid violating this requirement so that KLVR could be moved, the licensee also proposed changing the community of license for KTAE from Taylor, Texas, to Elgin, without any modification of KTAE's facilities. Both of these applications were granted, resulting in KTAE becoming Elgin's only radio service.

An applicant bears the burden of demonstrating that its proposal would serve the public interest, convenience and necessity. The Bureau said the applicant in this case failed to offer any rationale for its belief that it was free to relocate KTAE's nighttime service wherever it deemed appropriate. While an AM station is not required to cover any portion of its community of license with its NIF signal, it does retain what the Bureau called a "bedrock obligation" to provide the community of license with a program service addressing the community's needs and interests. A proposal to move the nighttime service farther away from the community provides no indication of a plan to meet that obligation and "implies the opposite." The Bureau said it could envision no public interest benefit to be derived from separating a station's daytime and nighttime services in the manner proposed in this case.

Furthermore, to allow the KTAE nighttime service to move farther away from Elgin would run counter to the Commission's expectations when KTAE was named to replace KLVR as Elgin's only radio service. Relocation of KTAE's nighttime service to Austin would merely have the effect of adding a de facto nighttime service to the Austin urbanized area while leaving Elgin with none. The Bureau ruled that the applicant had failed to demonstrate that the proposal would result in a preferred arrangement of allotments.

The Bureau concluded that granting this proposal would result in the continuation of the abandonment of full-time local radio transmission service for the residents of Elgin, and it dismissed the application.

Website Solicitations Violate Ex Parte Rules

The FCC's Associate General Counsel ("AGC") has issued a *Memorandum Opinion and Order* (DA 18-924) ruling that announcements on a broadcaster's website soliciting the public to contact FCC personnel about a contested matter violated the Commission's rules against ex parte contacts. An ex parte contact is a communication of any type from or on behalf of a party in a restricted FCC proceeding about the merits of the proceeding directed to one or more decision-makers at the Commission without the opposing party or parties being present, if oral, or without serving a copy of the presentation upon the opposing party or parties, if written. In a restricted proceeding, the rules prohibit a party from making an ex parte contact and from soliciting others to make such contacts on the party's behalf. The underlying purpose of these rules is to ensure fairness and transparency in the Commission's decision-making processes.

This order resulted when the licensee of WWGA(FM), Tallapoosa, Georgia, filed a Petition for Order to Show Cause alleging that Cumulus Licensing, LLC, was improperly soliciting via its website members of the public to contact FCC Commissioners and their legal advisors concerning an interference dispute involving WWGA and a Cumulus translator, W255CJ, Atlanta.

The Commission's Media Bureau had previously ordered W255CJ to cease broadcasting because of complaints that the translator was interfering with WWGA. Cumulus posted a notice on its website informing listeners of the

continued on page 8

Station Fined $6K for Botched Transition from CP to License

The FCC's Media Bureau has proposed to fine low power FM station KBUU-LP, Malibu, California, $6,000 for operating a hybrid facility with a combination of parameters – some of those authorized in the station's license, and some authorized in a minor change construction permit. This situation persisted for nearly a month in late 2017. The Bureau described the incident and explained the reason for the proposed forfeiture in a *Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture* (DA 18-879).

KBUU-LP applied to change its channel from Channel 248 to Channel 256 in an effort to mitigate received interference. Ordinarily, a minor change application involving a change of frequencies is limited to a move to an adjacent channel. However, LPFM stations can move to any vacant channel as a minor change if doing so will result in a reduction in interference. In the application, KBUU-LP provided evidence to show that it was receiving interference on Channel 248 from full power stations in an area with a population of 9,946. On Channel 256, KBUU-LP said it would receive interference from a different full power station potentially affecting only 3,648 people. The Media Bureau eventually accepted and granted this proposal, issuing the station a construction permit to move to Channel 256, and to increase its maximum effective radiated power from 55 watts to 71 watts, at the same transmitter site.

Despite the grant of KBUU-LP's application, significant new facts came to light when a Petition for Reconsideration was filed by Future Roots, Inc., the permittee of another LPFM station in nearby Los Angeles. Future Roots alleged that KBUU-LP, on Channel 256, would be short-spaced to its station on the same frequency. Future Roots based this argument on a demonstration of contour overlap using the Longley-Rice method of analysis. The Bureau rejected this evidence, confirming that the sole source of interference protection for LPFM stations is distance separation. The two co-channel LPFM stations meet the minimum distance separation criterion of 24 kilometers specified in the rules.

However, Future Roots also alleged that KBUU-LP was operating with more power than authorized. In the resulting pleadings, KBUU-LP admitted that its operation had not been completely within the bounds of its authorizations. On November 14, 2017, it moved from Channel 248 to Channel 256 and increased its power from 55 watts to 71 watts. Both of these modifications were authorized in the construction permit. KBUU-LP explained that it intended to take the final step of reorienting its antenna the next day and then to file a license application. However, due to a series of medical and weather issues, which KBUU-LP said were beyond its control, the final step of the process – reorienting the antenna – was not accomplished until December 11. The license application was filed on December 13. During the period from November 14 until December 11, the station operated on the frequency and with the power authorized in the construction permit, but with the antenna orientation authorized in the incumbent license.

The Bureau explained that a broadcast construction permit authorizes a permittee to build, but not to operate, the facilities specified in the permit. Upon completion of construction, the permittee must file an application for a license to cover the permit. In most cases, a permittee can begin to operate new facilities with automatic program test authority upon notification to the Commission that it has completed construction, provided that it files a license application within 10 days. Without promptly filing the license application, KBUU-LP was not authorized to broadcast on the new frequency even though it had a construction permit.

The Bureau proposed to fine KBUU-LP $3,000 for using an unauthorized frequency; and $3,000 for exceeding its authorized power limit (resulting from increasing the power before the antenna was reoriented). KBUU-LP has 30 days in which to request reconsideration and/or seek a reduction or cancellation of the forfeiture.

Foreign Media Disclosure Statements Due October 12

The John S. McCain National Defense Authorization Act for Fiscal Year 2019 ("NDAA"), enacted on August 13, 2018, amended the Communications Act to add a requirement for United States-based foreign media outlets to submit semi-annual reports to the FCC. These reports are to include the name of the outlet and a description of the relationship of the outlet to its foreign principal, including a description of the legal structure of the relationship and any funding that the outlet receives from the foreign principal. The Commission's Media Bureau has released a Public Notice with instructions for preparing and submitting these reports (DA 18-911). Filings should be submitted as email attachments and sent to ndaareport@fcc.gov. The filing deadline is 60 days after enactment of the statute, i.e., October 12.

For the purposes of this statute, the term, "foreign media outlet," is defined as an entity that produces or distributes video programming that is transmitted, or intended for transmission, by a multichannel video programming distributor to consumers in the United States, and that would be considered an agent of a foreign principal for purposes of the Foreign Agents Registration Act.

The NDAA relies on the definitions of the terms, "foreign principal," and "agent of a foreign principal," found in the Foreign Agents Registration Act. "Foreign principal" means the government of a foreign country or a foreign political party.

continued on page 8

DEADLINES TO WATCH

License Renewal, FCC Reports & Public Inspection Files

October 1, 2018 — Deadline to place EEO Public File Report in public inspection file and on station's Internet website for all nonexempt radio and television stations in **Alaska, American Samoa, Florida, Guam, Hawaii, Iowa, Mariana Islands, Missouri, Oregon, Puerto Rico, Virgin Islands** and **Washington**.

October 1, 2018 — Deadline to file EEO Broadcast Mid-term Report for all television stations in employment units with five or more full-time employees in **Alaska, American Samoa, Guam, Hawaii, Mariana Islands, Oregon** and **Washington**.

October 1, 2018 — Deadline for all broadcast licensees and permittees of stations in **Alaska, American Samoa, Florida, Guam, Hawaii, Iowa, Mariana Islands, Missouri, Oregon, Puerto Rico, Virgin Islands** and **Washington** to file annual report on all adverse findings and final actions taken by any court or governmental administrative agency involving misconduct of the licensee, permittee, or any person or entity having an attributable interest in the station(s).

October 10, 2018 — Deadline to place Issues/Programs List for previous quarter in public inspection file for all full service radio and television stations and Class A TV stations.

October 10, 2018 — Deadline to file quarterly Children's Television Programming Reports for all commercial full power and Class A television stations.

October 10, 2018 — Deadline to file quarterly Transition Progress Reports for television stations subject to modifications in the repack.

October 10, 2018 — Deadline for noncommercial stations to file quarterly report re third-party fundraising.

DEADLINE FOR SETTLEMENTS AMONG MUTUALLY EXCLUSIVE FM TRANSLATOR APPLICANTS IN AUCTION 100

SEPTEMBER 20, 2018

LOWEST UNIT CHARGE PERIOD FOR 2018 GENERAL ELECTION

SEPTEMBER 7 – NOVEMBER 6, 2018

Deadlines for Comments in FCC and Other Proceedings

DOCKET	COMMENTS	REPLY COMMENTS
(All proceedings are before the FCC unless otherwise noted.)		
Docket 18-202; NPRM Children's Television Programming Rules	Sep. 24	Oct. 23
Docket 18-227; Public Notice Status of competition in marketplace for audio programming	Sep. 24	Oct. 9
Docket 18-214; NPRM Repack reimbursement for LPTV and FM stations	Sep. 26	Oct. 26
U.S. Copyright Office Docket 2005-6; NPRM Copyright royalty reporting practices of cable systems	Oct. 4	Oct. 25
Docket 15-94: FNPRM Emergency Alert System		Oct. 9
Docket 18-31; Public Notice Review of rules more than 10 years old for possible elimination	Oct. 29	N/A
Docket 18-122; NPRM Flexible use of 3.7-4.2 GHz band	Oct. 29	Nov. 27
Docket 18-272; Public Notice Termination of dormant proceedings	FR+30	FR+45

FR+N means the filing deadline is N days after publication of notice of the proceeding in the Federal Register.

TELEVISION REPACK FOR STATIONS ASSIGNED TO PHASE 1

TESTING PERIOD BEGINS: SEPTEMBER 14, 2018
COMPLETION DEADLINE: NOVEMBER 30, 2018

NATIONWIDE EAS TEST

TEST DATE: OCTOBER 3, 2018

FORM TWO DUE: OCTOBER 3, 2018
FORM THREE DUE: NOVEMBER 19, 2018

DEADLINES TO WATCH

Cut-Off Date for AM and FM Applications to Change Community of License

The FCC has accepted for filing the AM and FM applications identified below proposing to change each station's community of license. These applications may also include proposals to modify technical facilities. The deadline for filing comments about any of the applications in the list below is **September 28, 2018**. Informal objections may be filed anytime prior to grant of the application.

PRESENT COMMUNITY	PROPOSED COMMUNITY	STATION	CHANNEL/ FREQUENCY	
Bagdad, AZ	Cienega Springs, AZ	New	296	101.7
Booneville, AR	Waldron, AR	KQBK	284	104.7
Waldron, AR	Mansfield, AR	KHGG-FM	278	103.5
Norfolk, CT	Canaan, CT	WSGG	207	89.3
Valparaiso, IN	Hobart, IN	WAKE(AM)	N/A	1500
Boston, MA	Quincy, MA	WMEX(AM)	N/A	1510
Mertzon, TX	Christoval, TX	KOTY	240	95.9

Cut-Off Date for FM Booster Application

The FCC has accepted for filing the application for a new FM booster station as described below. The deadline for filing petitions to deny this application is indicated. Informal objections may be filed any time prior to grant of the application.

COMMUNITY	PARENT STATION	CHANNEL	MHZ	FILING DEADLINE
Aspen, CO	KCJX	05	88.9	Oct. 1

FOREIGN MEDIA DISCLOSURE STATEMENTS DUE

OCTOBER 12, 2018

Paperwork Reduction Act Proceedings

The FCC is required under the Paperwork Reduction Act to periodically collect public information on the paperwork burdens imposed by its record-keeping requirements in connection with certain rules, policies, applications and forms. Public comment has been invited about this aspect of the following matters by the filing deadlines indicated.

TOPIC	COMMENT DEADLINE
Consumer complaint portal	Sep. 20
Application for FM translator and booster station, Form 349	Sep. 21
EEO rules, Section 73.2080	Oct. 1
Equipment test, Section 73.1610	Oct. 22

Global Music Rights Offers To Extend Licenses to March 31

Global Music Rights, LLC ("GMR"), the new entity seeking to enter the music licensing business, has offered to extend its interim license agreements with radio broadcasters for an additional six-month period, until March 31, 2019. This extension will feature the same fees and terms as the existing interim agreements that are set to expire on September 30. GMR says that stations accepting this extension will be able to broadcast the works in GMR's repertoire without risking a copyright infringement lawsuit.

GMR is engaged in slow-moving litigation with the Radio Music License Committee, representing radio broadcasters, in two U.S. District Courts — in Philadelphia and Los Angeles. The interim licenses are intended to be temporary measures pending some resolution in these lawsuits. GMR alleges in its antitrust lawsuit in Los Angeles that the current music licensing regime is an illegal monopoly that artificially depresses music license prices.

Regulatory Fees Due September 25 *continued from page 1*

delinquent regulatory fees. Prolonged delinquency can result in revocation of licenses and permits.

Regulatory fees are imposed with respect to the status of the authorization as of October 1, 2017. If an authorization has changed hands since that date, the Commission will look for payment from the current owner as of the due date. Former television licensees who have relinquished their spectrum after October 1, 2017, in connection with the incentive auction are reminded that they nonetheless owe a regulatory fee for the former authorization.

Entities whose regulatory fees for all authorizations combined total $1,000 or less for the fiscal year are exempt and need not pay what is considered to be a de minimis amount.

Nonprofit and government entities are exempt from paying regulatory fees, including for commercial stations they may own.

In the *Notice of Proposed Rulemaking*, the Commission proposed to change the methodology for calculating regulatory fees for full power television stations. Currently, stations are assessed a fee according to the size of the Nielsen Designated Market Area ("DMA") in which they are located. The Commission proposed that fees be assessed on the basis of the size of the population that a station serves rather than the size of its DMA. The agency has now adopted a transition plan for making this change. Television fees for FY 2019 will be based on an average of the current DMA methodology and the population covered within the station's contour. In FY 2020 and thereafter, television fees will be based entirely on the population within the station's noise-limited service contour. Population data for each station will be extracted annually from the TVStudy database. The fee will be calculated by multiplying the population figure by a specific monetary factor to be determined each year in the rulemaking process. Television fees for FY 2018 have been calculated using the old system, arriving at the figures shown in the chart below.

FCC REGULATORY FEES FOR FISCAL YEAR 2018

TYPE OF AUTHORIZATION	PROPOSED & ACTUAL FY2018	ACTUAL FY2017
Full Power Television		
Markets 1-10	$ 49,750	$ 59,750
Markets 11-25	37,450	45,025
Markets 26-50	25,025	30,050
Markets 51-100	12,475	14,975
Remaining Markets	4,100	4,925
Construction Permit	4,100	4,925
Satellite Television Station (all markets)	1,500	1,725
Low Power TV, TV/FM Translators and Boosters	380	430
AM Radio Construction Permit	550	555
FM Radio Construction Permit	965	980
Satellite Earth Station	325	360

PROPOSED AND ACTUAL FY 2018 REGULATORY FEES FOR RADIO

POPULATION SERVED	AM CLASS A	AM CLASS B	AM CLASS C	AM CLASS D	FM A, B1, C3	FM B,C,C0,C1,C2
0-25,000	$ 880	$ 635	$ 550	$ 605	$ 965	$ 1,100
25,001-75,000	1,325	950	825	910	1,450	1,650
75,001-150,000	1,975	1,425	1,250	1,350	2,175	2,475
150,001-500,000	2,975	2,150	1,850	2,050	3,250	3,725
500,001-1,200,000	4,450	3,225	2,775	3,050	4,875	5,575
1,200,001-3,000,000	6,700	4,825	4,175	4,600	7,325	8,350
3,000,001-6,000,000	10,025	7,225	6,275	6,900	11,000	12,525
6,000,000+	15,050	10,850	9,400	10,325	16,500	18,800

ACTUAL FY 2017 REGULATORY FEES FOR RADIO

POPULATION SERVED	AM CLASS A	AM CLASS B	AM CLASS C	AM CLASS D	FM A, B1, C3	FM B,C,C0,C1,C2
0-25,000	$ 895	$ 640	$ 555	$ 610	$ 980	$ 1,100
25,001-75,000	1,350	955	830	915	1,475	1,650
75,001-150,000	2,375	1,700	1,475	1,600	2,600	2,925
150,001-500,000	3,550	2,525	2,200	2,425	3,875	4,400
500,001-1,200,000	5,325	3,800	3,300	3,625	5,825	6,575
1,200,001-3,000,000	7,975	5,700	4,950	5,425	8,750	9,875
3,000,001-6,000,000	11,950	8,550	7,400	8,150	13,100	14,800
6,000,000+	17,950	12,825	11,100	12,225	19,650	22,225

On Appeal, Remix of a Pre-1972 Sound Recording Is Not a New Work

continued from page 1

Ace Cannon and Otis Clay; (2) Barnaby Records, owner of sound recordings made by Andy Williams, Johnny Tillotson, The Everly Brothers, Lenny Welch, Ray Stevens and The Chordettes; (3) Brunswick Record Corporation, owner of sound recordings made by Jackie Wilson, The Chi-Lites, The Lost Generation, The Young-Holy Unlimited and Tyrone Davis; and (4) Malaco, Inc., owner of sound recordings made by King Floyd, Mahalia Jackson and The Cellos.

February 15, 1972, was a pivotal date in the history of copyright law in the U.S. music industry. Musical scores and lyrics had long been subject to federal copyright, but not musical sound recordings produced, or "fixed," prior to that date. From that date forward, the producers of sound recordings also enjoyed the benefits of United States federal copyright in their works. Pre-1972 sound recordings remained subject to state copyright law, with substantial variations from state to state.

Recordings made before 1972 were produced in analog. To make use of these works later as technology changed, CBS reproduced them in digital recordings, with the copyright owners' consent, although whether that consent included permission to make derivative works was not clear. The court had to determine whether these post-1972 digital reproductions are merely copies of the originals or whether they are derivative works, entitled to new and separate copyright registration. If they are copies, no new federal copyright would pertain, and they would continue to be subject to California state copyright law. If they are post-1972 derivatives, they would be covered by federal copyright law. Under current federal copyright law, the broadcast of post-1972 sound recordings by terrestrial radio stations is exempt from the obligation to pay license royalties.

The plaintiffs argued in the District Court that the mere conversion of recordings from analog to digital could not render them as new works eligible for new copyrights. Defendant CBS offered statements from technicians and engineers to describe the changes in tone, timbre and volume that were introduced into the recordings that CBS had made. The central issue in the case then was whether the recordings that resulted from that conversion process were sufficiently different from the originals to constitute derivatives, distinguishable from the originals and eligible for their own new copyrights.

The District Court relied heavily on a publication of the U. S. Copyright Office, Circular No. 56, entitled *Copyright Registration for Sound Recordings*, for guidance on resolving the issue at hand. The Circular explains that:

> "A derivative sound recording is one that incorporates some preexisting sounds that were previously registered or published, or sounds that were fixed, before February 15, 1972. The preexisting recorded sounds must have been rearranged, remixed, or otherwise altered in sequence or character, or there must be some additional new sounds. Further, the new or revised sounds must contain at least a minimum amount of original sound recording authorship. This new authorship is the basis for the copyright claim… Examples of derivative sound recordings that generally can be registered include…[a] remix of multitrack sources; [and] a remastering involv[ing] multiple kinds of creative authorship, such as adjustments of equalization, sound editing, and channel assignment."

The appellate court focused on a different passage from Circular No. 56: "Mechanical changes or processes, such as a change in format, declicking, or noise reduction, generally do not contain enough original authorship to warrant registration."

The Court of Appeals cited a 1980 decision from the Second Circuit Court of Appeals, *Dunham Indus. v. Tomy Corp.*, for a two-pronged analysis of what constitutes a derivative work entitled to copyright, known as the *Dunham* test. First, the newly created elements of a derivative work must be more than trivial. Second, the newly created elements of a derivative work must not in any way affect the scope of any copyright in the preexisting material.

As for the first prong of this test, the court referred to several precedential decisions to conclude that a change in format without a change in content does not create a new work. Thus the conversion from analog to digital was not relevant to the copyright question. The court conceded that a recording technician could indeed provide creative elements to a work that might warrant copyright consideration. However, it contrasted the contribution of the production studio technician to that of a technician merely making a reproduction, albeit in a different format. The court concluded that the changes that CBS had imposed on the recordings were only trivial.

Regarding the second *Dunham* criterion, the court found that CBS's productions did indeed affect the plaintiffs' ability to exploit their state copyrights in the original material. CBS's purpose for remastering the recordings in digital was to improve their quality. Absent any other creative considerations, the resulting product would carry an implication of inferiority of the analog versions. If the CBS remastered recordings were eligible for new separate federal copyright protection merely on the basis of improved technical quality, the plaintiffs would suffer a decrease in the scope and value of their rights in the original material.

The plaintiffs had sued CBS for damages for infringement of their state copyrights. The District Court had dismissed the case with a summary judgment that CBS owed no obligation to the plaintiffs because the recordings broadcast by CBS were not subject to the plaintiffs' copyrights. Having reversed that finding, the Court of Appeals remanded the case to the District Court for further proceedings to determine the plaintiffs' damages.

This decision is entitled *ABS Entertainment, Inc., et al. v. CBS Corporation, et al.*, 2018 U.S. App. LEXIS 23097.

Under this decision, radio broadcasters (at least those in states in the Ninth Circuit) may be liable for infringement of state copyrights for the broadcast of sound recordings produced prior to February 15, 1972, even if remastered and converted to digital. The variations among states in this field of law is substantial. Some states have encoded various elements of copyright by statute. In states with no such statutes, plaintiffs

continued on page 8

Website Solicitations Violate Ex Parte Rules *continued from page 2*

Bureau's action. According to WWGA, the notice indicated that Cumulus was disputing the interference finding and that listeners "can help" by emailing the five FCC Commissioners and their legal advisors. Listeners were asked to send copies of their emails to Cumulus so that Cumulus could track how many were sent. WWGA states that it never received copies of any comments resulting from this website posting.

Cumulus offered three defenses to WWGA's allegations. Cumulus said that the notice on its website should not be considered a solicitation because the intention was merely to inform listeners who were already upset about the translator's silence. Cumulus also related that it had intended to provide WWGA with copies of the communications sent to the Commission, but that its counsel had not yet been able to do so. Finally, Cumulus argued that these comments from listeners were exempt from the ex parte prohibition because of an exception in the rule for a listener whose presentation concerns a pending application that has not been designated for hearing for a new or modified broadcast station or license, for license renewal, or for assignment or transfer of control of a station. A license renewal application for the translator was pending, and Cumulus asserted that these listener comments concerned that application.

The AGC agreed with WWGA and rejected Cumulus's explanations. The emails sent to the Commission violated the ex parte rules and were instigated by the notice on the Cumulus website. Those communications did not fall within the listener exemption because they addressed the interference problem – which was a different proceeding, separate and apart from the translator's license renewal application.

WWGA had asked the Commission to punish Cumulus by dismissing the translator license renewal application. The rules do provide that in an especially egregious case, it might be appropriate for a party's "claim or interest in the proceeding" to be dismissed or otherwise adversely affected. The AGC explained that the logic of this rule is that the proceeding in question might be so irretrievably tainted by the violation that dismissal would be warranted. Dismissal was not intended as a sanction to be arbitrarily applied to any other proceeding in which the violator might happen to be involved. Also, the AGC judged that Cumulus's conduct in this matter did not warrant a monetary forfeiture. Accordingly, the AGC admonished Cumulus for violating the ex parte rules and concluded the matter at that.

Foreign Media Disclosure Statements Due October 12

continued from page 3

The term, "agent of a foreign principal" means (1) any person who acts as an agent, representative, employee, or servant, or any person who acts in any other capacity at the order, request, or under the direction or control, of a foreign principal or of a person any of whose activities are directly or indirectly supervised, directed, controlled, financed, or subsidized in whole or in major part by a foreign principal, and who directly or through any other person (a) engages within the United States in political activities for or in the interests of such foreign principal; (b) acts within the United States as a public relations counsel, publicity agent, information-service employee or political consultant for or in the interests of such foreign principal; (c) within the United States solicits, collects, disburses, or dispenses contributions, loans, money, or other things of value for or in the interest of such foreign principal; or (d) within the United States represents the interests of such foreign principal before any agency or official of the United States government; and (2) any person who agrees, consents, assumes or purports to act as, or who is or holds himself out to be, whether or not pursuant to contractual relationship, an agent of a foreign principal.

The law excludes from the term, "agent of a foreign principal," any news or press service or association organized under the laws of the United States, as long as at least 80 percent of the entity is owned by and all of its officers and directors are United States citizens, and such news or press service is not owned, directed, supervised, controlled, subsidized or financed and none of its policies are determined by any foreign principal, or any agent of a foreign principal that would be required to register as a Foreign Agent.

All of these reports will ultimately become publicly available on the FCC's website, and will be summarized in a report to Congress to be submitted by November 11.

On Appeal, Remix of a Pre-1972 Sound Recording Is Not a New Work

continued from page 7

have at times attempted to assert copyright claims under the common law. Notably, Flo & Eddie, Inc. (remnants of the Turtles rock band) has been unsuccessful with the common law argument in New York and Florida.

It is important to remember that the issue in this case involves only *sound recordings*. Musical scores and lyrics were subject to federal copyright law from well before 1972 and continue to be up to the present. Broadcasters are required to obtain licenses for the on-air performances of such works.