

10 RADIO LEGAL/REGULATORY ISSUES FOR THE NEXT 10 YEARS

In the *Radio Ink* 20th-anniversary issue, published November 19, 2012, the article “10 Legal Issues to Watch for in the Next 10 Years” speculated on the challenges our radio industry might face through 2022. Included in the list were music performance fees, ownership regulation, spectrum use, AM radio, indecency, license-renewal expectancies, HD Radio, mobile DTV, interference, and the public interest.

This article, five years later for *Radio Ink*'s 25th anniversary, tries to own up to the failures and misplaced clairvoyance of the previous predictions, and naively attempts to again forecast the next 10 years.

Here are the radio legal/regulatory issues our industry will be facing in the next 10 years.

BY JOHN GARZIGLIA

1. Music rights issues. In 2012, music performance fees were at the top of the list. Again, performance fees remain a significant issue, with the complications now expanded to include songwriter fees. The past five years has seen the inception of GMR, a new songwriter representative, asking to be paid significant amounts in addition to the annual bills presented by ASCAP, BMI, and SESAC.

Meanwhile, BMI and ASCAP are litigating whole-work vs. fractional songwriter licensing, casting doubt on whether their agreements actually permit radio broadcasters to play any of their licensed songs. Recording artists continue to pound Congress to remove the statutory exemption for radio performance fees. Music rights issues, if split up into components, could easily occupy five spots on this list.

Being at the top of this list does not mean, however, that anything will be resolved in the next 10 years. Due to the utter complexity of copyright laws and the adamant prosecution by each interest group of its own grab for money, the status quo could stay in place through 2027. Or we might find blanket licenses and statutory fees abandoned in favor of a one-to-one, song-by-song transactional licensing scheme in which each spin is bargained for in an auction under which the rights for new or obscure music cost almost nothing, and hit music is priced at levels only the largest radio broadcasters can afford. Music rights issues, for their propensity to dramatically affect radio's bottom line and for their complexity, are clearly issue number one.



2. The automobile dashboard and more.

Oh, my, where is the radio? You know, the thing that plays free music with my favorite DJ and weather and traffic information? What? It's now a button marked “Media”?

Oh ... WTF? Our radio industry, while squandering time in the past foolishly worrying about issues such as the Sirius-XM merger, has nearly let go of its most important franchise: its position in the automobile dashboard.

We thought our affair would last forever. It is bad enough that automobiles are being manufactured without AM radio receivers because auto manufacturers do not wish to go to the expense of choking and filtering internally generated electrical noise. The sensitivity and performance of car radios and antennas widely varies. And now, the radio button itself cannot be found on many dashboards. Radio needs to emphasize that quality, available radio receivers are a necessity in times of catastrophe – it only takes one radio station remaining on the air to convey emergency information to millions.

Beyond the automobile dashboard are issues of radio's carriage on devices such as Amazon's Alexa and Google's Home. Part of radio's public service bargain with regulators should be protecting radio's availability and ubiquity in automobiles and homes for times of emergency. Sirius and XM bought their way onto the automobile dashboard. Our radio industry needs to make whatever bargain is necessary to maintain radio's accessibility and availability in both the automobile and home.

3. FM translator interference.

Thousands of new FM translators carrying AM stations are about to hit the airwaves. FM translators are an uncertain and risky venture, however. The FCC's rules now dictate the shutdown of an FM translator if interference to an existing station's regular listeners occurs anywhere, even far outside the existing station's protected contour.

This significant FM translator vulnerability has the potential to cause untold misery. Existing station owners and managers wish for their signals to extend as far as possible, to what is referred to as the "owner's contour," while FM translator owners want to serve their local audiences with an enhanced signal. The nature of FM propagation is that any FM signal on the same or an adjacent channel in any proximity to another FM signal will cause some interference somewhere.

The FCC's challenge is to come up with a workable solution that protects local listeners to FM translators from losing their radio station while likewise protecting local audiences for existing stations by a careful balancing of the equities. Hopefully, the resolution of this issue will not take 10 years.

4. RF noise. Cell phone chargers, computer chips, LED lights, grow lights – all substantially affect both AM and FM radio reception. With AM reception, the effect of the interference is heard as static. With FM reception, however, interference manifests itself as a reduction in the signal strength, with the listener experiencing significantly reduced FM coverage. There are zillions of such devices now in use, including inadequately filtered and choked computer chips in the modern automobile. The interference situation is far beyond the FCC's grasp even if it had the legal and regulatory powers to combat it.

There are only two possible solutions past the "live with it" answer. The first solution is substantially increased power levels for all broadcast services – which, for a number of reasons, including dramatically increased power bills and significant station-to-station interference, is a non-starter. The other solution is some sort of private bounty system, where significant legal penalties are imposed upon malfeasant device manufacturers, sellers, and users. Allowing any kid (or adult) with a spectrum analyzer to bring a private action at the FCC and collect a portion of a fine for illegal RF emissions would quickly get a device manufacturer's attention.

As repugnant as it may sound, entitling bounty hunters to share a portion of significant penalties for RF emissions non-compliance is our only hope for quickly stemming

what is now an unstoppable tide of RF noise pollution. Would you buy a car that is a rolling RF noise source, or a non-compliant cell phone charger, if you could be fined significantly for your RF noise pollution? Would manufacturers and merchants be less prone to sell them if they likewise could be fined?

5. Foreign ownership. An Australian couple received FCC approval to purchase a group of U.S. radio stations, which is a first for allowing for 100 percent foreign ownership. For many years the FCC has been asked to relax foreign ownership restrictions to facilitate institutional financing of station acquisitions. Is it possible that 100 percent foreign ownership will be part of the next wave of radio acquisitions?

Two of our largest broadcasters are so deeply in debt that it is doubtful that there are any U.S. buyers. But a foreign entity that wishes to make its mark in U.S. media might be a potential suitor. With national security concerns, would the FCC, DOJ, and DHS allow for 100 percent foreign ownership of a large group of radio stations?

6. Rule removal. Chairman Pai opened a Pandora's box with his entreaty for proposals on which FCC rules may be eliminated. Hundreds of suggestions were submitted. High school science teaches that every action has an equal and opposite reaction. So it is with FCC rules. Every rule was at one time adopted for a purpose. While there are certainly rules without current constituencies that deserve to be reevaluated, experience demonstrates that many of the more burdensome radio rules still have adamant champions who will squeal if a change in regulation is proposed.

The most oft-cited allegedly outdated FCC rules are EEO record-keeping requirements and the issues-programs lists. Just ask minority and public interest groups if they think that EEO rules are no longer needed. Without issues-programs lists, what will the FCC and the public use to evaluate whether a radio station has fulfilled its public interest obligations at license renewal time – some sort of gestalt calculation? Issues-programs lists serve as concrete evidence at license renewal time of the public interest being served. There are a number of such FCC rules our industry should be careful about before advocating for abandonment.

7. AM All-HD digital operations. HD Radio receivers in automobiles continue to proliferate. Thousands of AM stations have or soon will have FM translators. Yet AM stations continue to broadcast in analog

due to the deficiencies in the hybrid HD Radio scheme. An FM translator carrying an AM station, however, is a bridge toward an all-digital AM HD operation. Without a complementary FM translator, an AM radio station hard-cut to all-digital operations is highly problematic as a substantial portion of its analog audience would be lost. But an AM station carried on an FM translator allows a transition to all-digital HD AM operations while the FM translator continues to serve its analog audience. There is no public interest reason why AM stations should not be allowed to voluntarily go all-digital AM HD. Here's hoping this AM issue is resolved by the FCC in far fewer than ten years.

8. License renewals. Every eight years, radio stations must have their licenses renewed by the FCC using a nebulous public interest standard. The radio license renewal cycle begins afresh in 2019. Assessing whether the public interest is served touches on sensitive First Amendment content evaluations. We have seen our legislators and the public advocate that indecency, fake news, bias, failure of sponsorship ID, and propaganda should result in license renewal denials. These types of content allegations in past license renewal cycles have not merited an FCC license renewal death sentence.

Whether the FCC will continue to hold our First Amendment values sacred, or will capitulate to those who would have it bend to political forces, will be an issue percolating in the next several years through our next round of radio station license renewals.

9. Radio ownership limits. The 1996 Telecom Act unleashed a wave of radio station consolidation that many argue should continue. Others, citing the special nature of our radio industry, note that there are only a limited number of licenses available, along with the high barriers to new entrants, as reasons the FCC should keep radio from becoming fully monopolized by two or three entities.

The argument that radio entities need to be bigger to compete with other media is not lost in this debate. But our industry also needs to query whether just allowing the big to get bigger hurts all other radio broadcasters, and whether further consolidation serves either the public interest or continues radio's exceptionalism. The essential question on radio ownership, and indeed any media ownership limit, is just what is the empirical justification for any particular numerical limitation? It is a difficult if not impossible exercise to quantitatively justify the decades-ago 7-7-7 limits, the later expansion to 12-12-

12, or the now eight-radio/station limitation in major markets. Why not nine? Why not 10? What about six? Try as it might, the FCC will not likely be able to come up with a solid justification for any number. Therefore, no matter what number the FCC chooses, and whether AM-FM sub-caps remain, the agency will continue to face the specter of court disapproval for any ownership limitation scheme chosen. Expect this issue to continue to be litigated for at least the next 10 years.

10. Radio as a separately regulated entity. Finally, as the regulatory wheel of fortune turns, we may be coming to a point where radio is just lumped in with all other radio-frequency regulation. This could result in many of the separate restrictions placed upon, and special protections accorded to, radio broadcasters evaporating. Such a regulation amalgamation could result from radio rule elimination, attempts to standardize all bureaus at the FCC, or a Communications Act re-write. Spectrum interference regulations will undoubtedly remain. But radio as a regulated entity to serve the public interest may have outlived its day.

We may see significant spectrum fees in lieu of public interest obligations. Whether this would be beneficial for our radio industry, or would consign radio to the status of

just another app, is debatable and should be debated. Laws and rules directed at just radio arguably make little sense when the listening public is using computers, smartphones, and home assistants to listen. If radio is deemed just another audio source, is that good or bad for our industry? Stay tuned for the next 10 years.

Closing Comments. Number one on the list five years ago was the radio music performance fee statutory exemption. Given the ascent of GMR, that issue has now morphed into all music rights issues including songwriters fees. FM translator interference was hardly on the horizon five years ago, with broadcaster lobbying zeal being consumed by the now-disproved specter of LPFM interference. Only the most prescient among us saw the automobile dashboard and RF noise being issues five years ago.

Five years ago this article was wrong on the issues of HD Radio, and radio on what was then called Mobile DTV. In what might be viewed as a distressing eulogy, other than feeding FM translators with sub-channel programming and being “radio-with-pictures,” HD Radio creates far more listener reception difficulties than advantages, and fails to compete with what is today known as “digital.” Our industry set out in 1996 to maintain the status quo with its design of HD

Radio. We succeeded – HD Radio is now so 1996. In another erroneous call, Mobile DTV, with hundreds of audio channels, has yet to achieve lift-off (which is for the better).

Lists like this one no doubt pronounced radio dead at the inception of TV, at the advent of the cassette, at the rise of CB radio, at the introduction of the CD, at the beginning of the MP3, at the launch of satellite radio, and at the listener adoption of Pandora. We are now at the doorstep of ubiquitous over-the-air content carriage with 5G digital service.

Please, however, do not read this as a digital funeral notice for radio. Rather, radio as theater of the mind and a reliable daily companion continues to inform, entertain, and alert over 91 percent of the U.S. population on a weekly basis. There is nothing else like it.

There are two groups that love radio: our listeners, and we in the industry. Only we, however, have the foresight, experience, and knowledge of our special industry to keep Congress and the FCC from screwing it up. If this listing of 10 issues contributes to that important discussion, then it is serving its purpose. Here’s looking forward to another 10 great years for radio! ●

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