



# Virginia Association of Broadcasters Legal Review



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## Legal Memorandum

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*In this issue, link to information about*

*Developments:* [Music Streaming Alert: NAB Waiver Agreements Require Station Action](#)  
[More Video Description on the Horizon?](#)  
[Station License Renewal Heads to Hearing for Contest-Gone-Wrong](#)

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### MUSIC STREAMING ALERT – ACTION REQUIRED: NAB Announces Agreements that Waive Certain Limitations on Music Streaming

The National Association of Broadcasters (“NAB”) recently announced that it has concluded negotiations with Sony Music Entertainment and Warner Music Group for agreements that waive certain limitations on music streaming for AM and FM broadcasters. This is an important development for radio stations that stream music programming on the Internet, and one which requires such broadcasters to take certain action, as discussed below.

Stations that stream music on the Internet must, in addition to having ASCAP, BMI, and SESAC licenses, comply with a statutory copyright license that is administered by an organization called SoundExchange. SoundExchange collects statutory license fees from webcasters and distributes a portion of those fees to the owners of sound recordings, which are generally record labels. While there are numerous record labels, the “big three” are Sony Music Entertainment, Warner Music Group, and Universal Music Group, which own or control the majority of sound recordings played by radio stations.

The SoundExchange statutory license contains several requirements and conditions, including the following limitations:

- A restriction on the number of songs that can be streamed from the same artist or album in a row or within any 3-hour period;
- A prohibition on the announcement of when certain songs or artists will be played;
- A requirement that a station identify in textual data on its streaming player certain information about each song at the same time the song is played (e.g., title of the song and the featured artist); and
- A requirement that stations delete server/computer copies of songs, which are used to facilitate the streaming process, within six months of creating each copy.

NAB's new agreements with Sony and Warner generally waive the above-referenced limitations for programming streamed by AM and FM broadcasters where the streamed programming is generally a simulcast of the broadcaster's over-the-air radio programming ("AM/FM Streaming"). The new agreements extend similar waivers that had earlier expired.

*Brief Summary of Terms.* Under both agreements, the waivers provide that an AM/FM Streaming station (a) can stream any number of songs from the same artist or album in a row or within a 3-hour period provided that a station cannot play more than one-half of an album consecutively (other than a classical music album streamed in its entirety); (b) may announce upcoming songs, but generally may not provide a written or visual advance program schedule that specifies that a particular artist or song will be featured at a specified time; (c) is generally not required to provide textual data about each song when the song is streamed if the station only makes incidental uses of music (such as news, talk, and sports formats) or for occasional syndicated programming where such information is not available to the station from the syndicator and for inadvertent failures to comply; and (d) may retain server copies of songs used to facilitate the streaming process for the duration of the applicability of the waivers. Under each agreement, the waivers only apply to programming practices that are typical of over-the-air radio AM and FM radio stations. Both waivers apply to streams that simulcast analog and IBOC digital over-the-air broadcasts (including secondary digital subchannels). However, while the Sony waiver applies to both commercial and noncommercial stations, the Warner waiver only applies to commercial stations.

*More Than 80,000 Monthly Aggregate Tuning Hours?* The Sony waiver has additional requirements applicable to music stations that stream more than 80,000 Aggregate Tuning Hours per month. The term "Aggregate Tuning Hours" means the total hours of programming that the station has streamed over the Internet. By way of example, if a station streamed one hour of programming to 10 simultaneous listeners, the station's Aggregate Tuning Hours would equal 10. Likewise, if one listener listened to a station for 10 hours, the station's Aggregate Tuning Hours would equal 10.

Under the Sony waiver, a music station with more than 80,000 monthly Aggregate Tuning Hours must, by no later than August 1, 2017, provide on its website, player, or mobile application

offering the stream a prominent and proximate “buy now” link or button providing a seamless opportunity for listeners to purchase a download of the corresponding sound recording through an authorized retailer (e.g., iTunes, Amazon, etc.). And if such a station’s stream is available through third-party aggregator websites or mobile applications (e.g., TuneIn), the station must use “geofencing” technology to limit its streaming to the United States. Notably, unlike the Sony waiver, the Warner waiver does not apply to streams transmitted through third-party aggregators.

*Important Notes About Opting In.* Another critical difference between the Sony and Warner waiver agreements is that stations must affirmatively “opt into” the Sony waiver. In contrast, no action is required for the Warner waiver, which automatically applies to commercial AM and FM stations.

Stations can “opt in” to the Sony waiver on NAB’s website at this [link](#). Any AM or FM broadcast may opt into the Sony waiver—you do not have to be a member of NAB. There is no express opt-in deadline. Please note that NAB is obligated to provide to Sony the identity of and contact information for stations that opt into the agreement.

*Duration of Waivers.* The Sony waiver expires December 31, 2020. The Warner waiver expires September 30, 2019.

*Only Sony and Warner Catalogs Covered.* Finally, it is important to understand that the Sony and Warner waivers only apply to songs in each of their respective catalogs (including their respective subsidiary label catalogs). The SoundExchange statutory license limitations continue to apply in full to all other sound recordings. No similar waiver agreements with Universal Music or any independent labels have been announced.

*Consult with Legal Counsel!* If your station streams music on the web, you would be well-advised to consult with your legal counsel to determine the applicability of the waiver agreements to your operations.

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## FCC May Adopt More Video Description Requirements in November

The FCC has released the tentative agenda for its November 17, 2016, meeting, and a Report and Order relating to video description (also sometimes referred to as “audio description”) is on the docket. You may recall the FCC’s adoption in late March 2016 of a [Notice of Proposed Rulemaking](#) (the “Notice”) proposing to expand the availability of video-described programming for viewers who rely on the service. (At the time the Notice was adopted, Commissioners Pai and O’Rielly questioned the FCC’s authority to ultimately adopt some of the rules that were being proposed.)

In a nutshell, the Notice proposed the following changes and additions to the FCC’s existing video description rules:

- An increase in the amount of described programming on each included network carried by a covered broadcast station or MVPD, from 50 hours per calendar quarter to 87.5 hours per calendar quarter;

- An increase in the number of included networks carried by covered distributors, from four broadcast and five non-broadcast networks to five broadcast and ten non-broadcast networks;
- Adoption of a “no-backsliding” rule, which would ensure that once a network is required to provide description, it would be required to continue to provide description even if it falls out of the top-five or top-ten (as applicable) ranking;
- Removal of the threshold requirement that non-broadcast networks reach 50 percent of pay-TV (or MVPD) households in order to be subject to inclusion; and
- A requirement that covered distributors (including television stations) provide dedicated customer service contacts who can answer questions about video description.

In three short weeks we will learn the contours of the FCC’s decisions about these video description matters. Stay tuned!

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## Radio License Renewal Application Designated for Hearing

Nearly ten years ago, in January 2007, a radio station conducted an on-air contest that ultimately led to the death of a contestant and a multi-million dollar jury verdict against the licensee. On October 27, 2016, the full Commission released [an Order designating](#) the station’s 2013 license renewal application for hearing in order to determine whether it should be granted. According to the FCC’s 36-page Order, “the record suggests that [the licensee] formulated, promoted, conducted and aired over the station an inherently dangerous contest in which one listener-contestant died of water intoxication and many others suffered serious physical distress. This information could lead to the conclusion that [the licensee] failed to serve the public interest with the station during the previous license term, warranting denial of the renewal application.”

In evaluating each station’s application for license renewal, the FCC must find that, during its previous license term: (1) the station has served the public interest, convenience, and necessity; (2) there have been no serious violations of the Communications Act or FCC’s rules; and (3) there have been no other violations which, taken together, constitute a pattern of abuse. If the FCC determines that a licensee has failed to meet these standards, it may deny the application—after notice and opportunity for a hearing—or it may grant the application “on terms and conditions that are appropriate, including a renewal for a term less than the maximum otherwise permitted.”

According to the full Commission, the fact that the licensee used its broadcast facilities “to entice its listeners to participate in the contest that appears to have physically endangered them is a serious matter and must be carefully considered. [And a] jury’s verdict that [the licensee] negligently caused the death of a member of the station’s listening audience appears to be *prima facie* evidence that [the licensee’s] conduct was contrary to the public interest duty and a breach of [its] core obligations as a public trustee.” In the Order, the FCC suggests that the station was “indifferent” to the safety of the people who participated in the contest and that the licensee may have “plac[ed] its corporate self-interest over their safety and well-being.”

To be clear, the FCC's Order is merely the beginning of the process, and the FCC may ultimately grant the station's license renewal application. The FCC does not designate license renewal applications for hearing very often; sometimes an entire renewal cycle will go by without a single hearing designation. In the past, renewal applications have been designated for hearing probably most often as a result of (i) criminal activity of a licensee or person holding an attributable interest in the licensee, and (ii) allegations of misrepresentations made to the Commission by the licensee or a person holding an attributable interest in the licensee. Nonetheless, the current case serves as a significant reminder that the FCC has the ability to—and does—evaluate the purposes to which stations put their airwaves during each license term and whether licensees operate stations in furtherance of the public interest.

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If you have any questions concerning the information discussed in this memorandum, please contact your communications counsel or any of the undersigned.

*Stephen Hartzell, Editor*

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