Virginia Association of Broadcasters
Legal Review

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# Legal Memorandum

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## Four-Week Countdown Reminder for Special Displacement Window Filings for Certain Low Power Television Stations and TV Translators

This is a four-week countdown reminder for the deadline for filing displacement applications for certain low power television and TV translator stations (collectively, "LPTV stations") in the Special Displacement Window. You'll recall that the FCC announced last month that it had extended the filing deadline to **Friday, June 1, 2018,** at 11:59 pm Eastern Time.

As we have previously advised, the FCC in February released a Public Notice announcing the opening of the Special Displacement Window, during which LPTV stations and analog-to-digital replacement translators that (1) were displaced due to the Incentive Auction or subsequent repacking and (2) were "operating" as of April 13, 2017, are able to file for a new channel in the post-Auction, repacked TV spectrum. (Note: in order for a station to be deemed "operating," the station's construction permit facilities had to be licensed or the station must have had a license-to-cover application on file with the FCC by April 13, 2017.)

Stations will recall that the FCC also released data that identifies locations and channels where LPTV stations likely cannot propose displacement facilities because of the presence of full power and Class A television stations, land mobile operations, and other (non-displaced) LPTV stations. The channel data is intended to help displaced LPTV stations identify potential channels

to specify in their Special Displacement Window applications, and the data are available on the FCC's website at http://data.fcc.gov/download/incentive-auctions/LPTV-Data/. In addition, the FCC conducted an informational webcast relating to the Special Displacement Window, and both the archived video and copies of the slide presentation are available on the FCC's website.

If you have a displaced LPTV station, you may have already filed your application, or you may be busy preparing it. If you have not yet begun the process, however, we recommend that you reach out to your consulting engineer immediately to get started!

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## House Passes "Music Modernization Act" – No Performance Tax Included

In a vote seeking to bring sweeping changes to the music licensing ecosystem—not to mention a rare show of unanimity on Capitol Hill—the House of Representatives unanimously passed the Music Modernization Act ("MMA"), H.R. 5447, by a 415-0 vote last week. The MMA combines portions of several bills into one (provisions from bills known as the CLASSICS Act and the AMP Act are incorporated into the MMA), and it is supported by many stakeholders within the music industry. The bill now awaits action in the Senate.

While the MMA modernizes numerous aspects of copyright law, it is what the MMA does not have that is of most interest to broadcasters: the MMA does not include the so-called "performance tax."

Below please find a brief summary of several of the MMA's provisions:

*Pre-1972 Sound Recordings*. The MMA creates a public performance right for the digital/streaming of songs recorded prior to February 15, 1972. This does not affect play of these sound recordings over the air, but stations that stream pre-1972 songs online would have to begin paying public performance royalties for these sound recordings.

*Rate Court Proceedings for ASCAP and BMI*. Performance rights organizations ("PRO") ASCAP and BMI are subject to consent decrees which govern how the public performance royalties paid for an underlying musical work are set (i.e., the royalties that stations currently pay to composers/publishers). The MMA would allow the courts that oversee the ASCAP and BMI rate-setting proceedings to consider, when determining the royalty rates for musical compositions, the public performance royalty rates that music services pay to SoundExchange for sound recordings. The NAB recently struck a favorable agreement with ASCAP and BMI that narrows this change so that this "SoundExchange evidence" could not be used to raise the royalty rates the broadcast radio stations pay for the public performance of musical compositions. Thus, the impact of this provision would largely be on streaming services.

Also on the ASCAP and BMI front: currently, all rate proceedings related to these PROs are overseen by the same two judges in the Southern District of New York; one judge is assigned to preside over all of ASCAP's "rate" court proceedings, and another judge is assigned to do the

same for BMI's proceedings. The MMA would change this process by rotating these rate-setting cases among all judges on the court.

*Mechanical License*. The "reproduction" and "distribution rights" of a musical composition are covered by what's called the "mechanical license" in Section 115 of the Copyright Act. The Copyright Royalty Board ("CRB") currently uses four policy objectives set forth in the Copyright Act to determine Section 115 royalty rates. If the MMA becomes law, Section 115 rates will be determined by the CRB under a different, "willing buyer, willing seller" standard, which asks what a willing buyer and a willing seller would negotiate for in an arm's-length transaction.

*Mechanical License Collective*. The MMA would also create a new entity to grant Section 115 licenses to digital music providers. This new entity would then collect royalties and distribute them to copyright holders. This provision is designed to modernize the royalty process for interactive streaming services like Spotify or Apple Music, and it should not affect broadcast radio stations (unless they are using an interactive streaming service).

*AMP Act*. Finally, the legislation includes a portion of the bill known as the AMP Act and allows for some royalties that are paid to SoundExchange to be distributed to producers of sound recordings, provided that copyright owners agree to those distributions. These provisions do not change the amount of royalties paid to the producers, just the distribution channels, and they have little to no effect on broadcast stations.

The Senate is slated to consider The Music Modernization Act at a hearing in mid-May. We are following this legislation closely and will keep you updated.

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## FCC Eliminates Ancillary/Supplementary Services Reporting Requirement for Most Stations

Thousands of digital television broadcast licensees and permittees will be spared the time and resources (and headaches!) associated with filing the Annual DTV Ancillary/Supplementary Services Report (formerly known as "Form 317" and currently known as Form 2100, Schedule G). In April, the FCC adopted a Report and Order ("Order") revising its rules so that only those television stations that actually provide feeable ancillary or supplementary services will be required to file an annual report about their provision of those services (covering the 12-month period ending on the preceding September 30). The Order was published in the Federal Register on May 3, and it took effect immediately.

Prior to the rule change, all full power and low power digital television stations were required to file the annual report—even if they did not provide any ancillary or supplementary services or receive revenue from those services during the relevant reporting period. The FCC noted that several commenters urged the Commission to change the requirement "because it imposes pointless burdens on a substantial number of broadcasters." The FCC agreed, acknowledging that only a small fraction of television stations actually offer the ancillary or supplementary services. It adopted the Report and Order as part of its ongoing Modernization of Media Regulation Initiative to eliminate outdated or unnecessary rules.

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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