December 17, 2021

Legal Memorandum

*In this issue, please find information about*

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| *Deadline:* | **December 29, 2021:** [Opt-in Due for Latest GMR Interim License Agreement Extension](#_GMR_Offering_3-Month); RMLC/GMR Litigation Potentially Moving Toward Resolution |
| *Headlines:* | [FCC Issues $20,000 Fine for EAS Tones from Paid Programming](#_FCC_Issues_$20,000) |

# GMR Offering Three-Month Interim License Extension;

# RMLC / GMR Litigation Potentially Moving Toward Resolution

As the December 31, 2021, expiration deadline approaches for the current crop of interim licenses granted by Global Music Rights (“GMR”) to commercial radio stations, we have learned that GMR is again offering a further extension to those interim licenses. As explained below, GMR’s new proposed extensions are only for a three-month period.

**Please note:** As with prior GMR extensions, this interim license extension offer **only applies to commercial radio stations**. You’ll find additional information toward the end of this memo regarding commercial television stations, as well as noncommercial television and radio stations.

*Background.* As we have previously written, GMR’s interim licenses and corresponding extensions fall against the backdrop of the ongoing litigation between GMR and the Radio Music License Committee (“RMLC”). At issue in that litigation, among other things, is whether the antitrust principles applied to the rates set by other performing rights organizations (“PROs”), such as ASCAP and BMI, should also apply to the rates set by GMR. (Notably, since 1941 both ASCAP and BMI have been bound by consent decrees with the U.S. Department of Justice (“DOJ”) addressing those antitrust issues, with various modifications to the decrees having been made throughout the years.) Commercial radio stations currently must obtain licenses to broadcast any of the more than 55,000 works falling within GMR’s catalog. However, since late 2016—and in light of the pending GMR/RMLC litigation and its uncertainty—GMR has been offering such stations an interim license agreement (which license has been extended several times, as is the case now) to cover the works in its catalog.

*The Latest Extension and Potential Settlement.* In a recent [Joint Message](https://dehayf5mhw1h7.cloudfront.net/wp-content/uploads/sites/893/2021/12/16040142/New-GMR-Interim-License-Extension-Procedure-RMLC-GMR-Litigation-Update-121521.pdf) (the “Joint Message”) to commercial radio broadcasters, RMLC and GMR have indicated two extremely important developments: (1) GMR is offering a new three-month extension to and on the same terms (including price) as the current interim license agreement, with interested broadcasters required to opt-in no later than December 29, 2021; and (2) both RMLC and GMR are currently “optimistic” that they will settle their long-pending litigation “in the very near future.” According to the Joint Message, RMLC and GMR have agreed on preliminary settlement terms, and are currently working on the remaining details and final settlement terms.

For now, regardless what happens with the litigation, broadcasters must take action soon if they wish to continue to avail themselves of GMR’s current interim license agreement after the current December 31, 2021, expiration date.

*Do Stations Need to Take Action to Receive the New License Extension?* Again, yes! At a minimum, by no later than Wednesday, December 29, 2021, stations will need to review and complete the online form available at: <https://globalmusicrights.com/interimextension>. The Joint Message further indicates that—unlike with past extensions—this time stations will NOT receive a communication or reminder from GMR regarding required actions and the opt-in deadline, so stations should any necessary steps to ensure that they act by the deadline.

Please also note that the current GMR interim license is set to expire on December 31, 2021, and a station’s failure to timely opt-in to the extension will result in the station being unlicensed and unauthorized to perform the music represented by GMR as of January 1, 2022.

*I’m a Commercial Television Station—What About Me?*  PRO licenses and rates for commercial broadcasters are generally negotiated at the industry level by the RMLC for commercial radio stations and the Television Music License Committee (“TVMLC”) for commercial television stations.  The industry-negotiated licenses and license fees are available for broadcasters who timely authorize the RMLC or TVMLC, as applicable, to act on their behalf in negotiations with the PROs. However, at this point, there is no TVMLC-negotiated license agreement with GMR. Consequently, commercial television stations that need a license from GMR must reach out to GMR directly to negotiate the terms of such license. TVMLC has indicated that its members may reach out to it (i.e., TVMLC) for additional guidance on how to approach such negotiations, if TVMLC members wish to do so.

*I’m a* ***Noncommercial*** *Televisi**on or Radio Station—What About Me?* Unlike commercial broadcasters, the public performance of musical works by noncommercial educational television and radio stations is allowed under the terms of a “statutory” or “compulsory” license provided in Section 118(c)(1) of the Copyright Act.  In accordance with Section 118, the PROs and representatives of noncommercial broadcasters generally negotiate rates and terms that are submitted to and approved by the Copyright Royalty Judges, who are appointed by the Librarian of Congress to oversee the Copyright Act statutory licenses.

The current noncommercial broadcaster public performance royalty rates adopted by the Copyright Royalty Judges cover licenses from ASCAP, BMI, and SESAC for the 2018–2022 period.  One set of rates applies to noncommercial radio stations licensed to colleges and universities (based on the number of students attending the school).  Another set of rates applies to all other noncommercial radio stations that are not affiliated with NPR, including religious broadcasters (based on the population served by the station).  And another set of rates applies to NPR-affiliated radio stations and PBS-affiliated television stations (which rates are subject to a confidentially agreement), and all other noncommercial television stations ($1 per year).

However, because GMR failed to participate in the 2018–2022 rate proceeding, the public performance royalty rate for noncommercial stations is currently $1 per year to cover GMR-controlled musical works (and any other works not controlled by ASCAP, BMI, or SESAC). This rate will almost certainly change in the coming years, given that GMR has filed to participate in the coming, 2023-2027 rate proceeding.

Please reach out to communications counsel for questions regarding the matters above.

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# FCC Issues $20,000 Fine for EAS Tones from Paid Programming

The FCC recently issued a [Notice of Apparent Liability for Forfeiture](https://docs.fcc.gov/public/attachments/DA-21-1353A1.pdf) (the “Notice”)—inclusive of a proposed $20,000 fine—against a large radio broadcaster after one of its stations transmitted false or deceptive emergency alert system codes or Attention Signals (“EAS Tones”). The Notice serves as yet another reminder to broadcasters regarding the importance of ensuring EAS Tones are only used in a proper, lawful manner, not to mention how seriously the Commission takes the transmission of false Tones.

*Background*. As we have discussed previously, under section 11.45(a) of the FCC’s rules, “[n]o person may transmit or cause to transmit the EAS codes or Attention Signal, or a recording or simulation thereof, in any circumstances other than in an actual National, State or Local Area emergency or authorized test of the EAS . . . .” This rule was adopted for the purpose of protecting against the misuse of EAS Tones. Use of the Tones—whether simulated or actual—can lead to “alert fatigue,” causing the public to become desensitized to the Tones and question whether a particular transmission of the EAS Tone is associated with an actual emergency or authorized test.

The FCC’s rules provide for a “base forfeiture” of $8,000 for violations of the EAS rules. This base forfeiture applies for each violation or each day of a continuing violation, and it may be adjusted upward or downward depending upon the facts of the incident. In the Notice, the FCC considered a number of factors in *upwardly* adjusting the fine, including: (i) the number of repetitions; (ii) the duration of the violation; (iii) the audience reach of the transmissions; and (iv) the extent of the public safety impact.

*Underlying Facts*. Per the Notice, the violation occurred on September 26, 2020, when EAS Tones were broadcast in the absence of an emergency or authorized test during a paid programming block on a station in a Top 50 radio market. The Tones also aired on the station’s digital subchannel and its FM translator. The licensee had not reviewed the segment containing the EAS Tones before the broadcast, and—to the broadcaster’s credit—the station’s board operator immediately took action after the Tones aired to inform the show’s host that the broadcast was impermissible. Significantly, the host of the paid programming show admitted that he had used the EAS Tones as a “stunt.”

In determining the proposed forfeiture amount for this violation of the FCC’s rules, the Commission noted that: (i) the effect of the violation was increased by the rebroadcasts on the licensee’s digital subchannel and FM translator; and (ii) the stations are located in a top 50 market. Because of these factors, the Commission upwardly adjusted the fine to add $12,000 on top of the $8,000 base forfeiture, for a total of $20,000.

*Takeaways*. The FCC’s response to this content should serve as a warning to other broadcasters that air paid programming blocks, whether the programming is live or prerecorded. It is important that, where possible, stations make efforts to (i) review content that is pre-recorded and ready to be broadcast, and (ii) especially in the case of live paid blocks, be sure that hosts understand the type of content that is impermissible. Stations should also impress upon purchasers of airtime the severity of violations involving EAS Tones. Failure to guard against the possibility of an EAS violation can have expensive consequences for an (inadvertently) offending station, as well as risk desensitization of the public to EAS Tones.

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*Tim Nelson, Editor*

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This Legal Review should in no way be construed as legal advice or a legal opinion on any specific set of facts or circumstances. Therefore, you should consult with legal counsel concerning any specific set of facts or circumstances.

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