cpi interactive
Phone: 800-601-6923 Fax: 949-752-9456
2212 Dupont Ave., Ste. L, Irvine, CA 92612

DOCKET NO.
RM 2002.1
COMMENT NO. 10A

RECEIVED
MAR 13 2002
GENERAL COUNSEL
OF COPYRIGHT

03/07/02

David O. Carson, General Council
Copyright Arbitration Royalty Panel (CARP)
P.O. Box 70977, Southwest Station
Washington, DC 20024-0977

Dear Mr. Carson and Honorable Members of CARP,

I am writing as, copyright owner, professional musician and the Managing Partner of VirtualRadio.com, the FIRST commercial music web site on the Internet and still going strong. CPI Interactive built VirtualRadio.com in 1994 in a reaction to the elimination of independent music from traditional radio. Our site is designed to provide totally free access to rights owned by those artists who present them on recordings and their independent record labels. We will not be subject to the 2 year royalty requirement in the proposed rules because we have always received royalty waivers for performances since we began, 7 years ago.

A few points govern our position on the proposed rulemaking for the Notice and Record keeping for use of sound recordings. I will list these governing points below as I comment directly on the legislation at hand:

1. **Performances in a 'record store'.** Current law allows record stores to perform titles free of royalty, for the purpose of promoting the song within the confines of the store. This rule MUST be expanded to online record sellers performing titles in pursuit of sales. The argument against this is spurious. While the spirit of the law is to encourage shoppers to purchase the sound recordings that they hear while shopping, the letter requires that the performance be made inside the store as opposed to being broadcast onto the street in front. Our web site has been a store in the past and will be again shortly and I want to promote the available titles to the shoppers by performing them while they shop. I've been told that this is not happening 'inside a building' (where else can you get the Internet?) so this important use-provision 'can't apply' to the Internet. This ridiculous argument flouts the spirit of the law which is to promote music sales and benefit the owners of the copyrights on the items being sold. The only groups benefited by this marketing-performance prohibition are the performing rights organizations who lose their operational skim percentage from the performance royalty and do not benefit when a recording is sold. **The rights owners, the recording artist, the producer and the label all lose retail revenue and are harmed as a result.**

2. **Payments to rights owners**. Payments from performances on the Internet should be paid **DIRECTLY to the copyright owners, bypassing performing rights organizations**. Required performance reporting to the organizations and the rights owners can include the payment amounts for legal verification of payment. But Internet technology allows the rights owner to be paid directly, without 'skimming' by the rights organizations.

It is a well known fact that rights owners are often unpaid for performances on traditional broadcast radio. (If you have been advised to the contrary, I suggest you review that persons entire testimony for accuracy.)
The performing rights organizations refuse to pay based upon anything other than their 'surveys', or television broadcast 'Que Sheets'. These surveys are technological dinosaurs developed in the last century and can not accurately determine which titles have been performed. Many times rights owners have complained to me that they repeatedly hear their song on the radio but ASCAP or BMI won't pay them. The rights organizations simply do not pay for every performance. They would not even pay artists based upon the play-lists that I created during traditional on-air broadcasts when I was Music Director at radio KUCI 88.9fm. Naturally, you won't find that in a brochure - only in real life experience - which we possess and are reporting to you.

3. **Que Sheets.** In television, when a song is performed it is recorded on a 'Que Sheet' which lists all broadcast activity. These are accepted by the performing rights organizations as proof of a performance and they will pay the rights owner based upon the data on the sheet. The Internet offers a much more accurate record. When a title is performed we can PROVE it. We know how many times it is performed. Our server could easily send daily (hourly?) reports to the performance rights agencies upon which they could pay the rights owners. The rights organizations refused this offer when I made it to them in 1998 because they could not afford to pay all of the rights owners. They want to 'determine' who gets paid, rather than 'guarantee' payments. **As part of this legislative rule making, 'Digital Que Sheets' should be honored as a payable reporting standard for performances on the Internet as the traditional industry has honored Que sheets to verify a performance in a television broadcast.**

Current Rulemaking

1. **Rules eliminate 'live' or 'free-form' DJ broadcasts, violating the 1st Amendment to the US Constitution**
Requiring the credits to be listed on-screen as a song is performed will eliminate live Disc-Jockey broadcasts, violating the 1st Amendment to the Constitution entitling free speech. Why? As analog vinyl records and most CD's don't contain the information in digital format to be displayed on screen, a broadcaster would have to transfer (rip) the information (music) on a CD or vinyl recording to a digital computer database, (this activity is being blocked by the RIAA as they are continuously pursuing new methods of preventing the removal of digital data from a CD) The broadcaster would then type the credits information into another field in the same database and broadcast only from the 'canned' database. (This programming is sophisticated, costly and limits use of the Internet for free artistic expression. Its requirement by the government can be compared to the 'poll-tax' and 'comprehension tests' required by certain states in the last century to prevent voting by blacks, violating another provision of the constitution.) The canned database **eliminates requests and limits artistic expression, thus censoring the broadcaster**. This also means that an **in-studio artist would be prohibited from performing live** because there would be no way to present the credits information on the screen while he or she performed the copyrighted material - **even if they are the copyright owner, an obvious breech of the 1st Amendment.**

2. **Rules Require Payment to Rights Organizations, Not to Copyright Owners**
Unless the rules require that each reported performance result in a cash royalty to the rights owners, there is no guarantee that they are being paid - the very purpose of the legislation. Performance Rights Organizations notoriously do not pay accurately and individual rights owners have no other way of collecting outside of these organizations. Without requiring the rights

organizations to honor the 'Internet performance reports' with direct cash payment to the rights owners who's content has been performed, this legislation is a sham and only benefits the performing rights organizations and their large corporate members.

3. **Rules Limit Rights Owners' Access to Listeners**
By applying this major financial burden to independent Internet broadcasters, **this legislation limits rights owners' access to the music buying and listening public.**
The consolidation of traditional radio has eliminated independent music from the airwaves. Even college radio is influenced by major record label offerings, to the exclusion of extremely high quality and professional independent productions. Additionally, US radio networks do not purchase independently produced programming, eliminating that avenue of potential exposure. Exposure on the Internet had been the last resort for independent copyright eliminated from exposure on free over-the-air broadcast radio.
With these new rules, only major broadcasters and other businesses who can afford the financial burden of the required computer programming expenses, paper handling, record keeping expenses and 2 years' unknown dollar amount of back-pay royalties will be able to broadcast. Furthermore, the 2 year back-pay requirement is unenforceable because the businesses who can afford some of these expenses but do not wish to pay them will simply fold up and re-launch under a new name to avoiding the back-royalty fees, **again harming the rights owner**. If you are advised to the contrary, you should examine your advisor's other comments closely for accuracy.

4. **Rules Benefit the Minority while excluding the Majority of Rights Owners**
The majority of copyrights and performance rights are held by the independent, original creators of the works. US copyright law recognizes the ownership of rights to bestowed upon the creator of the work immediately upon its creation. Many millions more of these rights exist today in the hands of independent artists, producers and labels, than reside in the traditional industry's hands. These rules limit the access of the majority or rights owners to exposure and thus profit, in favor of the financially well-off minority rights holders. On an equal footing, the dollar amount that would be paid to the independent rights owner would dwarf the traditional industry's royalty collections. Of course, with major label effective control of broadcast radio there has not been 'equal footing' since the 1950's. Perhaps you should convene a roundtable of independent rights owners and producers to flesh out these problems. We are the majority rights owners, after all. It is obvious that you only queried the major players in the industry representing the MINORITY OF RIGHTS HOLDERS in the US.

Thank you for your attention to these important factors that may not have yet been brought to light.

Sincerely,

Joel B. Easton, COO
CPI Interactive
Virtual Radio