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OF COPYRIGHT

RadioValve RIAAction to CARP

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We have compiled information which complied with the original DMCA statutory license in good faith that we were signing onto a platform which would benefit artists, labels and broadcasters alike. We dispute the current ruling-specifically the rate scheduling-and contest that it complies with our understanding of DMCA's initial purpose. Moreover, it is difficult to understand exactly how the collected rate fees will benefit artists and labels, specifically artists and labels who are independent and/or unsigned and/or not registered through ASCAP, BMI or SESAC. The distribution of royalties under these performing rights organizations is already suspect when considering the realm of the independents, and there is no clear evidence from the CARP proposal that fees collected by Sound Exchange will better benefit independent or unsigned artists and labels. These types of unsigned artists constitute a significant portion of RadioValve's programming. It seems logical to conclude that before a new rates scheduling is considered for additional fees above and beyond what has been radio industry standard for decades that an amendment should be proposed to be more inclusive of independent artists - who do not appear to be adequately represented under the current CARP ruling. Essentially we are charged for streaming a program to a listener which may not contain materials by artists to whom those fees can effectively be distributed. More on the Rate Schedule follows below.

The New Reporting Requirements

Considering our resources, it would be burdensome for us to compile the newly requested information moving backward. In fact, because we are a hobbyist organization running on volunteer man-power, it would be nearly impossible.

We would like to comply with the reporting standards to the best of our abilities and can modify our recording procedures moving forward.

With that said, some of the information is either unknown or would be prohibitively burdensome to collect and report:

Sec. 201.36(e)(2)(ii)(J) International Standard Recording code (ISRC). Not available.

Sec. 201.36(e)(2)(ii)(K) On many compilations in this genre the release year is not included, and would be extremely burdensome or impossible to track down.

Sec. 201.36(e)(2)(ii)(O) UPC code. In many instances small independent labels issue vinyl records in small runs without UPC codes.

Sec. 201.36(e)(2)(ii)(P) Again many small labels issue short runs on vinyl which do not supply a catalog number.

Sec. 201.36(e)(2)(ii)(Q) On many compilations in this genre the copyright information for the original release is not included, and would be extremely burdensome or impossible to track down.

Sec. 201.36(e)(3)(v) To the best of our knowledge we do not currently collect this information.

Sec. 201.36(e)(3)(vi) To the best of our knowledge we do not currently collect this information, and may consider it a violation of a listeners rights to privacy to supply this information if we did collect it.

Sec. 201.36(e)(3)(vii) To the best of our knowledge we do not currently collect this information.

Sec. 201.36(e)(4)(v) International Standard Recording code (ISRC). Not available.

Sec. 201.36(e)(4)(vi) On many compilations in this genre the release year is not included, and would be extremely burdensome or impossible to track down.

Sec. 201.36(e)(4)(x) Again many small labels issue short runs on vinyl which do not supply a catalog number.

Sec. 201.36(e)(4)(xi) UPC code. In many instances small independent labels issue vinyl records in small runs without UPC codes.

Sec. 201.36(e)(4)(xii) On many compilations in this genre the copyright information for the original release is not included, and would be extremely burdensome or impossible to track down.

The Proposed Rate Schedule

Clearly the timing is wrong for the imposition of a flat fee across the webcasting industry. During attendance of digital music conferences, our team has talked with CEOs and other "industry leaders" in the area of webcasting, and the answers have been universal: while there's some revenue being generated, it's small, and no one is even close to reaching profitability. If the RIAA is not sensitive to this issue, then it's clear that their intentions are something other than protecting labels and recording artists. Give the industry time to thrive, and everyone wins.

At this critical juncture in the development of this new medium, it would be foolish to stifle the fledgling companies who are largely responsible for its popularity; companies who have over the last 4 years shown some of the potentials of this new medium. Let us quickly re-cap:

Webcasting is superior to radio in two ways.

First, since webcasters can cater to hundreds of market niches, they get closer to the RIAAs target audiences than broadcast counterparts who target the lowest common denominator.

Second, if one hears a song one truly enjoys, one can act on it. Impulsively. Instantly. While the song is still in ones head.

It would be stupid and short sighted to kill off Internet radio, which this proposal is likely to do in a significant way. It will stop the growing momentum of the listen/purchase habits of millions of potetial music buyers worldwide.

We would suggest a rate schedule based on revenues.

There is an atmosphere of paranoia emerging from the RIAA through this proposal. This fear is a reaction to the file sharing communities which pay for nothing as content aggregators and whose user's bases swap freely without compensation. However, this doesn't address small independent webcasters who pay licensing fees to performing rights organizations already; who keep track of playlist and performance information; whose streams are not downloadable; who respect the rights of artists because in many instances the webcasters themselves ARE artists; who, in good faith, signed the DMCA statuatory license believing that its effort was to engender manageable, fair standards for participants in an emerging broadcast medium. Most importantly: who, as music enthusiasts have dedicated blood, sweat and tears as pioneers in this medium to bring quality content to a growing wired audience and who have paid heavily while profiting nothing simply to break unconventional and diverse formats worldwide. It leaves those of us in the latter category feeling like we're being held at gunpoint by irrational extortionists...

The scheduling of rates fails to address the basic question of WhyA When terrestrial radio does not pay for the same privilege of broadcasting industry music, why is it necessary to implement new charges for more diversified formats of broadcastA It's an odd conundrum: the RIAA wants to piggy-back on the hard work of (in many cases) struggling visionary artists who have no opportunity of reaching profitability without increasing their ability to be heard.

Further, the scheduling of rates appears to be an unreasonable attempt to suffocate a burgeoning webcast industry which has yet to prove its profitability. It appears almost as if the RIAA wants compensation up front from an emerging field of media which clearly has an enormous developing audience and yet no established path to profitability from virtually a single player in the field. What seems to add insult to injury is that the RIAA has obviously seen how the free promotion of terrestrial radio drives its sales, yet somehow, they seek to penalize broadcasters who make marginal revenues, if any, seemingly before the webcasting industry even has a chance to get out of the gates.

If adopted, the current proposal will likely eliminate the vast availability of diversified formats of internet radio through imposing rates which are restrictive to most small independent webcasting businesses which have yet to show profitability in this young medium. Further, the RIAA seems committed to leveling the field in favor only of towering corporate giants who have already homogenized music broadcasting through mainstream channels; to disempowering a sea of voices who had no delivery medium (other than cable-access TV and community radio) prior to the advent of webcasting. To disproportionately affecting the avenues available to artists, producers and record labels— a total disservice to the community that the organization claims to protect.

The ambition, seemingly, is to eliminate small niche webcasters and leave only room for content producers who can afford the fees only to repurpose their content to the largest aggregators; and that just doesn't make sense for niche formats or special interest channels who currently provide active services to enthusiastic communities who don't find gratification through most mainstream outlets. Why not leave it up to individual labels to determine if and when they are being damaged by a webcasters activities, instead of building a top-heavy system which cripples a webcaster in advance! Better yet, why not structure the fees similarly to the Performing Rights Organizations, and base it on REVENUE instead of a flat fee. As a webcaster is able to become profitable, those artists and labels who supply the content to that station share those profits. Until a station reaches that point, "no harm, no foul". Perhaps a small "minimum fee" could be established (just like the Performing Rights Organizations, which amounts to between $200-$500 annually each) and in the meantime labels and artists continue to benefit from the exposure provided for their work, free of charge.

Webcasters have been accused of "webcasting royalty-free" which ignores the thousands of dollars we pay each year to organizations like ASCAP, BMI and SESAC. These Performing Rights Organizations were established to help protect the rights of artists and make sure they get paid. Their fees are based on a percentage of a station's REVENUES. The RIAA proposes a flat fee regardless of a station's revenues. Our station PROMOTES new artists and music. It is more of a service to those artists and labels, as an operating station, than it would be as a station forced to stop its operations due to fees imposed by some third-party, who may have little or no interest in the artists that our station promotes.

In 1998, the RIAA annual report said (and I paraphrase) that labels didn't have to worry about digital delivery of music until at least 2003 because the technology was not in place for widespread user activity, nor was bandwidth wide enough to carry WAVs in a timely fashion. So the industry needn't worry—by the time digital delivery was in the public mind, the RIAA would've figured out a compensation schedule. Doh! Obviously, these people are not very techy, nor was it responsible of them to make such sweeping statements during a period in which we've seen technology accelerate phenomenally. They were fooling themselves and misleading the industry.

Our team comes from 13 years of professional broadcast radio experience, working in Public, Commercial, Community and Internet Radio. Reading over the provisions of CARP is fairly reasonable in terms of the proposed reporting rules (except where the rules seem overly burdensome, impossible to comply with, or, at times, in violation of Privacy laws), and completely laughable when it comes to the payment schedule. Further, how is it fair that iRadio must pay additional fees at outrageous prices which terrestrial radio stations who do not webcast their signals are exempt from! This seems particularly unfair, especially when webcasters can report EXACTLY HOW MANY LISTENERS ARE ACTUALLY

TUNING IN; terrestrial radio cannot do this. Even worse—the RIAA is doing a disservice to the very artists and labels they claim to protect and serve, by potentially eliminating thousands of legitimate channels which help to freely promote their music and sell their records. This is unbelievable greed and fear, and all of it too little too late.

Lastly, are we to understand that the thousands of albums sold through our website because of user click-throughs on our playlists based on real-time impulse purchasing is damaging the industryT [ELIMINATED THIS LINE] This is completely irrational, bite-the-hand-that-feeds-you mentality on the part of the RIAA. Stations like RadioValve play music which serves niche interests and is simply not played on terrestrial radio virtually anywhere in this country. And, in fact, many of the artists we feature are not even licensed through ASCAP, BMI or SESAC and even if they were, based on the way artists are currently compensated by those organizations, they probably still would not receive any funds—which webcasters like ourselves pay every year specifically to compensate our featured artists.

In closing, we at RadioValve would like to reiterate our intent to comply with the reporting rules as set forth in the current proposal, save for the issues mentioned above, and to again communicate our utter inability to pay the fees as proposed. If implemented, we will be forced to stop our webcasting service, or to remain "on-air" in defiance of the ruling and continue to provide the kind of promotional service to artists and labels in the genre of music we have served for over 4 years, thus effectively criminalizing our station. Either way the RIAA loses, collects no fees, and most likely spends money pursuing litigation against an opponent "hiding in digital caves". If however the Copyright Office sees fit to impose a rate schedule based on revenues, we will gladly comply, pay our small minimum fee until we reach profitability and send everyone home a winner.

Additional Supporting Quotes from RIAA, NAB and Webcasters:

The Recording Industry Association of America (RIAA) "Artists and labels, who have supported these new businesses from the start with their music are one step closer to getting paid.

"We would have preferred a higher rate. But in setting a rate that is about 10 times that proposed by the webcasters, the panel clearly concluded that the webcasters' proposal was unreasonably low and not credible.

"It is apparent to us, as it was to the Panel, that webcasters and broadcasters of every size will be able to afford these rates and build businesses on the Internet." — Hilary Rosen, President and CEO of the RIAA

National Association of Broadcasters (NAB) "The ruling from the Copyright Arbitration Royalty Panel may have the effect of unintended consequences, in that many radio broadcasters may reevaluate their streaming strategies. If the powerful record company interests' goal was to strangle a fledgling new service to radio listeners, it may have succeeded beyond its own expectations." —Edward O. Fritts, president and CEO of the NAB

Beethoven.com "As one of the first major Internet Radio stations to incorporate advertising insertion into our webcast, Beethoven.com has been in the forefront of making our industry a profitable medium. To date, however, we have yet to see any significant revenue of any kind and have yet to turn any profit. The recent rulings by CARP, which we feel equate to no less than a complete capitulation to the demands of the egregiously powerful RIAA, will eradicate any possibility of a profitable future for us and the vast majority of other webcasters. By dismissing the vastly more equitable solution of basing royalties on a reasonable percentage of revenue in line with other traditional media, the CARP ruling slams the door on the possibility of opening new markets to not only webcasters, but to the RIAA itself. It has created an impermeable and unsurpassable barrier to entry for only but the largest corporations to enter or operate in the webcasting domain.

"We feel very strongly that this ruling, in tandem with the Copyright office's ruling on reporting requirements, fly not only in the face of the needs of webcasters to survive, but are in direct conflict with the public's best interest and even those of the RIAA itself. By forcing these issues, the RIAA has made the grave error of focusing its energies on controlling the flow of its copyrighted information and the collection of enormous royalties instead of what its primary focus should be: selling its recordings to the public. In fact, the RIAA has already made millions more from Internet radio than anyone in our industry! We alone have created the sale tens of thousands of dollars of CD's to our listeners for the RIAA without making enough money from advertising to make ourselves profitable. And this comes at a time where one would think the RIAA should take every sale it can get! The truth of the matter is that they will NEVER be able to promote and disseminate their recordings anywhere near as well as a free-market driven Internet radio industry can. "In short, these rulings, if fully instituted and enforced (which, in itself, may even prove to be prohibitively complex and expensive) will drive almost every Internet radio station out of business. Of this there can be no doubt or debate." — Kevin Shively, Director of Interactive Media, Marlin Broadcasting/Beethoven.com

MeasureCast "It is clear that the RIAA and the U.S. Copyright office don't understand the traditional radio business, or the streaming media business. The proposed rulemaking clearly seeks to impose cumbersome, unreasonable, and impractical tracking and record keeping on the part of streaming broadcasters. And, it requires them to take steps that, in some cases, are impossible. For instance, as a veteran broadcast station owner and operator, I see no way for broadcasters to track the UPC Code for every song streamed. Other requirements may even put streaming broadcasters in violation of Privacy Act rules. In addition, it is near impossible to ascertain the geographic location of every Internet radio listener.

"It's time for the RIAA and the U.S. Copyright Office to get real, and to understand that putting streaming broadcasters out of business will put zero dollars in their royalty coffers. But then maybe that's their end game; making certain that only major record labels control every piece of music streamed on the Internet. Perhaps it's time for the Department of Justice to look into this issue." — Ed Hardy, CEO, MeasureCast

iM Networks "If adopted, the CARP recommendations play right into the hands of the corporate giants. Instead of encouraging the spirit of the Internet's level playing field, these fees will squelch innovation by preventing independent Internet broadcasters from growing to a point of profitability.

"Broadcasters need to reach a critical mass audience before they are able to profitably sell advertising or other services on their station. With these fees, the out of pocket expenses required to grow to that critical mass become prohibitive. As a result, only major networks and corporate giants who already have an aggregated audience will be able to sustain these rates. Had similar rates been imposed in the early days of radio, we would not have the $20 billion dollar marketplace that we have today.

"These rates hamper the Internet broadcasting marketplace, and this kind of near sighted approach is just going to drive people back into the loving arms of illegal alternatives, similar to what happened in the P2P market."
— David Frerichs, Founder, President and Chief Technology Officer of iM Networks