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GENERAL COUNSEL
OF COPYRIGHT

03/08/02

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

RE: Addendum to 03/07/02 communication

Dear Mr. Carson and Honorable Members of CARP,

This addendum to our previous comments is to address certain specific information requests within the public notice requesting comment on rulemaking for reporting use to copyright owners and related record keeping. These rules combine to constitute 'institutionalized restraint of trade'.

As before, 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.

RIAA is a minority 'shareholder' in this issue. The are a minority of the owners of copyrights. **The vast majority of copyrights are held by Independent writers, musicians and labels.**

1. Section 201.35 **Discontinuing Internet posting of broadcaster's "Notice of Use of Sound Recordings" or "Notice of Initial Use of Sound Recordings" on the Internet:**
These postings MUST remain on the Internet. The vast majority of copyright holders have no way of travelling to Washington DC to view the public file of the Licensing Division of the Copyright Office. This means that they will have to constantly search for new broadcasters at random, to attempt a determination of whom may be performing their recording. This is a potentially insurmountable financial burden to the majority or rights owners- but not to the minority RIAA, who have lobbyists and aids in Washington who can go look it up.

2. Section 201.36 article 'C' Service of Reports to Collectives
The vast majority of rights owners are not served by Collectives. Why are the Majority of Rights Owners Excluded from Service?
Under the proposed rules, the Minority represented by the RIAA and the Collectives may pursue revenue collection based upon these reports. As proposed, the Majority of Rights Owners (independents) would be required to submit themselves to - or apply to join- a Collective in order to be notified that their property is being exploited. This 'Mandated Association' violates the Constitution's provisions regarding 'freedom of association' and perpetuates the current anti-

competitive dominance of the Minority - the Collectives - over the entire marketplace to the exclusion of the Majority of Rights Owners, the Independent Rights Owner.

3. Section 201.36 article 'D' Posting
Should the Collectives cease to exist, and should a broadcaster fail to name a collective the use reports should be posted on-line in a Central, Advertised web presence maintained by the Library of Congress or the FCC. **Distributed postings across the Internet will place undue financial burden upon the Majority of Rights Owners, forcing them to search millions of potential web sites for the information.** The import of these matters is well beyond that of current government agency budgetary concerns cited as a rebuttal to this need of public posting.

4. Section 201.36 article 'E' Content, paragraph 2 - Intended Play lists
The requirement to submit intended play lists is a violation of the 1st Amendment's guarantee of free speech. I perform 'free-form radio' in which I select a particular title based upon the meaning of it's lyrical content. I combine these selections with others, selected in the same way, to construct 'sets' of music, forming my political comment. As my commentary is based upon current events I have no way of predicting which titles I will perform. I could not submit such a monthly list because I have no way of knowing which songs I will perform until I arrive at the studio each day. Thus I would be forced to adopt play lists eliminating my ability to make political statement and expression relevant to daily or weekly events. Although the rules seem to make allowance for me under paragraph 'ii' 'every recording actually transmitted' they do not. In the very same section and paragraph, a list of the reporting requirements include burdensome activities that cannot be complied with, for example;
Item 'K' - The release year - many recordings come to me without this information.
Item 'M' Album or Compilation title -Many recordings come to me without an album or compilation title.
Item 'N' Label Name -Many recordings by independent artists are not on any label.
Item 'O' the UPC Number - This is not only unavailable on the majority of recordings, **it is unnecessary to the tracking of performances and the collection of royalty payments.** this useless burden seems to be in place solely to benefit other, unrelated RIAA business desires and market control goals. Once again we feel compelled to remind CARP that RIAA is a minority stakeholder in this marketplace. **The majority of copyright owners often distribute recordings only in digital format and there is no 'album', UPC code, liner notes, time stamp or listing of time, dates or other reporting information required of broadcasters in the proposed rules.**
Item 'P' Catalog Number - The majority of copyrights are not represented in any catalog.
Item 'Q' Copyright owner information provided in the copyright notice on the album - Many copyrights are represented by works which have no album, but are purely digital recordings. These have no such information attached, leaving the broadcaster without the information required of the proposed rules.
Item 'R' Genre - Free-form broadcasting has no Genre - it is free form. Often in web casting the genre changes by the day, hour or minute. This requirement, as all of the others, is obviously based in programming notions gleaned from the traditional corporate broadcasters and has no correlation to realities of the music performance and distribution marketplace on the Internet.

5. Section 201.36 article 'E' Content, section 3 Listeners Log -
This section is a violation of the Constitution's guaranteed right of privacy and adds no value to the protection of the copyright owner. Additionally it violates the 1st Amendment's guarantee of free speech.
This rule requires broadcasters to gather information that is of no value to the activity of protecting and collecting royalties from the performance of copyrighted works. US law requires

royalties to be paid based upon performance frequency - not on audience size. Only the Collectives and advertisers are concerned with audience size and they are concerned for their own collecting-strategy benefit - not for the benefit of the rights owners.
It is expensive to program a web site for such a capturing strategy and sophisticated techniques are required. Furthermore, accuracy is unworkable due to the very nature of Internet firewall technologies:
Item vi - the unique user identification assigned to a user or session -In order to capture the information required in the proposed rules, the broadcaster would need to ask for the listeners personal information prior to providing access to music. This means employing a User-name and password registration scheme on the broadcasters web site, limiting speech to those visitors who do not object to such a requirement, and preventing speech to those visitors who do not wish to be identified or simply don't wish the intrusion of registration Internet strategies. If not provided by the listener, than a technology that captures the 'IP address' of the visitor/listener would be needed - except that modern networks use servers behind a firewall, thus lending a SINGLE IP address to every user on the network, rendering such a strategy useless in the collection of user data. College dormitories, corporate networks, University networks, government offices all have hundreds of unique workstations and web-surfing users - but only a single IP Address for ALL traffic going to the Internet can be identified for each network.
Item vii - The country in which the user received transmissions -
This requirement adds no value to the owner of the copyright, does not assist in the collection of royalties, requires gathering of information impossible to fulfill or verify and violates both the Constitution's guarantee of free speech and the right to privacy. Furthermore, using the listener information to contact or market to listeners - a potentially tremendous value to the traditional industry's players - would be in gross violation of 'anti-spamming' 'Opt-In' conventions and etiquette practiced on the Internet.
US law requires royalties based upon frequency of performance, not region in which it is received or performed. Forcing individuals to identify themselves before listening to art, politics or education is a violation of privacy. **The requirement is impossible to fulfill because asking location of a visitor is no guarantee that they will answer truthfully and no technology exists that can pin-point a web site visitors actual location.** Internet 'surfers' can easily go to a server in one country, and from that server anonymously visit any site on the Internet. This rule seems aimed only to exclude from broadcasting those outside of the traditional corporate broadcast industry.

6. Section 201.36 article 'E' Content, section 4 Ephemeral Phonorecord Log -
This section is a duplication of other stature rule requirements (Section 201.36 article 'E' Content, paragraph 2 - Intended Play lists) **creates undue reporting burden on broadcasters, violates the broadcaster's right of free speech, is logistically and technologically unworkable**. Unless a broadcaster is placing the signal from a CD player, record player or tape machine directly over the Internet (this happens daily in independent broadcasting) an 'ephemeral phonorecording' must be made. **There is no need for two logs - one for 'play lists' and one for ephemral phonorecordings - they will all be ephemeral unless specified.** The information to be entered in the line items required by this rule often does not exist, as is with the play-list requirements. If a work does not contain the information required of the proposed rules, a broadcaster would net be able to use it. This limits free speech. Additionally, the rules open up the potential for broadcast market manipulation by major corporate labels - if they withhold the information from some broadcasters while making it available to others, they could determine who by and where a work is performed. This would also be desired by the traditional broadcast industry - a group already in total control of the marketplace fighting aggressively to keep competition out.

7. Section 201.36 article 'E' Content, section 5 - System Failure
This section requires adherence to the 'intended play list', **a violation of the 1st amendment to the Constitution guaranteeing free speech**, with precise reporting required for any deviation. This presents an undue burden on the 'live' broadcaster as it requires that a database be programmed in which to store and present the musical recordings. Without such a technology, the accuracy of such a list - an adherence to it - is questionable at best, leading to the logic that those without the technology should not be heard. Furthermore it is a double-standard. Traditional broadcasters go off the air every day - they are not required to adhere to a play list or to issue reports to the public regarding their system failures - only a verbal announcement that broadcasting will cease combined with a verbal 'legal ID'. A single-line note must be made in the activity log - that it all. It seems that this provision is also geared to dissuade non-traditional or corporate broadcasters from participating in the marketplace as its main 'actual' purpose.

8. Section 201.36 article 'E' Content, section 5 - System Failure, item 'f' - Signature
You are requiring minors to verify facts under penalty of perjury with their signature. Minors don't run traditional broadcast outlets, so we're not surprised that you missed this. Minors do broadcast on the Internet and this provision would seem to prohibit anyone who can't sign under penalty of perjury from participating in speech. As minor's can't sign legal documents, they would be in violation of the law and thus are prohibited from speaking. This is a violation of the 1st Amendment to the constitution.

9. Section 201.36 article 'E' Content, section 5 - System Failure, item 'h' - Confidentiality
The proposed rule is unenforceable and violates anti-spamming 'opt-in' conventions of the Internet. The Reports Of Use as proposed would be a sensitive document with huge marketing potential for a variety of market participants. It is obscenely naive of this body to accept that there will not be rampant violation of this rule. Possession is 99% of the law - and the sensitive information in these reports would be possessed by those wishing to profit and with nothing to lose. The broadcaster, however, would lose visitors due to lack of integrity (yes, that does factor largely on the Internet) and violation of anti-spamming conventions of 'Opt-in list use' which forbids the sharing of visitor information, effectively black-balling themselves on the web as a pariah. Once again, these rules serve the traditional (minority stakeholder) industry's purposes and those of the Collectives. It serves undue burden upon those broadcasters who would be forced to turn over their 'customer lists' to outside organizations who would exploit them for personal gain. Without a realistic deterrent from illegal behavior in the light of the temptations of massive potential advertising and marketing profits, those who would receive the reports are sure to use them to illegal gains.

In closing, a dialogue with Independent Internet Broadcasters, Producers and Labels prior to this late date would have greatly benefited this process. I suggest to you that the advice you have received from ASCAP, RIAA, BMI and the Major Traditional Broadcasters is patently self serving and is in restraint of trade. Then there is the violation of the 1st Amendment to the Constitution to consider.

Sincerely,

Joel B. Easton, COO
CPI Interactive
Virtual Radio