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Radio And Internet Newsletter

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September 13, 2002

PREV.

Daily news and commentary on the key issues involving radio and the Internet

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Today's the day! We hope you can make it to our **RAIN Reader Cocktail Party, today 5-7p** at the **Gordon Biersch Brewery Restaurant**. It's just one block from the convention hotel at 7th and Pine, right above the Barnes & Noble. No need to RSVP, just join us! Hope to see you this afternoon.



B'casters ask that webcast fees be put on hold pending appeal



BY PAUL MALONEY

Broadcasters, citing their ongoing appeal as to whether they should be subject to webcast royalty fees at all, filed a motion with the U.S. Copyright Office requesting a "limited stay" on those royalties.



The request, from commercial broadcast groups Bonneville, Clear Channel, Cox, Emmis, Entercom, Salem, and Susquehanna – as well as the National Association of Broadcasters – was delivered late Wednesday to Registrar of Copyrights **Marybeth Peters** (pictured left) from the law firm of Weil, Gotshal, and Manges.



BONNEVILLE
INTERNATIONAL
CORPORATION

Broadcasters are currently arguing in the Third Circuit Court of Appeals that the language of the DMCA does **not** make them liable for royalties for the use of sound recordings, as they are exempt for the use of such in over-the-air broadcasts.



"If AM/FM Streaming later is found to be exempt by the Third Circuit," the broadcasters' motion reads, "and this application for a stay is not granted by the Copyright Office, thousands of radio stations will suffer **irreparable harm** in that



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they will have been required to dedicate substantial resources to the complex task of calculating, preparing statements of account and making royalty payments covering a four-year retroactive period as well as ongoing monthly royalty payments..."



The broadcasters claim to fear the "very real spectre of administrative chaos" and "multiple law suits" that would result from refund claims from broadcasters who paid royalties, only to later be found exempt from those royalties by the Court.

Commercial broadcasters – with the exception of Salem – refrained from filing appeals to the Librarian of Congress's final determination on the



webcast royalty rates themselves.

A copy of the motion (in Adobe Acrobat format) can be found on the NAB website [here](#).

RAIN is brought to you today by:



The LMiV debacle ([here](#)) is just another example of a venture that could have used a fresh perspective from a disinterested outsider.

One option to consider: RAIN's Kurt Hanson is now available to help you and/or your management team make intelligent decisions — and maybe help you save up to \$37 million!

With your initial consulting visit, you can also schedule a **free two-hour seminar** for your staff and/or clients on the long-term future of Internet radio. Click [here](#) to learn more.

DeCastro joins "Strategy Council" for reshuffled AOL exec team

From the Associated Press: "AOL Time Warner Inc.'s America Online division announced a new management structure Thursday in a shake-up that included the dismantling of a department whose business transactions have come under scrutiny.

"The changes, which restore America Online veteran **Ted Leonsis** to a more prominent position, are intended to give newly appointed chief executive and chairman **Jon Miller** a more direct say in brand, marketing and technology issues..."



"Under the new structure, executive vice president and chief financial officer Joseph Ripp becomes a vice chairman with responsibilities including network infrastructure and technology operations.

"He and Leonsis, who is already a vice chairman, will effectively function as Miller's No. 2's. Leonsis will oversee new councils on brand, product and technology strategy.



"Current chief operating officer J. Michael

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Kelly becomes chairman and chief executive of AOL International. AOL Interactive Services president **James de Castro** will work on a Senior Strategy Council with Ripp, Leonsis, Miller and Don Logan, chairman of AOL Time Warner's media and communications group."

Read this entire AP story in Yahoo! [here](#).

This is Part 4 of 5 in a series...

RAIN Guest Essay

Royalty Voodoo Economics: Dealing with mixed messages



BY JOEL WILLER
for Radio And Internet Newsletter

College webcasters who have for any length of time watched developments on the digital sound recording performance royalty front expected this rate determination would look very much like previous rate determinations for noncommercial statutory licenses with Performance Rights Organizations ASCAP, BMI, and SESAC. Noncommercial broadcasters' statutory licenses with the PROs have always been based on a **blanket fee**, not on a per-performance royalty.

After reading the earlier installments of this series, the reasoning behind the previous royalty determinations should be self-evident. First, any exercise to attempt to determine an exact number of college webcaster "performances" is

futile and highly prone to overwhelming errors. Second, the **low-volume** of listenership for the typical college radio station makes elaborate royalty collection schemes impractical, both for the stations and for the copyright owners.



Under the per-performance model, the royalty collection machine is likely to totally consume the limited fees to be collected from college webcasters, long before any money is paid to artists or recording labels. If the costs of paying the royalty, when added to the royalty itself, outweigh the perceived advantage to the college webcaster, the station will simply cease providing the service, as many already have done. In either case, the artist receives no financial benefit. Actually, the artists stand to **lose** the promotional assistance provided by the increased public exposure provided by the college webcasters.



Rejection of "flat fee" model was wrong

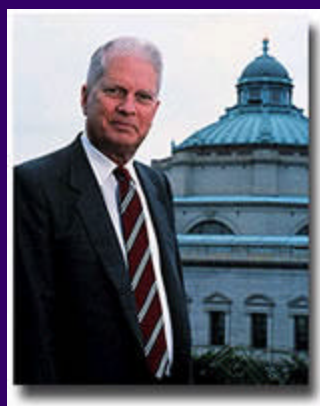
The **National Religious Broadcasters Music License Committee** urged the CARP to base noncommercial broadcaster sound recording performance rates upon the flat fees paid to the Pros. The arbitration panel declined this suggestion, stating, "Putting aside our hesitancy to utilize over-the-air musical works performance rates as a proxy for webcasting sound recording performance rates, those fees were settled pursuant to joint proposals that are not part of this record."



The panel thus erred in not just rejecting the amounts of the prior PRO statutory licenses as proxy for the webcasting rates, but in also rejecting the model of a blanket license for noncommercial webcasters.

The final CARP report states that "a per-performance metric "is directly tied to the nature of the right being licensed." However, previous arbitration processes, also tied to licensing performance rights for musical works, have determined that the blanket fee metric **can be appropriate** for noncommercial broadcasters.

A mixed message comes from the Librarian of Congress, who later makes reference to the rejected PRO licenses in his final determination:



**Librarian of
Congress
Dr. James H.
Billington**

"One last disputed issue raised by the non-CPB, noncommercial broadcasters is the imposition of the same \$500 minimum fee that the CARP set for all other licensees. They argue that a \$500 minimum fee far exceeds any reasonable rate that should be imposed on this category of users in light of the financial considerations that distinguish them from the other services. In support of this position, the users cite Dr. Murdoch's testimony to illustrate that the Internet license for use of SESAC's repertoire is less than \$100. But this is not the total amount that a noncommercial station would pay; it would also have to pay fees to BMI and ASCAP in order to license all the works included in the sound recordings covered by the section 114 license. The minimal amount that a webcaster must pay to cover the combined works administered by the three Pros is \$673, more than the proposed minimum rate to operate under the section 114 license."

In this statement, the Librarian arbitrarily and wrongly assumes that the size of non-CPB, noncommercial broadcasters' Internet audiences are of the **same size** as their over-the-air audiences. Once he elected to compare the rates under the two licenses, the Librarian was obliged to ensure his comparison was proportionate.

As with previous segments of this series, I'll use data from the University of Louisiana at Monroe's KXUL to demonstrate the harm caused by this mistake. For the calendar year 2001, KXUL's average Internet audience was just 0.77% of the station's over-the-air audience, yet the minimum sound recording performance fee (\$500.00) is 74% of the total PRO license fees for noncommercial broadcasters (\$673.00). The Librarian's final decision seemingly **values Internet performances** several orders of magnitude greater than over-the-air performances, which is an unfounded determination.

Even Librarian and RIAA can accept comparable agreements as benchmarks

The Librarian's decision demonstrates that he is willing to **revisit** the appropriate use of precedent established by the PRO rate proceedings. What he neglected to do, however, was to recognize that the CARP committed a legal error when the panel failed to fully consider the model of a blanket fee for small-volume services like college broadcasters. With this scheme's accompanying lowered administrative costs, a rate in keeping with the nature of these services could be established, while still protecting the interests of the copyright owners.

Even the RIAA has acceded to the merits of a blanket license fee for noncommercial broadcasters. The RIAA negotiated a private agreement with the [Corporation for Public Broadcasting](#) that includes a single blanket fee covering the Internet

retransmissions of 410

noncommercial radio stations funded by CPB. That pact represents the only accord negotiated by the RIAA with a noncommercial broadcaster. The terms of this agreement



received **no apparent consideration** by the CARP, although the negotiation was prompted by the arbitration panel. This turn certainly contradicts a section heading in the CARP report: "Comparable Agreements are the Best Benchmark."

Joel Willer is an Assistant Professor of Mass Communications at the University of Louisiana at Monroe and general manager of the school's radio station KXUL. There will be three more installments to this series. Read Part 1 [here](#), Part 2 [here](#), and Part 3 [here](#)...

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KSON GM blames rival station for fraudulent e-mails, feds called in

From Radio & Records: "**Darrel Goodin**, GM of Jefferson-Pilot's **KSON**, tells the **San Diego Reader** that several fraudulent e-mails have been sent under his and other station personnel's names, and he blames his station's rival, Clear Channel's **XHCR**.



"One e-mail, sent to KSON air talent **Deb Spring** [below right], read, 'Could that last break have sucked any more than it did?'

Jesus, act like you want to be here.' Another, to a sales manager, read, 'We're going to be commercial-free for the rest of the month, beginning tomorrow.'

"The FBI was brought in after the fourth e-mail, which Goodin says was a 'slur,' and while the feds contacted Clear Channel no charges were filed and the case was closed."

Read this entire story from R&R in the today's News section [here](#).



Silenced by royalties

Here is a growing list of webcasters who, because they don't feel they can manage webcasting royalties in a viable business, have decided that it's in their best interests to silence their streams. (We thank them for their hard work and dedication to their audiences and the industry, and wish them luck in their future endeavors...)

247PolkaHeaven.com	All80s.com	AudioCandy.com
BlueMars.org	BrazilCast_1_2	Celtic_Heritage_Webradio
Chez Whitey	CIRNH.com	Citadel stations
Clownmask Radio	Entercom stations	Gleiser Communications
Good Time Oldies Radio	Greater Media stations	GrrlRadio
HitRadio.biz	Hot Hit Radio	IdahosCast.com
Ithaca College Radio	Jones College Radio	KBCS/Bellevue
KBVR/Corvallis	KDEC/San Francisco	KEDM/Monroe
KEOM/Mesquite	KETR/Commerce	KGRK/Cedar Falls
KHUM/Humboldt. Co.	KKDV/San Francisco	KKNX/Eugene
KKNNG/Oklahoma City	KKPT/Little Rock	KKUP/Cupertino
KMGO/Centerville	KNHC/Seattle	KOIT/San Francisco
KOKE/Oklahoma City	KOMA/Oklahoma City	KPIG/Freedom
KRCL/Salt Lake City	KROK/DeRidder	KTPW/Dallas
KTRS/St. Louis	KTXN/Victoria	KVVP/Leesville
KUMX/South Fort Polk	KWXY/Cathedral City	Lotus Radio stations
Maranatha stations	McClure stations	Midwest Family stations
Minion Radio	MonkeyRadio.org	MoreMusicRadio.net
MYNDFK.com	NetRockRadio.com	NextMedia stations
OnTheCorner.fm	Perkigoth.com	PissMonkey
Powerrocks.com	Progrock.com	Psychedelic Time Warp
Pulverradio.com	RadioAmerica	RadioBoston.com
RadioCentral.com	RadioMAX	Radio Free Akron
Radio Free BD	Radio Free Tiny Pineapple	Radio Isla Negra
ReggaeTrain.com	Renda Broadcasting	RKNA: Aural Arcana
SavageRockRadio.com	Shwango Radio	Simmons Media stations
SomaFM.com	StarDogRadio.com	TagsTrance.com
The City Radio	The Lost 45s	The Radio People stations
therockfm.com	TheVoice	The Zoo
UCLARadio.com	WAAF/Worcester	Waitt Radio Network
WAME/Statesville	WBEB/Philadelphia	WCKW/La Place
WDCE/Richmond	WDWN/Auburn	WellsRadio.net
WELW/Cleveland	WEST/Easton	WEZS/Laconia

WGQR /Elizabethtown	WIIY /Baltimore	WJTL /Lancaster
WLUP /Chicago	WMHB /Waterville	WMMR /Philadelphia
WOVRadio.com	WRLT /Nashville	WRSI /Greenfield
WRUR /Rochester	WRVG /Georgetown	WSBF /Clemson
WSWI /Evansville	WUVT /Blacksburg	WVCR /Poughkeepsie
WXRV /Haverhill	WYYB /Phoenix	WZBC /Newton
WZIP /Akron	WZMR /Albany	Yahoo! Radio stations

Have we missed others? Use the feedback form above or e-mail us [here](#).

Other public stations now off line

This is from the [SOS: Save Our Streams](#) website, which focuses the struggle against the webcasting royalty rates as they pertain to independent educational and noncommercial stations.

KAPU-CA; KSDS-CA; KTAI-TX; KTSW-TX; KWJC-MO; KXCI-AZ; KXRJ-AR; WEBR-VA; WERS-MA; WEVL-TN; WMHW-MI; WMUA-MA; WNYU-NY; WONB-OH; WPTS-PA; WRMC-VT; WSRN-PA; WSTB-OH; WSUM-WI; WSUW-WI; WUTK-TN; WXOU-MI

Upcoming conferences

Sep. 12-14, 2002	NAB Radio Show 2002 : Seattle, WA
Sep. 26-Oct. 6, 2002	Museum of Television & Radio 8th Annual Festival : New York, NY
Oct. 1-4, 2002	Streaming Media East : New York, NY
Oct. 20-22, 2002	NAB European Radio Conference : Prague, Czech Republic
Oct. 30-Nov. 2, 2002	CMJ Music Marathon 2002 : New York, NY

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