



Virginia Association of Broadcasters Legal Review



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November 2, 2015

Legal Memorandum

AN IMPORTANT DECISION FOR RADIO STATIONS: TO ACCEPT SESAC'S ROYALTY RATE OFFER OR AUTHORIZE THE RADIO MUSIC LICENSE COMMITTEE TO SEEK A RATE THROUGH ARBITRATION

Radio stations throughout the country have received letters within the last two weeks from SESAC and from the Radio Music License Committee (the "RMLC") concerning renewal of their SESAC music licensure agreement. A copy of each letter is attached.

Stations have expressed confusion about the letters and have sought advice on how to respond. Each station, of course, will need to decide that question for itself, and, if needed, confer with its legal counsel, but here is an explanation of the two letters.

The RHMC, a committee comprised of radio broadcasters, filed an antitrust lawsuit against SESAC for unlawful antitrust violations. Several months ago, RMLC reached a settlement with SESAC in which SESAC agreed to have its royalty rates for the radio industry set through an arbitration process, but each individual station may, in lieu of arbitration, negotiate its own individual rate with SESAC. Stations have until **November 20, 2016** in which to notify the RMLC whether it will "opt in" and accept the industry-wide rate schedule that will be established by arbitration. Unless that deadline is extended, stations that elect not to "opt in" will be left to negotiate their rates, individually, with SESAC. (The process is explained in the attached October 28, 2015 letter from RMLC.)

In the meantime, SESAC has sent radio stations a letter (*see* SESAC's attached October 22, 2015 letter) urging stations not to "opt in" the antitrust settlement with RMLC, but rather accept SESAC's specific offer of 5% rate reduction. The RMLC contends in its letter that SESAC's rates are likely to be reduced in the upcoming arbitration process by a greater amount than 5%. The RMLC is recommending that stations reject SESAC's offer and, instead, "opt in" the arbitration process. The RMLC says SESAC is trying to "divide and conquer" the radio industry.

We encourage all radio broadcasters to carefully review each attached letter and any other information they may have on the issue. As noted earlier, the decision on to which option to elect is a decision for each station, individually, to make.

If you have any questions concerning the information discussed in this memorandum, please contact your communications counsel or any of the undersigned.

Stephen Hartzell, Editor

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October 22, 2015

Dear

In accordance with the terms and conditions of the current agreement in effect between your station(s) and SESAC, enclosed is the Radio License Fee Schedule for the years 2016-2018.

SESAC is pleased to offer you a 5% reduction in the license fees reflected on this Schedule beginning on January 1, 2016, with the only adjustment in 2017 and 2018 being reflective of any adjustment in the Consumer Price Index-All Urban Consumer (CPIU). This offer guarantees you license fee certainty and a discount in 2016 below present fee levels. To accept this offer, all you need to do is sign and return the attached Authorization by November 15, 2015.

You have alternatives. The RMLC and SESAC reached an agreement that allows commercial radio stations that meet eligibility requirements to elect to be represented by the RMLC in negotiations with SESAC to determine license fees — and in an arbitration proceeding, if the negotiations are unsuccessful — for the period January 1, 2016 through December 31, 2018. There is no certainty as to what fees will result from the negotiations or arbitration. In addition, to be represented by the RMLC, you will have to pay a new administrative fee to the RMLC. The RMLC estimates that this new fee will be about 50% of what you are currently assessed by the RMLC annually with respect to ASCAP and BMI. You will not have to pay this additional fee if you choose to sign the attached Authorization, and you will have certainty, today, as to the fees you will be paying SESAC from January 1, 2016 through December 31, 2018.

If you do not sign and return the attached Authorization by November 15th and do not choose to be represented by the RMLC, then the attached Radio License Fee Schedule will prevail from January 1, 2016 through December 31, 2018 with the only adjustment in 2017 and 2018 being reflective of any adjustment in the CPIU, and you will not have to pay the new RMLC fee.

We are pleased to enclose additional information that describes several of SESAC's recent affiliations and the growth of SESAC's repertory. Please feel free to contact us should you have any questions concerning this matter.

Sincerely,

A handwritten signature in cursive script that reads "William R. Lee".

William R. Lee
Senior Vice President
Licensing Operations

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October 28, 2015

Dear Broadcasters:

We recently advised that the Radio Music License Committee ("RMLC") and SESAC had reached agreement as to the terms of a settlement concerning antitrust litigation initiated by the RMLC against SESAC. You are receiving this letter for two reasons.

First, our records indicate that you have not yet elected to have your station(s) opt-in to the settlement and the initial deadline is almost upon us. [If you have submitted the settlement opt-in form within the past several days, please disregard this letter.]

Second, it has come to the attention of the RMLC that SESAC has been contacting the industry, by phone solicitation as well as by letter (see sample attached), in an effort to dissuade stations from joining and benefiting from the recently negotiated settlement. As an inducement, SESAC has offered stations and station groups varying, but small overall, reductions from their current license fees for licenses commencing 2016 – which, incidentally, follows repeated prior rate increases that SESAC imposed on the industry as recently as this year. While SESAC's letter is careful not to indicate a view as to how these reductions are likely to compare with the fees that will result from arbitration on behalf of stations electing to join the settlement, its telephone messaging has been far more aggressive. In those communications, SESAC has suggested without basis that it is likely to achieve significantly higher fees from arbitration than it is now collecting industry-wide. SESAC's letter further tries to steer stations away from the settlement by stating that by entering into individual arrangements with SESAC, stations will avoid paying an RMLC administrative fee designed to support the arbitration effort.

You should have all of the facts in front of you in making your election. You should ask yourself why SESAC would go to the trouble of undercutting the very settlement terms that it just recently bargained for with our industry. It seems evident that the divide-and-conquer strategy on which SESAC has now embarked has two primary goals. The first is to undercut the RMLC's ability to vigorously represent our industry in the forthcoming arbitration. Only by dissuading stations from entering into the settlement, and only by advising stations that they will allegedly be economically disadvantaged by financially assisting the committee in funding that arbitration, can SESAC hope to succeed in doing so. The second is SESAC's recognition that the likely outcome of the arbitration will be a much more significant rollback in fees than the reductions it is now offering. While more work and information gathering needs to be done,

the Committee's preliminary estimate is that SESAC has been overcharging the industry **by more than 100%** -- meaning that reasonable fees beginning 2016 should be set at **half or less than current levels**. We believe this result is attainable and that SESAC recognizes as much. As a result, SESAC is hoping to "cut its losses" by securing individual station and station group deals at levels well above that likely outcome. By doing so, SESAC seeks to reduce the number of stations that will benefit from the much larger fee reduction that is likely to result from arbitration. It also hopes to put before the arbitration panel as asserted evidence of the fair market value of its repertory whatever individual licenses it is now able to enter into at these inflated fee levels.

We wish to be clear that each broadcaster is free to decide whether to enter into the terms of the antitrust settlement or not, and whether to continue to deal individually with SESAC or not. We remind you that a decision *not* to participate in the settlement will result in your having a continuing obligation to deal with SESAC on your own. It will deprive your stations of protection from threatened infringement suits from SESAC if you fail to agree to SESAC's terms of license and also deprive your stations, for the first time in the industry's history, to have their SESAC fees determined by a third-party arbitration panel.

For your benefit, we summarize below these and other highlights of the recent settlement, which are available only to stations opting into it:

- In the absence of a voluntary agreement, SESAC will submit to binding arbitration in order to set reasonable license fees to be offered the radio industry through the RMLC. This binding arbitration period will encompass 22-years commencing 2016 and no historic SESAC rates may receive precedential value.
- SESAC's rates will be frozen at existing 2015 levels, with no opportunity for SESAC to attempt further rate increases until the parties' negotiations or arbitration are concluded covering rates for the license term 2016 through 2018.
- SESAC will continue to offer its existing All-Talk Amendment discount of 75% to operators of talk-format stations.
- SESAC will refrain from pursuing pending audit claims or instigating new audits.
- The scope of rights to be covered under future SESAC licenses will mirror the coverage that traditional operators currently enjoy with ASCAP and BMI, and SESAC commits to consolidating (as of 2016) its current three separate license structure for over-the-air, HD radio and streaming into a single license.
- SESAC's writer and publisher affiliates will have greater ability to license works directly to radio station operators.
- In terms of pressing copyright infringement claims against stations, SESAC will be limited to pursuing only claims on works that have been posted to their online repertory search tool for at least 45 days. Additionally, SESAC must divulge, in addition to song title, the time and date of all alleged claims of infringement.
- SESAC will enhance its online repertory search offerings in order to support more user-friendly identification of SESAC works (including commercials and incidental music).

- SESAC will, at the RMLC's discretion and upon consent from stations participating in this settlement, bill and collect an RMLC administrative fee to enable funding of the RMLC's support efforts in implementing the terms of the settlement and managing future arbitrations.

It is the fervent belief of the RMLC that this settlement affords our industry the best opportunity to achieve sustained SESAC fee and risk-of-infringement relief. We regard the recent communications from SESAC as reflecting nothing short of an effort on SESAC's part to repudiate the terms of a carefully negotiated settlement, and to avoid the consequences of having SESAC's monopoly pricing subjected for the first time to careful scrutiny by an arbitration panel. Please consider SESAC's outreach to your stations in the light of these considerations.

In order to participate in and receive the benefits of this settlement, please "opt-in" for RMLC representation by completing and returning the enclosed Authorization form to the RMLC by no later than November 20, 2015. This represents an extension of our initial deadline in view of the extraordinary circumstances triggered by SESAC's attached industry letter.

Should you have any questions concerning this matter, please feel free to contact the RMLC.

Best regards,

A handwritten signature in black ink, appearing to read "Ed Christian". The signature is stylized and cursive.

Ed Christian
RMLC Chairman