

Testimony of
Mr. Frank Schliemann

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Introduction

Chairman Leahy and members of the committee, I want to thank you for the opportunity to discuss the proposed sound recording royalty rate released by the Copyright Arbitration Royalty Panel on February 20th, 2002. I am privileged to be here on behalf of the Internet radio community.

Onion River Radio is an Internet-only radio station located in Montpelier, Vermont. Our objective is to serve our community, which we do in many ways. We are a Media Sponsor of community events such as First Night Montpelier and Green Up Vermont. We also feature local music in regular rotation to provide exposure and opportunity to local artists.

We believe, based on feedback from our listeners, recording artists, advertisers and the community, that Onion River Radio is in the earliest stage of what will eventually be a successful, local business. The recommended royalty rate, however, will cause Onion River Radio and hundreds of other Internet radio stations to file for bankruptcy. This is not the result Congress intended when enacting the DMCA.

Personal background

My career in radio began in 1992. Over the past ten years I have "worn many hats." As an On-Air Personality, I interviewed various artists such as Sheryl Crow and Melissa Etheridge. I also had the privilege of introducing the Dave Matthews Band to an intimate crowd of fans and record executives. The performance celebrated the band's major label recording contract with RCA.

As Management Information Systems Director with Capstar Broadcasting, I provided Local Area Network management support, developed the Internet department for the creation of station web sites and sale of online advertising, and assisted the Engineering Department in the maintenance and repair of studios, transmitters, and associated equipment.

I was able to combine my programming background with my engineering experience working for Burlington Broadcasters. As Acting Operations Manager I oversaw all Programming, Marketing and Operations in the absence of the General Manager, and oversaw the build-out of WIZN-FM and WBTZ-FM On-Air, Production, and Performance Studios.

Most recently with Killington Broadcasting, I oversaw the build-out of the On-Air and Production Studios for WEBK-FM, as well as all Programming and Production. When WEBK-FM was acquired by Pamal Broadcasting, the owner of many stations in Vermont and New England, I was offered a higher position within Pamal.

Rather than accept the position with Pamal, I chose to start an Internet-only radio station called Onion River Radio. I made the decision for several reasons:

1. The programming offered by broadcast radio has suffered as a result of the substantial consolidation of stations into a few large chains that was permitted by the Telecommunications Act of 1996.
2. Unlike terrestrial radio, Internet radio is not limited by local terrain or signal strength.
3. My combination of music programming, computer networking and engineering skills enabled me to create a viable business while keeping costs to a minimum.

A few large companies own the majority of broadcast radio stations, resulting in "cookie cutter" radio

Since Congress enacted the Telecommunications Act of 1996, radio stations have been bought and sold numerous times. Eventually, companies such as Clear Channel were able to acquire many of the other broadcasting companies. WVGO-FM, for example, was under the ownership of five separate broadcasting companies over the span of three years: Benchmark, ABS, SFX, Capstar, and Clear Channel.

In an effort to reduce costs, many broadcasters use a single music consultant for stations with a similar format. The songs played on a country station in Springfield, Massachusetts are the same songs heard on a country station in Springfield, Illinois. The result is "cookie cutter" radio.

Another trend in broadcast radio is to limit the number of songs that can be scheduled for airplay and decrease the amount of time before a song can be repeated. Fewer songs and a tighter rotation increase the listener's chance of hearing his or her favorite song as he or she drives to work. Unfortunately, the same listener will hear the same songs on the drive home. This also makes it difficult for local and lesser-known artists to receive radio airplay. A lack of diversity on the other hand, creates opportunity for stations such as Onion River Radio.

Internet radio provides listeners and artists with an alternative to cookie cutter radio

The success of Internet radio, as reported to you in this hearing by Arbitron and as documented daily by our server logs, is proof that music-loving consumers want access to the originality and variety that online radio represents (see, for example, a sample from the numerous testimonials from our listeners that I have attached to the end of this testimony). Notwithstanding the technological imperfections of this new and developing medium Onion River Radio's audience is steadily growing, and Internet radio generally has exploded. Since January 1, 2001, the total time spent each week listening to Internet radio stations measured by one ratings company, MeasureCast, has increased 563%, as shown in the attached chart.

A listener in Los Angeles sent the following email: "I figured a Vermont station might play toward my classic rock, slightly granola, songwriter leanings. It really is a great station free from bubble gum pop and overplayed classics." On Onion River Radio, listeners can hear lesser-

known artists mixed in with more established artists. Local artists and record labels also appreciate the exposure we provide them.

Internet radio overcomes the physical limitations of broadcast radio

In Vermont, as you know, Mr. Chairman, local terrain makes it difficult to listen to broadcast radio. Although only forty miles away, a listener in Montpelier cannot hear a 50,000-watt broadcast station in Burlington. The Internet however, makes it possible to listen to Onion River Radio anywhere in the world.

Internet radio stimulates the growth of broadband services

Internet radio also gives consumers a reason to install a high-speed connection in their homes, therefore encouraging the growth of broadband. Very soon, wireless broadband networks using third-generation or 3G technology will take Internet radio to the next level. The growth of networks such as this will expand Onion River Radio's opportunity for success. The Internet is an exciting new medium that needs time to develop.

The CARP's proposed decision would bankrupt my business

As General Manager, Program Director, Engineer, and Traffic Manager, I have invested a considerable amount of time over the last sixteen months to ensure the success of Onion River Radio. I have also invested a substantial amount of money. Our audience has continued to increase, and prior to February I was convinced that Onion River Radio would not only survive, but also provide results for local advertisers. Then the Copyright Arbitration Royalty Panel recommended music licensing rates that would result in royalty fees totaling 78% of our gross revenue.

The RIAA and SoundExchange have said many times in the media that webcasters should not get a "free ride" from record companies and recording artists. Webcasters are not asking for a free ride. We want to ensure that all creators are fairly compensated for their work. Like broadcast radio, Internet radio stations already pay royalty fees to songwriters and music publishers for the same performances of the same works. If the CARP decision is approved by the Librarian of Congress, Onion River Radio will pay a sound recording Performance Fee of \$1,880.93 for January - March 2002. In contrast, our performance fees for that period to songwriters and music publishers, through ASCAP, BMI and SESAC, will total \$170.50.

The total time spent listening to Onion River Radio has doubled between October 2001 and March 2002 (from 16,513 hours to 32,162 hours). Because the CARP-recommended royalty rate is a flat rate based on the number of times a listener hears a song performed, Onion River Radio and other Internet radio stations must pay for every additional listener. As our ratings continue to increase, I expect our TSL (total time spent listening) will reach a minimum of 100,000 hours per month by the end of the year. A station that streams 100,000 hours per month will be required to pay an annual Performance Fee of \$25,200 (Performance Fee = TSL x 15 songs per hour x .14¢).

A percentage of revenue royalty formula is fair to all webcasters in all markets

Radio broadcasters have paid songwriter royalties on a percentage-of-revenue basis for decades. For a typical broadcaster, larger audience means increased payments for advertising, which means increased payments to songwriters and music publishers through ASCAP, BMI and SESAC. The percentage-of-revenue formula is a win-win for broadcasters and songwriters.

The advertising rate for a 60-second commercial between 6 a.m. and 7 p.m., on Onion River Radio is \$10. Our advertising rates must remain low in order to compete with local broadcast stations. With limitations on growth and advertising revenue, the sound recording royalty is even more threatening. We need a large number of listeners in order to attract local advertisers and increase revenue. We also need a large number of listeners to ensure our advertisers will get results. An increase in the number of listeners, however, will result in a higher fee. We will be bankrupted by royalties.

I have been asked why Onion River Radio did not prepare for this new royalty. To the contrary, we did. Regretfully, I assumed, like everyone else in the industry, there would be a percentage-of-revenue alternative similar to the 3-4% webcasters already pay to songwriters and music publishers. Rather than a flat rate based on the unknown, a percentage-of-revenue alternative will allow Onion River Radio and other Internet radio stations to grow and generate more profits for creators, publishers, performers and producers, as well as webcasters.

The record industry has misinformed Congress and the media about Onion River Radio and webcast economics

I am troubled by the lengths to which the RIAA has gone in its effort to squeeze every penny possible out of webcasters, with no regard to whether they are killing the goose in their greed for golden eggs. For example, in a recent letter that was published in Salon.com ("The Battle Over Web Radio Continues") Steve Marks of the RIAA makes the following misstatements and distortions:

1. "OnionRadio [Onion River Radio] is part of the WarpRadio Network, which includes 12,518 stations."

? Fact: The actual number of stations is between 180-195 according to Denise Sutton, WarpRadio CEO.

2. "WarpRadio is likely to be paying, not OnionRadio."

? Fact: All sound recording licensing fees are the responsibility of the affiliate (in this instance, Onion River Radio), according to our contract with WarpRadio and according to Candice Seevers, WarpRadio Traffic Manager.

3. "More important, based on MeasureCast reports, WarpRadio would owe about \$57 per station."

? Fact: At our current audience size, it will take less than two days to exceed a fee of \$57, and as noted above our fee for January-March 2002 is almost \$1900.

Additionally, in a recent New York Times story, Mr. Marks said "They [webcasters] pay for the bandwidth, they pay for their computers, they pay for the streaming software. There's no reason they should not be able to pay for the very music they're building a business on."

? Fact: Onion River Radio already pays for music. We also pay performance fees to songwriters and music publishers, through ASCAP, BMI and SESAC. At a cost of \$250 per month, bandwidth is our single largest expense. Because our contract with WarpRadio includes live no-limit streaming the cost of bandwidth will remain unchanged. As technology improves we anticipate bandwidth costs will in fact go down. Our performance royalty of \$675 per month, however, will increase as our audience continues to grow.

Internet radio should be treated like broadcast radio

Broadcast radio has never paid sound recording performance royalties, based on the theory that radio performances serve to promote CD sales. However, the same can be said for Internet radio. In fact, Internet radio is a better promoter of music sales than is broadcast radio: If a listener hears a new song on Onion River Radio that is unfamiliar, he or she can find the artist, song title, and record label by clicking on the "Menu" button and "New Music Playlist." Other Internet radio stations let the listener click right through to a sales destination to buy the new song or CD that they just heard and enjoyed.

Onion River Radio should not be held responsible for revenue the RIAA believes it is losing in CD sales from file-sharing web sites such as Napster. Internet radio is similar to broadcast radio and does not pose a threat of piracy. There is a fundamental and crucial difference between streams, which Internet radio sites like Onion River Radio provide and which are transitory occurrences that are not stored on a computer's hard drive any more than a song played by broadcast radio is stored on your car radio, and downloads, which are made available by services such as Napster and KaZaA and which are permanent copies that are stored on hard drives.

Physically, there is little difference between WIZN-FM, WBTZ-FM, WEBK-FM and Onion River Radio. All four stations use similar hardware and software. In order to maximize hard drive space, broadcast radio stations use compressed copies of original sound recordings. Like broadcast radio, Onion River Radio uses compressed copies of sound recordings that are approximately one-fourth of the original file size. Streaming further degrades the quality of a recording. Onion River Radio streams at a rate of 20K bits/second with a frequency of 22.05 kHz. With a 20K, 22.05 kHz stream, the bit rate is compressed by more than 6 times and the frequency is cut in half.

The copyright principles that exist for broadcast radio should also apply to Internet radio. However, the law presently discriminates against the Internet, by requiring Internet radio to pay whole sets of royalties that broadcast radio does not have to. Unlike broadcasters, webcasters are required to pay a Performance Fee as well as an Ephemeral License Fee (9% of the Performance Fees due). In order for an Internet transmission to sound as smooth as broadcast radio, a few seconds of audio are retained in the RAM (random access memory) of the listener's computer. Once performed, the buffered audio is discarded and replaced with the next few seconds of music or commercial announcement. The Ephemeral Recordings do not have any economic value.

The recordkeeping requirements sought by the RIAA are oppressively burdensome

I am also concerned with the extensive monthly reports that the RIAA is urging the Copyright Office to require. Our Music Use Report for BMI requires the following four (4) fields of information: song title, artist, composer, and count (the number of times the song was played during the reported time period). The regulation submitted by the RIAA and published for comment by the Copyright Office requires twenty-three (23) fields of information (including ten separate means of identifying each sound recording, with items such as the UPC code) even though Congress, in the DMCA, required webcasters to submit only three (song title, album title and featured artist) to ensure the accurate distribution of royalties.

The proposed regulation requires webcasters to provide information on every song played, every hour of the day, every day of the year. Music reporting is a huge burden on a small business. It currently takes three weeks to compile the information requested by BMI for a three-month period. Keep in mind that BMI is requesting only four (4) fields of information. Compiling all twenty-three (23) fields of information (including ten separate means of identifying each sound recording) required by the RIAA would be infeasible.

I am now in the process of having new music scheduling software written that will enable me to record the additional information required by the RIAA and generate an electronic file. The time it will take to obtain the information, and whether it is possible to provide all of the requested data, is still an issue.

In addition, many details of this information could even be considered proprietary, like the order in which songs are played. This is information that broadcast radio stations pay research companies to keep track of on their competitors' stations in order to "counterprogram" their station. And there is no assurance for webcasters that we won't be competing with the RIAA directly within the webcasting space.

Conclusion

In the (attached) Business Week article "Saving Web Radio: The 5% Solution," Steve Marks of the RIAA "argues that the shakeout in the webcasting business would be a natural step toward a more mature industry." The future of my industry, and my right to build a healthy local business in Vermont, should not be determined by an exorbitant flat rate. Unfortunately, the reality is that these royalties would never be paid, as we would be forced into bankruptcy. A percentage-of-revenue alternative would allow good business models to thrive while others fall short.

Giving consumers a choice makes good business sense. Onion River Radio is similar to a broadcast radio station with regard to format clocks, music categories, and certain programming rules. The music, however, is a unique mixture of AAA, Americana, Classic Rock, and Modern Rock, with local and lesser-known artists featured in regular rotation.

If the intent of the Digital Performance Right in Sound Recordings Act of 1995 and Digital Millennium Copyright Act of 1998 was to encourage the growth of new technology, implementing the exorbitant proposed rates will have the opposite effect. Instead, it will decimate the webcasting industry, reduce consumer choice, and decrease artists' opportunities to promote their music. I urge the committee and members of Congress to help save my industry, and do everything in your power to prevent these calamitous rates from being implemented.