

Testimony of

The Honorable Patrick Leahy

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Opening Statement of Senator Patrick Leahy,
Chairman, Senate Judiciary Committee

Hearing On:

"Copyright Royalties: Where is the Right Spot On The Dial For Webcasting?"

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The Internet is an American invention that has become the emblem of the Information Age and an engine for bringing American content into homes and businesses around the globe. I have long been an enthusiast and champion of the Internet and of the creative spirits who are the source of the music, films, books, news, and entertainment content that enrich our lives, energize our economy and influence our culture. As a citizen, I am impressed by the innovation of new online entrepreneurs, and as a Senator, I want to do everything possible to promote the full realization of the Internet's potential. A flourishing Internet with clear, fair and enforceable rules governing how content may be used will benefit all of us, including the entrepreneurs who want us to become new customers and the artists who create the content we value.

The advent of webcasting - streaming music online rather than broadcasting it over the air as traditional radio stations do - has marked one of the more exciting and quickly growing of the new industries that have sprung up on the Web. Many of the new webcasters, unconstrained by the technological limitations of traditional radio transmission, can and do serve listeners across the country and around the world. They provide music in specialized niches not available over the air. They feature new and fringe artists who do not enjoy the few spots in the Top 40. And they can bring music of all types to listeners who, for whatever reason, are not being catered to by traditional broadcasters.

We have been mindful on this Committee that as the Internet is a boon to consumers, we must not neglect the artists who create and the businesses which produce the digital works that make the online world so fascinating and worth visiting. With each legislative effort to provide clear, fair and enforceable intellectual property rules for the Internet, a fundamental principle to which we have adhered is that artists and producers of digital works merit compensation for the value derived from the use of their work.

In 1995, we enacted the Digital Performance Right in Sound Recordings Act, which created an intellectual property right in digital sound recordings, giving copyright owners the right to receive royalties when their copyrighted sound recordings were digitally transmitted by others. Therefore when their copyrighted sound recordings are digitally transmitted, royalties are due. In the 1998 Digital Millennium Copyright Act we made clear that this law applied to webcasters and that they would have to pay these royalties. At the same time, we created a compulsory license so that webcasters could be sure of the use of these digital works. We directed that the

appropriate royalty rate could be negotiated by the parties or determined by a Copyright Arbitration Royalty Panel - or CARP - at the Library of Congress. Little did we know then how apt an acronym that would later become.

Most webcasters apparently chose to await the outcome of the arbitration panel proceeding, and now that the finding has been reached - and is being reviewed by the Librarian of Congress - the industry is in an uproar. Nobody seems happy with the outcome of the arbitration and all the parties have appealed. The recording industry and artist representatives feel that the royalty rate - which is based on the number of performances and listeners, rather than on a percentage-of-revenue model - is too low to adequately compensate the creative efforts of the artists and the financial investments of the labels. Many of the webcasters have declared that this per-performance approach, and the rate attached to it, will bankrupt the small operations and drain the large ones. Such an outcome would be highly unfortunate not only for them but also for the artists, the labels and the consumers, who all would lose important legitimate channels to connect music and music lovers online.

Moreover, independent of the substantive outcome, I have heard complaints from all sides about the fairness and completeness of processes and procedures employed in the arbitration. Indeed, the concerns of many small webcasters were never heard, since the cost of participating in the proceedings was prohibitively expensive and their ability to participate for free was barred by procedural rules.

The Librarian of Congress can do three things. He could approve the decision, which nobody seems to like. He could order a new proceeding, which would require considerably more time and expense for the participants. Or he could reject the decision and set the rate himself, without any further input from the parties. Then, any aggrieved party could appeal the Librarian's decision to federal court, with yet another round of costly, time-consuming litigation. With respect for the Librarian, and with much sympathy for his task, I venture to guess that none of the interested parties to the arbitration are enjoying the suspense of what he will do and would prefer certainty so they can plan for the future. I also venture to guess that some if not all will find complaint with whatever he decides to do.

All of which brings me to the question I want each of our witnesses today to consider: Why can't everyone - Congress and artists and labels and webcasters alike - take the CARP as a genuine learning experience, and sit down to determine what is the next best step? If the parties can avoid more expense and time and reach a negotiated outcome more satisfactory to all participants, that would surely be preferable to rampant dissatisfaction.

There are lessons for Congress here as well, especially lessons about how compulsory licenses are no panacea, and how we might reconsider the arbitration procedures and the guidance given to rate-setters in the DMCA. Congress also should take time to evaluate how best to reach results that are as fair as possible to all concerned, and results that encourage the best use of everyone's resources in helping the Internet reach its full potential in the music realm.

I know that this panel of witnesses will be a productive and timely source of information for all of us as we move towards these goals, and I look forward to the testimony this morning.

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