

“Hold Up, Wait A Minute”: D.C. Circuit Rejects Copyright Board’s Categorical Exclusion of Internet Transmissions from Grandfathered Royalty Rates

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On August 18, the D.C. Circuit directed the [Copyright Royalty Board](#) (“CRB”) to reconsider what royalties are owed to artists by [Music Choice](#) for its streaming services, vacating the final determination of the Copyright Royalty Board. In the Court’s view, the CRB wrongfully excluded internet transmissions from the grandfathered royalty rate paid by some music services that were early providers of digital music transmissions under the Digital Millennium Copyright Act (“DMCA”). [Music Choice v. CRB, No. 19-1011](#)

The DMCA requires certain digital music services to pay a market-based royalty rate. However, the DMCA includes a grandfathering provision that makes preexisting subscription-based services, such as Music Choice, eligible to pay only “reasonable rates,” which generally allowed service providers to pay lower royalty rates. In 2016, the CRB commenced proceedings to establish preexisting service royalty rates for the years 2018 to 2022. The Register of Copyrights categorically excluded, as a matter of law, internet transmissions from the unconditional grandfathered rate. Music Choice, the only remaining “preexisting service” participating, was thus subject to the higher market-based royalty rate under the DMCA.

Music Choice argued that its internet transmissions qualified for the grandfathered rate under the plain language of the DMCA, and the D.C. Circuit agreed. Under the DMCA, a “subscription digital audio transmission” “shall be subject” to the grandfathered rate if it is (1) “made by a preexisting subscription service,” and (2) offered “in the same transmission medium used by such service on July 31, 1998.” The Court found that the DMCA’s definition of a preexisting subscription service was broad enough to include Music Choice’s internet transmissions, because the term “service” in “preexisting subscription service” refers to both the business entity making the transmissions (i.e. Music Choice) and to the “program offering” the entity provides (i.e., the Music Choice digital audio service). *Id.* at 11. Put differently, for a digital audio transmission to qualify as a “preexisting subscription service,” it must be made by a business entity with a relevant “program offering”, both of which were in existence before July 31, 1998. *Id.* Furthermore, the plain language of the DMCA grandfathers a covered entity’s program offerings that were “in existence” on or before July 31, 1998. *Id.*

Second, the DMCA applies an unconditional grandfathered rate to transmissions made “in the same transmission medium.” 17 U.S.C. § 114(d)(2)(B). Since the provision does not distinguish between different transmission media, the Court found no reason to exclude internet transmissions. Moreover, Congress *did* distinguish “satellite digital audio service” and “broadcast transmissions” for a conditional grandfathered rate, bolstering the Court’s conclusion that if Congress intended the DMCA to categorically exclude internet transmissions from the unconditional grandfathered rate, it could have done so. Since Congress did not, however, the Court declined to read the DMCA as excluding internet transmissions from those covered by the grandfathered rate.

Given that Music Choice had been providing some digital audio transmissions over the internet since 1996, and was still doing so on July 31, 1998, the Court found the Register’s categorical exclusion of internet transmissions was incorrect. Moreover, the Court determined that the “preexisting subscription service” definition and the unconditional grandfathered rate provision distinguish between transmission media employed before July 31, 1998, and those offered after that date. Therefore, the Court vacated the Register’s legal opinion and remanded the case to determine under the correct legal standard whether Music Choice’s current service offering, including its internet transmissions, qualified for the unconditional or conditional grandfathered rates. We will continue to monitor this case and report back.

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