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Not Your Grandfather's Internet Royalties? DMCA Favorable Rates Might Apply to Internet Offerings

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Reversing the Copyright Royalty Board's determination that a favorable grandfathered royalty rate did not apply to internet streaming audio transmissions, the US Court of Appeals for the District of Columbia Circuit concluded that internet transmissions are not categorically excluded from the definition of "service" in the Digital Millennium Copyright Act of 1998 (DMCA). *Music Choice v. Copyright Royalty Bd.*, Case No. 19-1011 (DC Cir. Aug. 18, 2020) (Rao, J.).

In the late 1990s, Music Choice, a company best known for its cable television genre-specific music channels, also offered some digital audio transmissions over the internet. These audio transmissions—and their alleged continuation through today—are the subject of this case.

Seeking to establish a new regime governing royalties for digital music services, Congress required in the DMCA that service providers pay copyright holders a market-based rate for playing digital music, but set a generally lower "reasonable rate" for certain preexisting subscription services. A preexisting subscription service—*i.e.*, a service offering digital audio subscriptions for a fee before July 31, 1998—was entitled to the lower rate for its subscription transmissions "made in the same transmission medium used by such service on July 31, 1998." The question here was whether those transmissions could be made over the internet.

In 2016, the Royalty Board held proceedings to set the preexisting royalty rates for 2018 to 2022, during which it referred the legal question of whether Music Choice's internet transmissions qualified for the grandfathered rates to the Copyright Register. The Register concluded that, based on the DMCA's legislative history, the grandfathered rates were intended to apply only to cable and satellite offerings. Accordingly, when the Royalty Board set rates for Music Choice's offerings, it excluded its internet transmissions from the more favorable grandfathered rate.

Music Choice appealed, and the DC Circuit reversed the Royalty Board. The Court found nothing in the DMCA that required that the definition of "service" categorically exclude internet transmissions. As long as the entity existed as of July 31, 1998 (as Music Choice undisputedly did), internet transmissions could be eligible for the grandfathered rate so long as such transmissions were in the medium in existence on that date. The Court found that nothing in the clear and broad statutory definition of "transmission medium" excluded internet transmissions. The Court also concluded that the structure of the DMCA supported such a conclusion, because in other places it distinguished

between particular types of transmissions, whereas in the grandfathered copyright rate at issue, the statute used language capturing all types of transmissions available before the key date.

Having concluded that the Royalty Board wrongly excluded internet transmissions *per se*, the DC Circuit remanded to the Board to consider "the extent to which Music Choice's current internet offerings can be fairly characterized as included in the service offering Music Choice provided on July 31, 1998."

Practice Note: It remains to be seen how narrowly the Royalty Board will define the service offered by Music Choice as of July 31, 1998. Regardless of what the Board finds, this case will likely return to the DC Circuit for further guidance on whether the "service offering" that Music Choice made more than 20 years ago is still in use today.

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