Copyright Board’s Royalty Rates for Streaming Services Can Play On

Article By
Sarah Bro
McDermott Will & Emery
IP Update

- Communications, Media & Internet
- Entertainment, Art & Sports
- Intellectual Property
- Litigation / Trial Practice
- Federal Circuit / U.S. Court of Spec. Jurisdiction

Friday, October 26, 2018

The US Court of Appeals for the District of Columbia Circuit sustained statutory royalty rates set by the Copyright Royalty Board for certain web streaming services following a challenge to the rates by an independent singer/songwriter and a collective organization representing holders of copyrights in sound recordings. SoundExchange, Inc. v. Copyright Royalty Board and Librarian of Congress, Case No. 16-1159, consolidated with 16-1162 (DC Cir. Sept. 18, 2018) (Srinivasan, J).

In 2016, the Copyright Royalty Board, a group of three judges appointed by the Librarian of Congress, undertook its responsibility of setting the rates and terms of statutory copyright licenses, including for “noninteractive” webcasting services (i.e., services that select the songs they play for listeners), for the following five-year period. In a hearing before the Board, SoundExchange opposed the Board’s use of real-world negotiated agreements from certain third-party noninteractive webcasters (among other market factors) to establish “benchmarks” for reasonable statutory royalty rates intended to reflect the private market, or the rates that “would have been negotiated in the marketplace between a willing buyer and a willing seller,” as required by the Copyright Act.

The Board rejected SoundExchange’s concerns and used the third-party agreements
to form the basis of the 2016–2020 statutory royalty rates. The Board noted that the alternative agreements proposed by SoundExchange for benchmark rate setting were not “effectively competitive” because they focused on subscription-based interactive webcasting services (i.e., services that allow a user to select the songs to be played), as opposed to the noninteractive services at issue.

SoundExchange and independent singer/songwriter George Johnson moved for a rehearing of the Board’s royalty rate determination and were denied. The parties appealed.

Applying a deferential standard of review given the “highly technical” nature of the Board’s royalty rate-setting process, the DC Circuit sustained the denial of appellants’ challenges. In upholding the Board’s royalty rates, the Court rejected SoundExchange’s argument that the Board’s acceptance of the third-party benchmark agreements were “arbitrary and capricious” and instead found that the Board has “broad discretion” to select, reject and/or adjust rate benchmarks based on the terms of the benchmark agreements, predictive judgments about the music marketplace, and/or in comparison to other market factors.

SoundExchange also challenged the Board’s adoption of an effective-competition standard when determining the statutory rates and terms that would have been negotiated “between a willing buyer and a willing seller,” arguing that such an approach was foreclosed by the Copyright Act. Under Chevron review, the DC Circuit disagreed and noted an inherent ambiguity in the Act’s “willing buyer and a willing seller” standard. Instead, and in line with its decision in Intercollegiate Broadcasting System, the Court confirmed that the statute does not compel any particular level of competitiveness in the market, such that the Board is entitled to its discretion in identifying “relevant characteristics of competitiveness” to determine an “effectively competitive market” when assessing the suitability of a party’s proposed benchmarks under the statutory framework.

The DC Circuit also supported the Board’s decision to set different statutory rates for ad-based and subscription-based noninteractive webcasters. On this point, the Court noted that the Copyright Act specifically contemplates the Board’s ability to set different rates for distinct market segments, noting a “sharp dichotomy” between listeners willing to pay for subscription services and those that use only free ad-based services.

The final issue disputed by SoundExchange was copyright owners’ ability to audit webcasters’ royalty payments. In the rate resetting hearing, the Board tightened up the audit provision, requiring that any auditor must be a certified public accountant licensed in the jurisdiction in which it seeks to conduct the verification. The DC Circuit nonetheless found the requirement reasonable since, as the Board explained, the auditor would be held accountable to the local governance in the jurisdiction in which it operates.

The DC Circuit also examined the issue raised by George Johnson, who complained that the low royalty rates set by the Board equated to an unconstitutional taking of a copyright holder’s property rights in his or her intellectual property. Here, the Court explained that the Board’s extensive adversarial hearing process in determining such rates was sufficient due process, and that the royalty rate-setting process
required by the Copyright Act was thus appropriate and constitutional. Therefore, the Court affirmed the Board’s rate determination.

**Practice Note:** The Music Modernization Act (MMA) passed Congress and was submitted for presidential approval only one week following this decision, so these disputes may become a thing of the past. Title I of the MMA establishes the standard that the Board must use when determining rates that digital streaming services pay to songwriters for mechanical licenses. Specifically, the MMA harmonizes the different standards that the Board uses to set rates for streaming services versus digital radio services, and settles on a willing buyer/willing seller standard that allows for consideration of market conditions.

© 2020 McDermott Will & Emery

**Source URL:** [https://www.natlawreview.com/article/copyright-board-s-royalty-rates-streaming-services-can-play](https://www.natlawreview.com/article/copyright-board-s-royalty-rates-streaming-services-can-play)