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Callie P. Borgmann

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The Future of Streaming Music: The Music Modernization Act and New Copyright Royalties Regulations

THE FUTURE OF STREAMING MUSIC: THE MUSIC MODERNIZATION ACT AND NEW COPYRIGHT ROYALTIES REGULATIONS

*By: Callie P. Borgmann**

ABSTRACT

This note details how the Copyright Royalty Board and Congress are seeking to change the music industry. In January of 2018, the Copyright Royalty Board introduced new regulations that outline new procedures for paying songwriters and record labels royalties that derive from streaming services. These regulations will increase royalties from streaming by nearly fifty percent over the next five years and will help to eliminate the disparity between streaming and terrestrial royalty compensation. Additionally, Congress has proposed the Music Modernization Act, which would ultimately create an administrative agency that would handle copyright within the music industry. In the end, these new regulations will influence songwriters, streaming services, and users.

NEW ROYALTY REGULATIONS

On January 26, 2018, the Copyright Royalty Board (“CRB”) introduced new regulations relating to royalties paid to songwriters for streaming services.¹ This decision came as a result of a 2017 trial between the National Music Publishers Association (“NMPA”) and the Nashville Songwriters Association International (“NSAI”) (NMPA and NSAI are collectively the “writers”) against various streaming services such as Amazon, Apple, Spotify, and Pandora, as well as pressure from songwriters to increase streaming royalty rates.² Over the next five years, songwriter royalty rates for interactive streaming will increase by nearly fifty percent.³ Prior to implementation of the new regulations, services were only required to pay

* University of Denver, Sturm College of Law, Juris Doctor 2019. Callie is also a Managing Editor on the Sports and Entertainment Law Journal.

¹ Press Release, Nashville Songwriters Association International, CRB Dramatically Increases Rates for Songwriters NMPA & NSAI Declare Victory (Feb. 12, 2018), <https://www.nashvillesongwriters.com/crb-dramatically-increases-rates-songwriters-nmpa-nsai-declare-victory>.

² *Id.*

³ Paula Parisi, *Copyright Royalty Board Boosts Songwriters' Streaming Pay Nearly 50%*, VARIETY (Jan. 27, 2018, 11:23 AM) <http://variety.com/2018/biz/news/copyright-royalty-board-boosts-songwriters-streaming-pay-nearly-50-1202679118/>.

songwriters ten percent of revenue; this will now be raised to fifteen percent in coming years on a progressive scale.⁴

Royalty Year ⁵	2018	2019	2020	2021	2022
% of Revenue	11.4%	12.3%	13.3%	14.2%	15.1%
Percent of Total Content Costs	22.0%	23.1%	24.1%	25.2%	26.2%

Though the streaming services sought to reduce the rates in the 2017 trial, the writers came out victorious despite not receiving a per-stream rate that they had initially hoped to receive.⁶ In the past, streaming services had to utilize multiple calculations to determine the amount of royalties owed to songwriters. However, the regulations introduce new, more simplified rate terms.⁷ Rates are now based on either total content costs or a percentage of revenue, whichever is greater.⁸ Content costs are paid directly to record labels without harsh legal constraints, meaning the writers have some free-market impact. In addition to the new calculations, there are no longer caps and limitations on writer rates, giving more opportunity for benefits.⁹ Rates that are paid directly to record labels from streaming services have improved as well.

Going forward, for every \$3.82 earned by a streaming company, the songwriter or publisher will receive one dollar.¹⁰ These regulations only include mechanical licenses, a term that originated from rolls cranked through player pianos, and includes albums, CDs, and downloads.¹¹ Anything that is broadcasted, either analog or digitally, is considered to be “public performance,” which have different royalty rates.¹² This is where Pandora differs from Spotify and Apple Music. Pandora’s rates are similar to traditional radio stations, because it is not an interactive listening platform, whereas Spotify and Apple Music are interactive by allowing

⁴ Mark Kaufman, *Musicians Must Now be Paid More for Their Streamed Songs – But is This a Big Blow to Spotify?*, MASHABLE (Jan. 31, 2018), <https://mashable.com/2018/01/31/copyright-court-rules-streaming-companies-have-to-pay-artists-more/#UzLlpMgjbPq1>.

⁵ Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III), Docket No. 16-CRB-0003-PR (2018-2022), <https://app.crb.gov/case/viewDocument/2288> [hereinafter Public Initial Determination].

⁶ Parisi, *supra* note 3.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

listeners to play songs on demand. Non-interactive services are simply able to pay less royalties because they lack the on-demand nature that some streaming services provide.¹³

Subscription costs are likely to increase in the future, but not due to increased streaming royalty rates. Subscription costs may increase due to additional content; however, it is not likely subscription costs will increase immediately, but rather over the course of the next five years.¹⁴ It is possible that streaming services such as Apple Music and Spotify may already be paying above the rates set forth in the regulations due to agreements with record labels.¹⁵ Streaming services may already intend on increasing their subscription prices as they add additional content, such as podcasts and videos, regardless of the new regulations. Though the additional content could come at a higher price, it could provide users a more interactive listening process that is reminiscent of visiting record stores.¹⁶

IMPACT OF NEW REGULATIONS

While the new streaming royalties are considered a win for songwriters and singers alike, the new regulations may have a negative impact on some individual streaming services. Large streaming services, such as Apple, may feel less impact in their bottom line numbers by being required to pay out more to individual songwriters.¹⁷ However, the implications of these new rates may have a greater impact on Spotify, a smaller streaming service, as it seeks to become profitable in its first year as a publicly traded corporation.¹⁸ A large part of streaming income is driven by the number of people who subscribe to the streaming services. As of October 2017, Spotify had 18.2 million paid subscribers in the United States alone, while Apple Music had approximately fifteen million in the United States.¹⁹

¹³ Erin Jacobson, *How Spotify Has Waged War with the Music Industry*, FORBES (Sept. 22, 2017, 8:35 PM), <https://www.forbes.com/sites/legalentertainment/2017/09/22/how-spotify-has-waged-war-with-the-music-industry/#470fe0c856d5>.

¹⁴ Kaufman, *supra* note 4.

¹⁵ *Id.*

¹⁶ *See generally id.*

¹⁷ Parisi, *supra* note 3.

¹⁸ *Id.*; *see generally* Zack O'Malley Greenburg, *Spotify Goes Public at \$30 Billion; When Will Artists See Any of That?*, FORBES (Apr. 3, 2018, 2:01 PM), <https://www.forbes.com/sites/zackomalleygreenburg/2018/04/03/spotify-ipo-goes-public-at-30-billion-when-will-artists-see-any-of-that/>.

¹⁹ Ed Christman, *Apple Music, Spotify Battle Heats Up Again as Race for US Subscribers Gets Closer*, BILLBOARD (Feb. 5, 2018), <https://www.billboard.com/articles/business/8098161/apple-music-spotify-streaming-wars-subscribers-advantage>.

Apple has continued to add subscribers in the United States at a faster rate than Spotify, which provides speculation about the strength of Spotify's earning power.²⁰ However, Spotify has more subscribers worldwide, and it seems likely Spotify will utilize their overall subscription growth to show their strength as a corporation.²¹

Currently, Spotify pays an average of \$0.00397 per stream, or \$3.97 per 1,000 streams.²² This rate gives Spotify a competitive advantage over Apple, who pays \$7.83 per 1,000 streams, or \$0.00783 per stream.²³ This merely shows that Spotify users listen to more music than Apple subscribers, not that Spotify is necessarily more successful.²⁴

An increase in streaming rates is incredibly important for songwriters and publishers alike. In 2013, Rodney Jerkins, producer of "As Long As You Love Me" by Justin Bieber, exposed the discrepancies between streaming rates and public performances.²⁵ Though the song earned songwriter Andre Lindall \$146,000 in royalties, Jerkins revealed just how little streaming royalties contributed to that number; thirty-eight million streams on Pandora generated a mere \$278 and thirty-four million YouTube streams generated only \$218.²⁶ According to UC Irvine Media Studies Professor Peter Krapp, for a songwriter to make minimum wage in the state of California, their songs would need to receive four million streams per month.²⁷

²⁰ *See id.*

²¹ Michelle Castillo, *Music Streaming Service Spotify Files to Go Public, Lost \$1.5 Billion Last Year*, CNBC (last updated Mar. 5, 2018, 9:21 AM) <https://www.cnbc.com/2018/02/28/spotify-files-for-ipo.html>.

²² Daniel Sanchez, *What Streaming Music Services Pay (Updated for 2018)*, DIGITAL MUSIC NEWS (Jan. 16, 2018), <https://www.digitalmusicnews.com/2018/01/16/streaming-music-services-pay-2018/>.

²³ *Id.*

²⁴ See Kabir Sehgal, *Spotify and Apple Music Should Become Record Labels So Musicians Can Make a Fair Living*, CNBC (last updated Jan. 26, 2018, 11:04 AM) <https://www.cnbc.com/2018/01/26/how-spotify-apple-music-can-pay-musicians-more-commentary.html>. (stating that Spotify is still losing money, despite growing forty percent a year).

²⁵ Kai Miller, *Rodney Jerkins Reveals the Ugly Truth About Royalties After Writing a Hit for Justin Bieber*, BET (Oct. 6, 2017) <https://www.bet.com/music/2017/10/06/rodney-jerkins-justin-bieber-royalties.html>.

²⁶ *Id.*

²⁷ Kaufman, *supra* note 4.

MUSIC MODERNIZATION ACT

In addition to changes through the CRB's new regulations, Congress has begun working on an act that could permanently change the face of the music industry and royalties. In late 2017, Congress introduced H.R. 4706, also known as the Music Modernization Act ("MMA"), with the intention to "amend title 17, United States Code, to provide clarity and modernize the licensing system for musical works under section 115 and to ensure fairness in the establishment of certain rates and fees under sections 114 and 115."²⁸ This act was passed unanimously by the House of Representatives on April 25, 2018, but still must past the Senate.²⁹ This act would provide for an administrative agency that would issue licenses to digital streaming services, and collect and distribute royalties to rights holders. This is different than current policies in place, where services are required to identify each rights holder and issue payment directly.³⁰ The MMA will help to regulate policies within the music industry and update copyright laws that have not been updated since 1976.

Another issue songwriters face frequently is that royalty payments are untimely. This act would seek to cure that problem with the new late fee provision of the CRB's regulations.³¹ Currently, 17 U.S.C. § 115 does not outline any late fees regarding royalty payments;³² however, the CRB's new regulations impose fines on streaming services that fail to compensate songwriters in a timely fashion. The new regulations outline the fines for streaming services that fail to compensate songwriters in a timely fashion as a late fee of 1.5% or the highest lawful rate, whichever is lower, for any payment that is received after the due date.³³

²⁸ Music Modernization Act of 2017, H.R. 4706, 115th Cong. (as passed by H.R., Apr. 25, 2018); see also Micah Singleton, *Congress May Actually Fix Music Royalties*, VERGE (Jan. 26, 2018 10:36 AM), <https://www.theverge.com/2018/1/26/16931966/congress-music-modernization-act-licensing-royalties>.

²⁹ Paula Parisi, *Music Modernization Act Unanimously Passes House of Representatives*, VARIETY (Apr. 25, 2018, 1:57 PM), <http://variety.com/2018/biz/news/music-modernization-act-unanimously-passes-house-of-representatives-1202787045/>.

³⁰ See generally Singleton, *supra* note 28.

³¹ *Id.*

³² 17 U.S.C. § 115 (2018).

³³ 37 C.F.R. § 385.4.

CONCLUSION

Ultimately, the new regulations set in place by the CRB change the face of streaming. For songwriters, these changes will impact their earning power. Increased penalty enforcement will also help to decrease the amount of late payments made by streaming companies. If the MMA is enacted, songwriters and streaming services will be regulated more closely. However, until Congress enacts the MMA, songwriters may need to continue to fight for higher compensation and more stringent regulation. Streaming services will have an uphill battle in maintaining their bottom line as well as preserving and improving their relationships with artists.

