



CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

August 13, 2018

S. 2823

Musical Works Modernization Act

As ordered reported by the Senate Committee on the Judiciary on June 28, 2018

SUMMARY

Under current law, a digital music provider (such as Spotify, Apple Music, or Pandora) must pay the copyright owner a royalty fee to use a protected work of music. If it does not otherwise have a voluntary license agreement with the copyright owner to use the work, the music provider must file a notice of intent—on a song-by-song or record-by-record basis—with the copyright owner or the U.S. Copyright Office when it seeks to use any copyrighted digital musical work.

S. 2823 would eliminate notice-of-intent licensing for digital musical works and direct the Copyright Office to designate a nonprofit entity—a mechanical licensing collective, or MLC—to administer a new blanket-licensing system. Under such a license, a digital music provider could use certain copyrighted musical works without filing a notice of intent to do so. S. 2823 also would require the MLC to collect royalties from digital music providers using the blanket license and distribute them to copyright owners.

CBO estimates that enacting S. 2823 would increase deficits by \$47 million over the 2021-2028 period. That amount comprises an increase in direct spending of \$222 million and an increase in revenues of \$175 million. In addition, CBO estimates that, over the 2019-2023 period, it would cost \$1 million to implement the bill, subject to the availability of appropriated funds.

Because enacting S. 2823 would affect direct spending and revenues, pay-as-you-go procedures apply.

CBO estimates that enacting S. 2823 would not increase net direct spending by more than \$2.5 billion or on-budget deficits by more than \$5 billion in any of the four consecutive 10-year periods beginning in 2029.

S. 2823 would impose intergovernmental mandates, as defined in the Unfunded Mandates Reform Act (UMRA), in the form of preemptions of state laws, but CBO

estimates that the costs of those mandates would fall well below the threshold established in UMRA for intergovernmental mandates (\$80 million in 2018, adjusted annually for inflation).

The bill would impose private-sector mandates on companies that provide digital music services by:

- Requiring those companies to pay higher fees when they apply for licenses issued by the MLC to cover the administrative costs of the organization;
- Requiring those companies to provide usage reports to the MLC each month detailing the artists and works that have been streamed; and
- Changing the processes used to resolve disputes over claims of copyright infringement in certain cases.

Because of the uncertainty in determining the effect on settlements due to copyright holders under the new dispute resolution process, CBO cannot determine whether the aggregate cost of the mandates on private entities would exceed the annual threshold established in UMRA for private-sector mandates (\$160 million in 2018, adjusted annually for inflation).

ESTIMATED COST TO THE FEDERAL GOVERNMENT

The estimated budgetary effect of S. 2823 is shown in the following table. The costs of the legislation fall within budget function 370 (commerce and housing credit).

	By Fiscal Year, in Millions of Dollars												2019- 2023	2019- 2028
	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027	2028			
INCREASES IN DIRECT SPENDING														
Estimated Budget Authority	0	0	0	20	28	28	29	29	30	31	31	76	227	
Estimated Outlays	0	0	0	17	27	28	29	29	30	31	31	72	222	
INCREASES IN REVENUES														
Estimated Revenues	0	0	0	16	22	22	22	23	23	23	24	59	175	
NET INCREASE IN THE DEFICIT FROM INCREASES IN DIRECT SPENDING AND REVENUES														
Impact on Deficit	0	0	0	1	5	6	6	7	7	7	8	13	47	

Components may not sum to totals because of rounding.

CBO estimates that discretionary spending to implement S. 2823 would total \$1 million over the 2019-2023 period, subject to the availability of appropriated funds.

BASIS OF ESTIMATE

For this estimate, CBO assumes that S. 2823 will be enacted near the end of fiscal year 2018 and that the necessary amounts will be available each year. Estimated outlays are based on historical patterns for similar activities.

Under S. 2823, the Copyright Office would designate an entity to act as the MLC and the judges of the Copyright Royalty Board would establish an administrative assessment to be paid by users of the blanket license and by certain other large users of copyrighted digital musical works. That assessment would be designed to cover the costs of establishing, maintaining, and operating the MLC. Payment of the assessment would be compulsory and could be enforced through a court order. In CBO's view, in keeping with guidance in the 1967 *Report of the President's Commission on Budget Concepts*, the cash flows from the assessment and subsequent spending should be recorded in the federal budget.¹ Under the bill, the initial administrative assessment would be effective on January 1 two years after the date of enactment of the legislation and CBO expects that collections would begin in fiscal year 2021.

S. 2823 would make several changes to royalty rates and to protections for certain copyright holders of sound recordings and musical works. Because royalty amounts collected by the U.S. Copyright Office or its designated agents and later distributed to copyright owners are not recorded in the federal budget, CBO estimates that implementing those provisions would have no budgetary effect.

Direct Spending

S. 2823 would authorize the MLC to spend amounts collected under the administrative assessment levied by the Copyright Royalty Judges, without further appropriation, to cover the MLC's costs. Such expenditures would be considered direct spending. For this estimate, CBO expects that the Copyright Royalty Judges would estimate the operating costs of the MLC accurately and set an assessment rate to equal those costs each year. Using information from industry experts and the administrative costs to operate entities that engage in similar activities, CBO estimates that expenditures by the MLC would average \$30 million annually and would total \$227 million over the 2021-2028 period.

Revenues

S. 2823 would authorize the Copyright Royalty Judges to levy an assessment on digital music providers with blanket licenses and on certain other digital music providers that instead obtain voluntary licenses to use specific copyrighted musical works. The

1. For more information, see Congressional Budget Office, *How CBO Determines Whether to Classify an Activity as Governmental When Estimating Its Budgetary Effects* (June 2017), www.cbo.gov/publication/52803.

assessment would be based on the entities' use of musical works and set at a rate intended to fund the operations of the MLC. For this estimate, CBO expects that the assessment would be set to recover all of the allowable costs of the MLC and would be collected in full in each year; therefore, CBO estimates that collections would average about \$30 million annually. Those amounts would be recorded in the budget as revenues. CBO estimates that enacting S. 2823 would increase gross revenues by \$227 million over the 2021-2028 period.

Because excise taxes and other indirect business taxes (like the bill's proposed assessment) reduce the base of income and payroll taxes, the amounts collected would lead to reductions in revenues from income and payroll taxes.² As a result, the gross assessments under the bill would be partially offset by a loss of receipts of 22 percent to 24 percent of that gross amount each year. Thus, CBO estimates that enacting S. 2823 would increase net revenues by \$175 million over the 2021-2028 period.

Spending Subject to Appropriation

S. 2823 would require the Copyright Office and Copyright Royalty Judges to make rules that create the MLC, establish a digital licensee coordinator, establish a blanket-licensing system, and set new rates for royalty payments. Under the bill, the Copyright Office also would be required to engage in outreach efforts regarding changes to the copyright royalty system and to complete a report with recommendations to the MLC to identify copyright owners with unclaimed royalties and to reduce the incidence of unclaimed royalties. Using information from the Copyright Office, CBO estimates that those activities would cost the agency \$1 million over the 2019-2023 period.

S. 2823 also would require the Department of Justice (DOJ) to provide briefings upon request to members of the House and Senate Committees on the Judiciary regarding the status of its review of consent decrees between the U.S. government and a performing-rights society. DOJ also would be required to notify and provide certain information to members of Congress before filing a motion to terminate such a consent decree. CBO estimates that any administrative costs associated with such briefings and notifications would be insignificant and would be subject to the availability of appropriated funds.

PAY-AS-YOU-GO CONSIDERATIONS

The Statutory Pay-As-You-Go Act of 2010 establishes budget-reporting and enforcement procedures for legislation affecting direct spending or revenues. The net changes in

2. See Congressional Budget Office, *The Role of the 25 Percent Revenue Offset in Estimating the Budgetary Effects of Legislation* (January 2009), www.cbo.gov/publication/20110.

outlays and revenues that are subject to those pay-as-you-go procedures are shown in the following table.

CBO Estimate of Pay-As-You-Go Effects for S. 2823, the Music Modernization Act, as Ordered Reported by the Senate Committee on the Judiciary on June 28, 2018.

	By Fiscal Year, in Millions of Dollars												
	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027	2028	2018-2023	2018-2028
NET INCREASE IN THE DEFICIT													
Statutory Pay-As-You-Go Effect	0	0	0	1	5	6	6	6	7	7	8	13	47
Memorandum:													
Changes in Outlays	0	0	0	17	27	28	29	29	30	31	31	72	222
Changes in Revenues	0	0	0	16	22	22	22	23	23	23	24	59	175

INCREASE IN LONG-TERM DIRECT SPENDING AND DEFICITS

CBO estimates that enacting S. 2823 would not increase net direct spending by more than \$2.5 billion or on-budget deficits by more than \$5 billion in any of the four consecutive 10-year periods beginning in 2029.

MANDATES

S. 2823 would impose intergovernmental and private-sector mandates as defined in UMRA. CBO estimates that, in the aggregate, the cost of mandates imposed on public entities would not exceed the annual threshold established in that act (\$80 million in 2018, adjusted annually for inflation). CBO cannot determine whether the aggregate cost of mandates on private entities would exceed the annual threshold established in UMRA for private-sector mandates (\$160 million in 2018, adjusted annually for inflation).

Mandates That Apply to State Governments Only

S. 2823 would impose intergovernmental mandates as defined in UMRA by preempting state laws. In establishing a new system for collecting and distributing royalties through the MLC, S. 2823 would preempt state laws that allow states to collect royalties that remain unclaimed for a certain period. Using information from music industry sources about current unclaimed royalties and the efforts states make to claim them, CBO estimates that the amount of revenue that states might forgo as a result of the preemption would be small.

S. 2823 also would establish federal copyright protections for musical works recorded before 1972 and would preempt state property laws that govern infringement claims regarding those works. Although the preemption would limit the application of state laws, it would impose no duty on states that would result in additional spending or a loss of revenues.

In addition, S. 2823 would give producers, mixers, and sound engineers a statutory right to seek payment of their royalties through a nonprofit collective designated by the Copyright Royalty Judges. The nonprofit collective would adopt and implement a policy to provide for royalty distributions that would supersede and preempt any state law, including common law, concerning abandoned property. CBO estimates that the preemption would not affect the budgets or revenues of state governments.

Mandates That Apply to Private Entities

S. 2823 would impose private-sector mandates on companies that provide digital music services. Under current law, digital music providers negotiate directly with copyright owners for the right to use musical works or, when the copyright owner cannot be identified, pay fees to the Copyright Office for the right to use the music. S. 2823 would direct those companies to pay fees instead to the MLC to administer a new blanket-licensing system. Using information from the Copyright Office and music industry sources, CBO estimates that the fees companies would pay to the MLC would range from \$22 million to \$28 million annually, beginning in 2021. (Those amounts include a small savings that would result from companies' no longer paying fees to the Copyright Office for the covered services.)

As a condition of receiving a blanket license, companies that provide digital music services would be required to submit reports to the MLC detailing the artists and works streamed each month. Because such companies already maintain and provide similar information under current law, CBO estimates that the costs of compliance would not be significant.

Finally, the bill would establish new processes for settling legal disputes over the infringement of copyrights for musical works by ending outstanding—or prohibiting future—lawsuits by copyright owners in certain cases. In the case of lawsuits alleging copyright infringement filed after January 1, 2018, the bill would terminate those lawsuits. In lieu of settlement under the terminated lawsuits, copyright owners would be entitled to royalties under the rates set by the MLC for music streamed during the three years preceding the suit (the period of the federal statute of limitations on claims of copyright infringement); in exchange, digital music companies would receive liability protection as long as they made good-faith efforts to aid the MLC in matching works with their copyright owners and to make timely payments of royalties.

Similarly, in the case of lawsuits involving musical works recorded before 1972 and brought under state law, the bill would nullify those claims and substitute a federal process under which copyright holders would be entitled to three years' worth of back royalties; in exchange, music companies would receive protection from further claims.

In substituting those new processes for rights of legal action under current federal or state law, S. 2823 would impose mandates on copyright holders by terminating their existing rights to make infringement claims. The costs of the mandates would be the forgone value of awards and settlements for those claims to the extent that the legislation resulted in lower compensation than under current law. CBO is uncertain how the value of royalties claimed by copyright owners in lawsuits would be affected under the bill or how much those amounts might differ relative to current law.

PREVIOUS CBO ESTIMATE

On April 25, 2018, CBO transmitted a cost estimate for H.R. 5447, the Music Modernization Act, as ordered reported by the House Committee on the Judiciary on April 11, 2018. The estimated increases in direct spending and revenues are the same for both pieces of legislation. S. 2823 includes provisions that would direct the Copyright Office to engage in additional outreach efforts and to complete a report. S. 2823 also includes provisions requiring DOJ to provide briefings and additional information to members of Congress. CBO's cost estimates for the two pieces of legislation reflect those differences.

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