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Will Spotify's expensive US copyright shortcut be its coda?

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Spotify is a popular interactive music streaming platform where individual users may select and listen to a particular song or playlist on demand. Spotify launched in Stockholm in 2008 and entered the US market in 2011, providing free and paid access to millions of sound recordings.

For several years, songwriters and music publishers have sued Spotify for streaming musical compositions without certain required copyright licences, resulting in several class action suits, some of which are consolidated in *Ferrick v Spotify USA Inc* (1:16-cv-8412 (AJN)). In May 2017 a proposed \$43 million settlement of the *Ferrick* class action suit was announced.

A number of parties, particularly music publishers (entities that administer the rights of songwriters), protested that the proposed *Ferrick* settlement does little to compensate copyright owners for Spotify's allegedly breathtaking level of copyright infringement.

On December 29 2017 Wixen Music Publishing, located in Calabasas County, California, filed a \$1.6 billion lawsuit against Spotify in a Los Angeles federal court (*Wixen Music Publishing Inc v Spotify USA Inc* (17-cv-9288) (CD Cal December 29 2017)).

The *Ferrick* settlement does not adequately compensate injured artists, says Wixen, adding that it "has and, to the extent not yet effected, will opt out" of the proposed *Ferrick* settlement.

The *Wixen* complaint alleges that Spotify violated federal copyright laws by repeatedly failing to obtain certain licences required to distribute streaming music in the United States.

Each music track has two separate copyrights: a musical composition and a sound recording (fixed after December 31 1971) of a performance of the musical composition. Songwriters and music publishers (rights holders), as authors of the musical composition, are entitled to royalties from streaming their songs, including mechanical royalties for musical compositions embodied in sound recordings that are manufactured and distributed to the public, and public performance royalties for public performances of their musical compositions. Spotify must obtain a licence for both rights for each song.

Not all streaming music services require a mechanical licence. If the music service provides a non-interactive streaming of songs, such as the Pandora non-interactive streaming service and the Sirius satellite radio service, blanket licences from the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc (BMI) and the Society of European Stage Authors and Composers (SESAC) cover licensing of the public performance of the musical compositions in their catalogue. However, since Spotify is an interactive service, it must obtain, secure and comply with mechanical licences.

Record companies are paid for commercial exploitation of their master sound recordings in various ways, including the sale of copies (phonorecords), which include physical product such as CDs and vinyl records, and digital phonorecord downloads. Record companies are also paid for non-interactive digital streams through Sound Exchange, the performing rights organisation for sound recording artists and companies; but for interactive streams and limited downloads, there is no compulsory licence, so the streaming service must negotiate directly with the rights holders.

The *Wixen* complaint alleges that Spotify gambled when contemplating its US launch. Spotify negotiated licences with record companies for each recording in its catalogue and also secured blanket licences for public performances of the musical compositions through the public performance organisations that represent rights holders: ASCAP, BMI and SESAC.

However, Spotify did not comply with Section 115 of the Copyright Act to obtain mechanical licences under a compulsory licence from the rights holders properly – like many music platforms, it decided to outsource its required compliance for mechanical licences to the Harry Fox Agency, which administers some mechanical licences for rights holders.

In order to obtain a mechanical licence from a compulsory licence properly:



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- the song must have been previously distributed to the public by the authority of the copyright owner; and
- the person desiring to stream the song must send a notice of intention to the rights holders (usually the music publisher).

The notice of intention must be received by the rights holders of the original musical composition 30 days before streaming the song, otherwise it forecloses any possibility of a compulsory mechanical licence and, in the absence of a directly negotiated mechanical licence from the copyright owner, renders on-demand streams and limited downloads of music actionable as acts of infringement.

According to the *Wixen* complaint, Wixen alleges that no mechanical licences – compulsory or directly negotiated – were issued by Wixen to Spotify. Wixen notified Spotify of its allegedly spectacular copyright infringement of Wixen's songs, but Spotify continued to stream Wixen's songs comprising wilful infringement.

The musical compositions listed in the *Wixen* complaint are registered or pending registration in the US Copyright Office which, for the registered musical compositions, makes Wixen eligible for statutory damages of up to \$75,000 per copyright infringement or up to \$150,000 for wilful copyright infringement.

Wixen's claim has merit – if it has standing by successfully opting out from the *Ferrick* suit. The spectacular level of wilful infringement, if proven, could result in a tremendously large verdict of at least \$1.6 billion, at \$150,000 statutory damages per approximately 10,784 infringed musical compositions. As Spotify moves towards its planned initial public offering, *The Wall Street Journal* [reported](#) that “Spotify's most recent valuation was nearly \$20 billion”.

Wixen's damages claim is close to 10% of Spotify's valuation. If other large music publishers opt out of the class action settlements and follow Wixen to file suit for statutory damages, Spotify could be in deeper trouble.

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