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Copyright suit against Spotify has merit, attorneys say

By Patrick H.J. Hughes

A \$1.6 billion copyright infringement suit filed against music streaming service Spotify USA Inc. days ahead of its Jan. 3 initial public offering is likely to succeed, according to attorneys familiar with the matter.

Wixen Music Publishing Inc. v. Spotify USA Inc., No. 17-cv-9288, complaint filed, 2017 WL 6663826 (C.D. Cal. Dec. 29, 2017).

Wixen Music Publishing Inc.'s suit, filed Dec. 29 in the U.S. District Court for the Central District of California, alleges Spotify violated federal copyright laws by "repeatedly" failing to get the required licenses to distribute music.

Spotify launched in Stockholm in 2008 and entered the U.S. market in 2011, providing free and paid access to millions of recordings.

In a Dec. 14 report, Reuters said sources estimated Spotify's worth at \$19 billion. It said the company was aiming to file an IPO in late 2017 and to list with the New York Stock Exchange in 2018.

Wixen, based in Calabasas, California, administers more than 50,000 songs written or owned by its 2,000-plus clients, according to the suit. The company's website, wixenmusic.com, says it "specialize[s] in finding uncollected and underpaid royalties."

Wixen is seeking \$150,000 for each of its clients' compositions that Spotify played, the maximum available for willful copyright infringement under



REUTERS/Christian Hartmann

Section 504(c) of the Copyright Act, 17 U.S.C.A. § 504(c).

WIXEN OPTS OUT OF CLASS ACTION

Wixen says it filed the suit in response to a proposed \$43 million class-action settlement agreement that Spotify and a class of copyright holders reached in May.

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

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EXPERT ANALYSIS

The inequitable conduct defense: What is relevant?

Dechert LLP attorneys Christopher S. Ruhland and Michael A. Fisher discuss issues that arise when accused infringers raise the inequitable conduct defense in patent cases.

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Spotify suit

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A New York federal court preliminarily approved the settlement in June. *Ferrick v. Spotify USA*, No. 16-cv-8412, order granting motion for preliminary approval of settlement issued (S.D.N.Y. June 28, 2017).

Cynthia Blake Sanders, an attorney at Baker Donelson Bearman Caldwell & Berkowitz who is not involved in the case, said that if a court finds Wixen has standing from successfully opting out of the settlement, it has a “meritorious claim.”

“According to the complaint, Spotify took a short cut to avoid delaying its U.S. launch and only negotiated with record labels for rights to stream their sound recordings,” Sanders explained.

“Spotify continues to stream Wixen’s catalog without paying mechanical licenses, despite Wixen putting Spotify on notice of its rather spectacular infringements of Wixen’s songs, which is willful infringement,” she said.

Dykema attorney Marsha Gentner, who also is not involved in the suit, agrees that Wixen probably will prevail, but the amount of damages will be at issue.

“Currently, obtaining all necessary licensing for musical works is a difficult maze of rights, stakeholders and representatives,” Gentner said, noting that Spotify may challenge Wixen’s ability to bring suit on behalf of the musicians it represents.



Baker Donelson Bearman Caldwell & Berkowitz attorney Cynthia Blake Sanders said Wixen has a “meritorious claim.”



Dykema attorney Marsha Gentner said Wixen probably will prevail, but the amount of damages will be at issue.

MUSIC LICENSING

Section 102(2) of the Copyright Act, 17 U.S.C.A. § 102(2), says recorded music generally includes two copyrights: one for the sound recording and one for the underlying musical composition.

A music streaming service must obtain licenses for both copyrighted works, a requirement Spotify acknowledged in 2014 in a hearing before the U.S. Copyright Office, Wixen’s suit says.

Revenues from a sound recording license typically go to a record label. Streaming services must also pay to reproduce and distribute a musical composition through a mechanical license.

Services such as Spotify can obtain a mechanical license by either negotiating with a song’s author or obtaining a compulsory license, which requires the service to notify the music publisher.

Instead of negotiating or notifying the publisher, Spotify “outsourced” the responsibility to the Harry Fox Agency, a rights-management organization that is “ill-equipped to obtain all the necessary mechanical licenses,” the complaint says.

By failing to notify Wixen, Spotify is liable for infringement under Section 115(b)(2) of the Copyright Act, 17 U.S.C.A. § 115(b)(2), the suit says.

MUSIC MODERNIZATION ACT

“This lawsuit speaks to the risk for music services like Spotify of a strategy to seek forgiveness rather than permission,” said Benjamin Semel, an attorney at Pryor Cashman LLP who is not involved in the litigation.

“The law sets out a very specific process that must be followed to compel such a license,” he said. “Failure to follow the process in good faith ... can leave a music service like Spotify asking for forgiveness from an awful lot of people.”

The process might change with the Music Modernization Act, which Georgia Republican Doug Collins and New York Democrat Hakeem Jeffries introduced in the U.S. House of Representatives in December.

The bill would amend Section 115 by eliminating the compulsory license-notice requirement.



“This lawsuit speaks to the risk for music services like Spotify of a strategy to seek forgiveness rather than permission,” Pryor Cashman attorney Benjamin Semel said.

Dykema’s Gentner said this bipartisan legislation was the reason Wixen filed the suit on the last weekday in 2017.

“One of the provisions would bar any lawsuit of this type ... not filed prior to Jan. 1, 2018,” she noted. **WJ**

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