

Settlements

Spotify Agrees to Pay \$43M to Settle Class Action Claims by Songwriters

Music streaming service Spotify has agreed to pay \$43 million into a fund to compensate songwriters for use of their music, according to settlement documents filed May 26 in federal court (*Ferrick v. Spotify USA Inc.*, S.D.N.Y., No. 16-8412, *motion to approve preliminary settlement* 5/26/17).

The agreement would settle claims in a proceeding that consolidated class actions filed in 2015 and 2016 by folk singer Melissa Ferrick and singer-songwriter and guitarist David Lowery, who is the frontman for the band Cracker and the founder of alternative rock band Camper Van Beethoven.

The songwriters claimed that Spotify USA Inc. was playing recordings of their compositions without securing mechanical license rights, which are required by Section 115 of the Copyright Act for reproducing a recording. Such licenses, unlike those available for performing music in public that broadcast radio stations rely on, aren't available through blanket licensing organizations.

John Simson, who was the first CEO of digital performance licensing organization SoundExchange Inc., told Bloomberg BNA that he hopes the agreement is a step toward solving a big licensing problem for the streaming industry.

Spotify declined a request for comment from Bloomberg BNA.

Mechanical License a Problem The Section 115 issue is a problem for streaming services, Simson said, and administering it is far more complicated than the Section 114 license that SoundExchange manages.

Section 114 applies to digital performances—that is, playing music for listeners. A digital music service can go to SoundExchange and get a blanket license and tell that organization what songs it's playing. SoundExchange is then responsible for collecting the royalties and distributing them to copyright owners.

Traditional AM/FM radio stations, restaurants, and other businesses that play music can get performance licenses just from going to the handful of royalty organizations—the American Society of Composers, Authors, and Publishers, Broadcast Music Inc., SESAC, and Global Music Rights—that cover well over 90 percent of the music commonly played in the U.S.

However, under the Section 115 mechanical license, the streaming service is responsible for informing the copyright holder that it is going to take advantage of the

compulsory license, which the copyright holder cannot refuse to grant.

"I don't think anybody thinks it operates in a way that benefits anybody, even if they agree with the concept of it," Serona Elton, a music industry professor at the University of Miami, Coral Gables, Fla., told Bloomberg BNA.

Streaming Is Different Traditionally, record companies and other makers of mechanical reproductions of composition recordings go to songwriters, or the publishing companies that hold their copyright interests, and negotiate direct licenses, resorting only to compulsory licenses if there's no other option.

However, that old way doesn't work for streaming services, Simson said. Spotify and similar services use millions of songs and the job of obtaining either negotiated or compulsory licenses for each one has become a big puzzle, he said.

"It started with piano rolls in the early 1900s that only had one song, then it went to 78 rpm records that had two songs, then to LP record albums, but it was still a very discrete number of songs and it was relatively easy to track down," Simson said. Although this settlement doesn't solve that problem, Simson said he hoped it would lead to a more global solution for streaming services.

But this settlement might not be the end of the road for Spotify, according to Christian L. Castle, an Austin, Texas, based copyright lawyer who has been critical of streaming services on mechanical licenses issues.

"It's not over for Spotify at all," Castle told Bloomberg BNA. Other music publishers that don't agree to join the settlement may still bring their own lawsuits against streaming services, he said.

Notices Issue Implicated Elton and Castle told Bloomberg BNA that some streaming services are taking advantage of the logistical problems posed by the Section 115 issue in a way that is harming copyright holders.

Under Section 115, if the service doesn't find the relevant contact information for a composition in Copyright Office records, it can submit its notice of intent to go ahead and play the song directly with the office—and won't pay royalties until the copyright owner comes forward to claim their rights.

In the past year, Streaming services have begun serving large numbers of such notices, Castle said. That amounts to a kind of loophole, because a lot of older copyright records aren't searchable online, necessitating a trip to the office to physically look through paper records.

Even for new copyright registrations, there's a long backlog at the Copyright Office, and that period during which a composition's information is not searchable online might be its most valuable stretch, Elton said.

From Castle's point of view, "Spotify at least is trying to do the right thing," but other online services haven't taken those steps, and in his view, Facebook Inc., with its billions of users, may be the biggest fish in that pond.

Lowery Split Off Lowery, who brought the first claim against Spotify at the end of 2015, was dismissed as a class representative from the consolidated class action in August 2016.

In March 2016, Lowery and three others who were dismissed as representative class members in the Spotify lawsuit had filed yet another class action, this time against Rhapsody International Inc.—now known as Napster—in the U.S. District Court for the Northern District of California. That case seems also to be near-

ing settlement, according to the plaintiffs' lawyer in the Spotify case, Steven Sklaver of Susman Godfrey LLP.

Judge Alison J. Nathan of the U.S. District Court for the Southern District of New York must approve the terms of the settlement as being fair to the members of the class who are not directly represented in the proceeding.

The court must also accept the definition of the scope of the class—that is, who may claim to be a member. Those who fit within that definition will have an opportunity either to claim a portion of the settlement funds or bring their own separate lawsuits against Spotify.

Susman Godfrey LLP and Gradstein & Marzano PC are co-lead representation for the class. Mayer Brown LLP represents Spotify.

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