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Why does Spotify Keep Getting Sued?

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Founded in 2006 in Stockholm, Sweden, Spotify is the world's leading subscription-based music streaming service, with over 140 million active users, 70 million of whom are paid subscribers (Dickey, 2018). They have paved the way forward for other streaming services such as Apple Music and Tidal, popularising demand for music in this way. Even Napster, the illegal music service that began to shift the consumption of music in this direction, now a fully-fledged, legal subscription service. While it has managed to coax listeners away from illegal downloads, and seemingly tried to do things legally, the company has had its share of contention from music rights holders over the fairness of per-stream payments, and numerous claims of copyright infringement held against them.

Spotify has once again come under fire in recent weeks over allegations that the music streaming giant has failed to pay royalties to songwriters and publishers. This is not the first time that Spotify have faced legal action for an infringement of this kind, having been sued countless times, by various parties on grounds that the service had not obtained the necessary mechanical licenses required to use music on the service. 'Wixen', a music publisher who represent the works of artists such as Tom Petty, Neil Young and Janis Joplin, has most recently filed a lawsuit against Spotify for damages of \$1.6 billion, for failing to pay royalties on a large number of musical compositions in their ownership (Kreps, 2018). According to Wixen's filed lawsuit, Spotify has infringed over ten thousand compositions and Wixen is therefore entitled to maximum damages of \$150,000 per infringement, totalling nearly \$1.6 billion.

Within any sound recording, there are a number of underlying rights, and the owners of these rights are entitled to be paid when their music is used. A mechanical license grants the rights to reproduce a compositional work and make it available to the public. Traditionally, this has meant to reproduce the musical work by copying the song onto a physical medium such as a CD or a cassette tape, but more recently, this has incorporated downloads and streaming (Harry Fox Agency, 2017). In the UK, the Mechanical Copyright Protection Society, or MCPS, is a collection society set up to issue licenses and pay royalties of this kind to writers, however there is no collection society of this sort in the US, hence the barrage of claims being filed from American publishers.

The closest thing the US has to MCPS is the Harry Fox Agency, which Spotify employs to handle its mechanical licenses, however, there are a large number of musical compositions not affiliated with Harry Fox, whose writers and publishers Spotify must approach directly in order to obtain the correct permissions for the use of the composition (Jacobson, 2017). Harry Fox handles licensing for numerous clients and is also a music publisher in its own right.

Spotify has also claimed at one stage, even after paying out to settle a mechanical royalty case against them, that it does not, in fact, need to pay mechanical royalties, due to the nature of its service, with their argument being that mechanical royalties cover the reproduction of a work and that they don't reproduce music (Resnikoff, 2017). However, copyright law in the U.S. very specifically states that they are, in fact, required to do so (Plumb, 2017). The strange thing about this assertion on Spotify's part, however is that it is already paying some of the mechanical royalties it is supposed to pay.

It may be that they are paying the royalties they can't avoid paying (for example, mechanical royalties to Harry Fox's publishing clients, or the major labels who also act as publishers), and are waiting to pay the smaller publishers if, and when they eventually come after the royalties they're owed, which they may never do, thus allowing Spotify to avoid making these royalty payments knowing that the small publishers don't have enough capital to go through a legal process.

Spotify don't even need to approach publishers to obtain permission for mechanical rights in most cases, thanks to what is known as a compulsory mechanical license. Provided the composition is a non-dramatic musical work, has been recorded previously and that recording has been made available publicly, the copyright owner is obligated to license it – hence the name, 'compulsory mechanical license' (Passman, 2014, p. 226). In this case, under U.S. copyright law, the licensee need only provide notification of intent to use the work and then start paying royalties at the rate set under the law. Licensees are also entitled to obtain licenses direct from the publisher if they wish to negotiate on the rate for example. There is therefore really no excuse for Spotify or Harry Fox not to obtain the correct mechanical licenses.

Current rates for mechanical royalties to be paid to publishers from interactive audio streaming services were set in October 2008 by the Copyright Royalty Board or CRB. The CRB consists of three administrative judges who set rates for these compulsory licenses in the U.S. The exact percentage amounts for compulsory are calculated based on the type of service to be licensed (Passman, 2014). In a simplistic format, the rates that were finalised by the CRB (for a service like Spotify) are calculable in three steps, as presented on the Harry Fox Agency website:

1. Calculate the "All-In Royalty Pool"

Whichever is calculated to be greater of A and B where:

A = 10.5% of music service revenue

B = the lesser of X and Y where:

X = 80 cents per subscriber per month

Y = 21% of Record company payments if paid to publisher direct

Or 17.36% of Record company payments if paid through the label

2. Calculate the "Payable Royalty Pool"

Subtract the performance royalties from the 'All-In Pool'

Whichever is calculated to be greater between the remainder of the royalty pool or 50 cents per each qualified subscriber (Harry Fox Agency, 2014).

3. Divide the "Payable Royalty Pool" by the total number of plays, for the 'per play' royalty.

An additional issue is that the rate set for mechanical licenses by the CRB is the legally mandated amount that needs to be paid.

Other stakeholders, such as record labels, are free to negotiate their own terms for royalties and thus, are able to get a higher rate (Plumb, 2017). This means that publishers don't even have the opportunity to negotiate on what they believe to be fair compensation for a license. All writers can do is rally the CRB in the hope they set a better rate under the U.S. Copyright Act (National Music Publishers Association, 2017).

However, it must be said that Spotify is not yet a profitable company, and paying these royalties whether legally obliged to do so or not, would put further strain on the financials (Shaw, 2017). In addition, Spotify might argue that due to the lack of a centralised information system with details of which rightsholders are attributed to compositions, they would have a close to impossible task of tracking down everyone they owe. In response to claims of unpaid mechanical royalties made in a Wall Street Journal article back in 2015, Spotify responded spokesman Jonathan Prince, "We want to pay every penny, but we need to know who to pay. The industry needs to come together and develop an approach to publishing rights based on transparency and accountability (Carlisle, 2015)."

However, as correctly pointed out by Stephen Carlisle in his article detailing his first-hand mechanical licensing experience with Spotify, every record company has a licensing department and Spotify would have had to obtain licenses from them to use the recordings in the first place. Those same departments know exactly who owns the royalties in each work. But as acknowledged later on in the article, the issue of mechanical licensing was handed to the Harry Fox Agency to administer. Carlisle then contacted Harry Fox and was informed that Spotify would back-pay all owed royalties, which would support the argument that Harry Fox, on behalf of Spotify, idly awaits any claim to royalties by publishers, paying them in full when requested, but still in the hope that they never have to. Although, according the Harry Fox representative Carlisle liaised with, the money remains black boxed offering no financial advantage to Spotify, unless that is of course that Spotify is accruing interest on the unpaid royalties (Carlisle, 2015).

Other online platforms have faced legal action for similar accusations, such as Soundcloud and YouTube, however, these are protected by slightly different legislation with regard to the use of copyrighted music. The Digital Millennium Copyright Act or DMCA, offers these platforms protection that is not afforded to Spotify. The content on YouTube and Soundcloud is user-uploaded and therefore the platforms don't have control of what copyrighted material can be uploaded to the site. While YouTube does have licenses with some record labels to cover a music that can be accessed on the site, there are still copyrighted materials uploaded to YouTube by its users illegally. The DMCA offers what is known as a safe harbour provision for Internet and Online Service Providers, which indemnifies the service from legal action provided the discontinue the use of the material on the service as soon as possible after being notified. If a copyright holder requests that an upload that infringes their copyright be removed from the site, then the service is compelled to do so, in order to remain protected by the safe harbour provision. Spotify is not protected by the laws in the DMCA as its content is not user uploaded (material is uploaded through select distributors) and therefore, is fully accountable for any copyright infringing material uploaded.

Rising levels of streaming and diminishing download sales have rallied songwriters into fighting to obtain a per-stream rate percentage so that they are fairly compensated for their work (Shaw, 2017).

With the amount of revenue being directed to songwriters being so low, the National Music Publishers Association, or NMPA, have warned that the diminishing rates paid to writers will ultimately lead to a demise of the output of new music, leaving nothing for the streaming services to offer their customers anymore (National Music Publishers Association, 2017). There has been significant growth in the industry in the past year, with streaming providing 62% of the income. With 30 million paying streaming service subscribers in the US alone, the streaming revenue for the first half of 2017 was up by 48%. Therefore, you could say that without streaming services, there would be no money to fight over in the first place, as people would still be illegally downloading music on peer-to-peer networks.

However, while payments may be of lesser value, using Spotify to distribute music offers some advantages to writers and artists. Where in the days before streaming was available, consumers would purchase a single or album once in a physical format, they pay once, and have the freedom to listen to that purchase as many times as they like. Potentially thousands of times. Now while Spotify can't offer the sort of short-term income level as physical CD sales may have been in the nineties, it can offer some amount of stable income for artists and writers over a longer period of time, and, they receive payments for every single time the song is played, which may be more lucrative than if they were to sell their music in a conventional way. This I imagine, even more so for smaller artists who sell their music direct to consumer over the internet or at their gigs.

In conclusion, whilst Spotify has a legal obligation and is fiscally responsible for the payment of mechanical royalties to publishers and songwriters, a lack of information between Spotify and the Harry Fox Agency is a large part of the issue at hand. However, if they aren't proactive in obtaining this information from the labels that have it, they are going to continue to be sued by the parties that can afford to. There is also a separate issue of the rates being set by the CRB not being of a sufficient level to satisfy songwriters interest, though while is not necessarily in Spotify's control, will definitely contribute in the diminishing number of songwriters. The Harry Fox Agency, which has been employed to handle the mechanical rights mess that Spotify has continuously found itself amidst, should be held to account for not having made follow-ups with the mechanical rights holders that it doesn't represent, on Spotify's behalf. The U.S. needs to better manage the information on music rightsholders and to have the interests of mechanical rightsholders better represented, like the UK do with MCPS. On the current trend in the U.S., we are heading towards the end of professional songwriting as we know it, with writers not being able to afford to sustain their careers in the age of streaming, however, had the streaming services not come along, would they be any better off?

Bibliography

Carlisle, S., 2015. *How Spotify Pays (or Doesn't Pay) Songwriters*. [Online]

Available at: <http://copyright.nova.edu/spotify/#note-1135-5>

[Accessed 11 January 2018].

Dickey, M. R., 2018. *Spotify hits 70 million subscribers*. [Online]

Available at: <https://techcrunch.com/2018/01/04/spotify-hits-70-million-subscribers/>

[Accessed 11 January 2018].

Harry Fox Agency, 2014. *Rate Charts*. [Online]

Available at: https://www.harryfox.com/find_out/rate_charts.html

[Accessed 11 January 2018].

Harry Fox Agency, 2017. *What is a Mechanical License?*. [Online]

Available at: https://www.harryfox.com/license_music/what_is_mechanical_license.html

[Accessed 11 January 2018].

Jacobson, E. M., 2017. *Spotify May Have To Pay Songwriters \$345 Million*. [Online]

Available at: <https://www.forbes.com/sites/legalentertainment/2017/07/19/spotify-may-have-to-pay-songwriters-345-million/#2ef6bfde193d>

[Accessed 11 January 2018].

Kreps, D., 2018. *Wixen's \$1.6 Billion Spotify Lawsuit: What You Need to Know*. [Online]

Available at: <https://www.rollingstone.com/music/lists/wixens-16-billion-spotify-lawsuit-what-you-need-to-know-w514878>

[Accessed 11 January 2018].

National Music Publishers Association, 2017. *Songwriters to Big Tech: Stop Fighting Us in CRB*. [Online]

Available at: <http://nmpa.org/songwriters-to-big-tech-stop-fighting-us-in-crb/>

[Accessed 11 January 2018].

Passman, D. S., 2014. *All You Need To Know About The Music Industry*. 8th Edition ed.

London: Penguin Group.

Plumb, B., 2017. *Is Spotify Challenging Streaming Mechanical Rates?*. [Online]

Available at: <https://www.royaltyexchange.com/blog/is-spotify-challenging-streaming-mechanical-rates-1#sthash.JkxWjRHY.24rRfPOL.dpbs>

[Accessed 11 January 2018].

Resnikoff, P., 2017. *Surprise! Spotify Says They Don't Owe Anything for 'Mechanicals'*.

[Online]

Available at: <https://www.digitalmusicnews.com/2017/08/31/spotify-mechanicals-surprise/>

[Accessed 11 January 2018].

Shaw, L., 2017. *Songwriters Sing Blues Over Diminished Streaming Royalties*. [Online] Available at: https://www.bloomberg.com/news/articles/2017-03-07/songwriters-sing-blues-over-diminished-royalties-from-streaming?cmpid=socialflow-twitter-business&utm_content=business&utm_campaign=socialflow-organic&utm_source=twitter&utm_medium=social [Accessed 11 January 2018].