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Online Streaming

Copyright Owners Say Spotify Knows It's Required to Get Licenses



Snapshot

- Individual songwriters, small music publishers suing Spotify for distribution royalties
- Spotify motion said it was only required to get public performance licenses

By [Anandashankar Mazumdar](#)

A dispute pitting Spotify USA Inc. against several copyright holders, including a musician and songwriter who helped found Frankie Valli and the Four Seasons, has presented an issue that could upend the licensing structure underpinning the fastest-growing consumer source for music: interactive streaming.

Spotify, in a recent court filing in the copyright infringement dispute, suggested that it only has to pay for one kind of royalty, instead of two, whenever it streams a particular song.

But Bob Gaudio, other founders of the 1960s pop group fronted by crooner Valli, and Nashville-based music publisher Bluewater Music Services Group argued in a Sept. 13 court filing that Spotify has long-acknowledged an obligation to pay both types of royalties—one for performance rights to play a song and another for mechanical rights to distribute a song—and that its filing was an attempt to draw out the proceedings (*Gaudio v. Spotify USA Inc.*, M.D. Tenn., No. 17-1052, *response filed 9/13/17*; *Bluewater Music Servs. Corp. v. Spotify USA Inc.*, M.D. Tenn., No. 17-1051, *response filed 9/13/17*).

The plaintiffs filed the lawsuits in July, alleging that Spotify wasn't paying for the licenses required to include the plaintiffs' songs on its interactive music streaming service. They asked the U.S. District Court for the Middle District of Tennessee for a \$370 million award against Spotify for copyright infringement.

Spotify, in response, demanded to know why it should have to pay royalties for both distributing and playing music, instead of just one royalty for playing music, in an Aug. 30 filing with the court. The streaming service argued that streaming isn't distribution.

The plaintiffs' lawyers pointed to the Copyright Act, federal regulations, prior case rulings, and established industry practice as justifications for why Spotify owes both royalties.

"Among other things, Spotify's very public admissions about its obligations under the law to obtain mechanical licenses is completely contrary to what they seemed to float in their motion," the plaintiffs' lawyer Richard S. Busch of King & Ballow, Nashville, Tenn., told Bloomberg BNA. "I am at a loss to explain what Spotify was thinking by filing this motion for a more definite statement."

The same legal team filed another lawsuit against Spotify on Sept. 13, this time by a group of companies that hold rights in several works, including "Boogie Woogie Bugle Boy," "Whatever Lola Wants (Lola Gets)," and "Tumbling Tumbleweed" (*A4V Digital, Inc. v. Spotify USA Inc.*, M.D. Tenn., Docket no. unavailable, *complaint filed 9/13/17*).

Spotify didn't respond to a Bloomberg BNA request for comment.

Objection to Comparison With Napster

Spotify "has paid over \$6 billion in royalties to copyright owners," the company said in its Aug. 30 motion. "Spotify is a legitimate, licensed streaming company." The company objected to plaintiffs' statements comparing Spotify to Napster, the peer-to-peer file-sharing service shut down in 2001 for copyright infringement.

Spotify demanded that the plaintiffs specify exactly what it was doing that amounted to distributing copies of music, instead of just playing music. That question goes to the heart of a long-simmering debate over what rights under the Copyright Act are triggered by online streaming.

Before the internet, there was no dispute over the distinction between mechanical rights and performance rights. When a radio station played a song on the air, that was a performance, which required a public performance royalty. When a record company pressed a disc and sold it, that was distribution, which required what is known as a mechanical royalty.

"The act of streaming does not reproduce copies of sound recordings or musical compositions, and equally does not distribute copies of either sound recordings or compositions," Spotify's Aug. 30 motion said. "This is not to say that streaming has no copyright consequence. Streaming does result in a public performance of both sound recordings and musical compositions."

Jim Griffin, a Virginia-based consultant in the digital content industry, told Bloomberg BNA that Spotify's position is logical.

"The word 'mechanical' is almost antithetical to an interactive stream, because there's no mechanical component at all," Griffin said. He pointed out that mechanical rights were originally included in the Copyright Act to deal with the making of piano rolls for player pianos.

Prior Acknowledgement of Obligation

But in their latest filing, the plaintiffs said that Spotify has itself repeatedly acknowledged its obligation to get mechanical licenses. And, they said, the Copyright Act and case law are clear in requiring interactive streaming services to get both performance and mechanical licenses.

The distinction between an interactive service like Spotify, and a noninteractive service like Pandora or Sirius XM Radio, is central to the issue. The Copyright Act says that a noninteractive service—which, like a radio station, doesn't allow listeners to choose exactly what will be played—is exempt from paying distribution royalties. Those suing Spotify in those cases said that the industry, including Spotify, has accepted that interactive services must pay for distribution.

Aaron B. Swerdlow, an entertainment and music lawyer with Gerard Fox Law PC, Los Angeles, told Bloomberg BNA that he expects a settlement—and sooner rather than later.

"The practical likely outcome is that the parties will settle and reach agreement," Swerdlow said. "The parties will realize that they're rowing in the same direction."

King & Ballou represented the plaintiffs. Simpson, Thacher & Bartlett LLP and Baker, Donelson, Bearman, Caldwell & Berkowitz PC represented Spotify.

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For More Information

Text of Spotify's Aug. 30 motion is available at: <http://src.bna.com/sv4>

Text of plaintiffs' Sept. 13 response is available at: <http://src.bna.com/sv3>

Text of new Sept. 13 complaint is at: <http://src.bna.com/sv2>

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