

# The Spotify Settlement With NMPA: What It Means for Music Publishers

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In March 2016, the popular music streaming service, Spotify, reached a settlement with the National Music Publishers Association ("NMPA") to cover billions of unlicensed streams from member publishers dating back to the service's U.S. launch in 2011.<sup>[1]</sup> Spotify will pay \$25 million to publishers and songwriters and \$5 million in punitive damages—a sum many are calling an easy break for the billion dollar streaming service.<sup>[2]</sup> Those who had their mechanical license rights infringed had until June 30, 2016, to opt-in to a settlement agreement between the NMPA and Spotify. The NMPA negotiated the settlement with Spotify on behalf of its members.<sup>[3]</sup> The pros and cons of opting-in have been hotly debated as class action lawsuits, such as those brought by singer David Lowery and singer-songwriter Melissa Ferrick, have been filed.

The NMPA, founded in 1917, is the trade association responsible for advancing the interests of music publishers and their songwriting partners in matters relating to the domestic and global protection of music copyrights.<sup>[4]</sup> The NMPA's goal is to protect and advocate for its members' property rights in copyright law by proposing advantageous legislation and regulations, as well as supporting members in litigation.<sup>[5]</sup> The NMPA's members include both major and independent music publishing companies such as Sony/ATV, Universal Music Publishing Group, and BMG Rights Management.<sup>[6]</sup> The NMPA owned the Harry Fox Agency ("HFA") until 2015.

Spotify is a Sweden-based online streaming company that allows its 100 million subscribers, 30 million of which are paid subscribers, to access millions of songs.<sup>[7]</sup> The company is required to pay a licensing fee to artists, and Spotify, like other online streaming services, contracts this process out to HFA.<sup>[8]</sup> HFA acts as a clearinghouse by issuing mechanical licenses for song reproductions on behalf of the 45,000 publishers it represents.<sup>[9]</sup> A mechanical license "grants the rights to reproduce and distribute copyrighted musical compositions."<sup>[10]</sup> However, litigation began when Spotify failed to pay song owners their royalties from the mechanical licenses.

The process of obtaining and paying royalties through copyright licensing is fairly standardized. Spotify must obtain two different licenses from the music publishers: a mechanical license and a public performance license. Public performance licenses, which allow one to publicly perform someone else's musical creations, are easier to obtain; Spotify can negotiate a blanket license with one of the three performance rights organizations and then pay a lump sum.<sup>[11]</sup> However, mechanical licenses are typically obtained from the music publishers directly. Spotify used HFA's services to obtain mechanical licenses, and then sent their streaming data to HFA in return.<sup>[12]</sup> HFA matched the data to the songs their publishers own, and then calculated the publisher's share of the royalties for the underlying compositions.<sup>[13]</sup> The controversy arose when Spotify began infringing the publisher's rights when royalties for every song streamed from Spotify's 40 million song database could not be calculated and paid to the song owners, as a result of Spotify's inability to properly match songs to their copyright holders based on data from HFA.<sup>[14]</sup> The NMPA then stepped in to advocate for the rights of its members.

In March 2016, the NMPA and Spotify announced a settlement in which publishers would receive royalties for compositions Spotify had already utilized in its catalog in the United States where ownership information had been previously unknown.<sup>[15]</sup> Under the terms of the settlement, publishers were able to claim past royalties owed and ensure that future royalties were paid when due.<sup>[16]</sup> After all claims were addressed, the additional money included in the settlement, including the \$5 million payment for punitive damages, was distributed to publishers who choose to opt-in to the settlement based on their proportionate amount of Spotify streams.<sup>[17]</sup>

There was some hesitation among publishers and songwriters in deciding whether to opt-in, especially in light of the class action lawsuits filed against Spotify. Most notably, David Lowery filed suit in December 2015 alleging \$150 million in damages due to nonpayment of mechanical royalties.<sup>[18]</sup> Lowery represents a class of musicians who claim that Spotify knowingly and willfully infringed on copyrights by failing to obtain mechanical licenses or pay royalties to the copyright owners.<sup>[18]</sup> The case has since been consolidated with other lawsuits brought against Spotify, such as the one by singer-songwriter Melissa Ferrick.<sup>[19]</sup>

In today's litigious atmosphere, class action certification is not always granted and individual plaintiff suits can be costly. Those who opted-in to the settlement instead of joining the class actions were guaranteed some compensation for the unlicensed songs streamed on Spotify. Thus, the settlement provided a way to minimize legal fees for those who did not stand to recover a large sum from Spotify. Lastly, through the settlement, publishers assisted Spotify in building a database for submission of claims of royalties owed.<sup>[20]</sup> Registry in Spotify's database will ensure its ability to locate and pay the proper song owners for future streams.<sup>[21]</sup>

However, the restrictions imposed by the terms of the settlement may not outweigh the benefits. Those who opted-in to the settlement were required to waive their rights to bring separate claims for infringement against Spotify, or to join in a future class action lawsuit.<sup>[22]</sup> If the pending class action lawsuit brought by Lowery and Ferrick, which estimate damages between \$150-200 million, prevails, those who opted-in to the settlement will be unable to recover.<sup>[23]</sup> Additionally, the settlement between Spotify and

the NMPA was private; the artists did not have the opportunity to participate in negotiations.<sup>[24]</sup> Further, there was no judicial oversight ensuring that the settlement was fair.<sup>[25]</sup> The NMPA founded and maintains close ties to HFA so there was speculation of collusion.<sup>[26]</sup> With class certification, there is guaranteed transparency provided by the court that the settlement reached is fair and equitable to all class members, which those who opted-in effectively waived. The final settlement figure was \$30 million, but it is unclear how much that translated to for individual artists.<sup>[27]</sup>

The NMPA assisted in negotiating the settlement on behalf of its members. It estimated that as much as 25 percent of all royalties owed by Spotify were either unpaid or distributed to an improper party due to Spotify's neglect in obtaining mechanical licenses.<sup>[28]</sup> According to David Israelite, President and CEO of the NMPA, the settlement allows both NMPA members and non-NMPA members to participate.<sup>[29]</sup> One of the terms of the settlement required Spotify to publish a list of songs they could not match to publishers so that those who chose to opt-in would have the opportunity to review the list and claim any songs as their own.<sup>[30]</sup> If any songs are left unclaimed after the deadline, the money that would have gone to those owners will be liquidated and distributed per a market share distribution formula to the remaining publishers and songwriters.<sup>[31]</sup> Spotify also agreed to implement a series of best practices to prevent future mechanical license infringement.<sup>[32]</sup>

The class action lawsuit is still pending, and as of November 7, 2016, the only case update was that Spotify counsel's motion to transfer venue to the Southern District of New York was granted.<sup>[33]</sup>

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<sup>[1]</sup> Ed Christman, *Spotify Adds \$5 Million in Damages*, Billboard, (Oct. 31, 2016, 4:25PM), <http://www.billboard.com/articles/business/6913442/spotify-nmpa-settlement-plan>.

<sup>[2]</sup> Bonnie Eslinger, *Spotify's Class Communications Off-Limits*, Law360, (Oct. 31, 2016, 4:33PM), <http://www.law360.com/articles/799440/spotify-s-class-communications-off-limits-in-150m-ip-row>.

<sup>[3]</sup> *Id.*

<sup>[4]</sup> *Mission Statement*, NMPA, (Oct. 31, 4:36PM), [http://nmpa.org/about/#mission\\_statement](http://nmpa.org/about/#mission_statement).

<sup>[5]</sup> *Advocacy*, NMPA, (Oct. 31, 2016, 4:37PM), <http://nmpa.org/atwork/#advocacy>.

<sup>[6]</sup> Dale Kawashima, *NMPA President David Israelite Discusses*, Songwriter Universe, (Oct. 31, 2016, 4:38PM), <http://www.songwriteruniverse.com/david-israelite-nmpa-2016.htm>.

<sup>[7]</sup> Sarene Mae Butao, *Spotify Reached 30 Million Subscribers While Apple is Closing The Gap*, University Herald, (Nov. 21, 2016, 1:57PM), <http://www.universityherald.com/articles/32300/20160621/spotify->

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[16] *Id.*

[17] Ed Christman, *Spotify Adds \$5 Million in Damages*.

[34] Ed Christman, *Spotify Hit with Second Lawsuit*, Billboard, (Oct. 31, 2016, 4:4PM), <http://www.billboard.com/articles/business/6836439/spotify-hit-with-second-copyright-infringement-lawsuit-melissa-merrick-david-lowery>.

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[19] Bonnie Eslinger, *Spotify's Class Communications Off-Limits*.

[20] *Id.*

[21] *Id.*

[22] *Id.*

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[25] Paul Resnikoff, Songwriters: Should You Sign the Spotify Settlement Agreement?, Digital Music News, (Nov. 7, 2016, 3:31PM), <http://www.digitalmusicnews.com/2016/03/16/frequently-asked-questions-about-the-spotify-settlement-agreement/>.

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