

A review of Wixen Music Publishing, Inc.'s December 29, 2017 complaint filed against Spotify USA, Inc. suggests that Spotify may have approached its mechanical licensing obligations under the Copyright Act for the musical compositions in Wixen's catalogue with an approach one might euphemistically refer to as "it's easier to ask for forgiveness than permission." The crux of Wixen's argument is simple: Spotify has been making available for streaming and/or limited downloading musical compositions for which Wixen is the exclusive licensee and administrator without obtaining licenses for the protected works. This is a violation of U.S. copyright law.

Wixen claims that Spotify is using the musical compositions without identifying the composition rights holders and without retaining the required mechanical licenses (either compulsory or direct) for the musical works as required under the Copyright Act. Wixen alleges that Spotify is well aware of the licensing requirements for Wixen's musical compositions, but is ignoring its legal obligations and is continuing to use the protected musical works without proper licensing. One assumes that Spotify is aware that offering to pay licensing fees after the fact does not cure the underlying copyright violation...

There are deeper implications here. While Bill and Ted may have espoused a lovely ethos with their life view of "be excellent to each other," Wixen's lawsuit demonstrates that at least in the context of the recondite world of digital music licensing, this admittedly nebulous goal is easier said than achieved.

According to Wixen, Spotify made the attempt to license the sound recordings that it was intending to offer when it launched its music service in the United States, but made "insufficient efforts" to obtain the required musical composition information and licenses, or to comply with the compulsory licensing scheme provided in 17 U.S.C. §115 (not surprising, considering the general disuse of §115 within the industry). Why was Spotify apparently more willing to work to license the sound recordings than it was to license the musical compositions? This is unclear, but the subtext in Wixen's complaint may be that it has something to do with record companies being the entities that generally own the sound recordings. Does Spotify consider that it has more to lose or faces greater potential liability by "rocking the boat" with the record companies than it does with those who hold the copyrights in the musical works?

Neither is Wixen's complaint very kind to the Harry Fox Agency ("HFA"), the leading provider of mechanical rights services for musical compositions in the United States. Wixen notes that Spotify "outsourced its [licensing] responsibility" to HFA, and then describes Harry Fox as "ill-equipped to obtain the necessary mechanical licenses[]" for the musical works in question. Wixen further alleges that Spotify knew that HFA did not possess the infrastructure and ability to procure the required mechanical licenses. It seems unlikely that any of this would be interpreted as "excellent" by either Bill or Ted.

It is no coincidence that Wixen filed its lawsuit against Spotify when it did. Wixen has made clear that passage of HR 4706, the proposed Music Modernization Act of 2017, in part a

response to the seemingly ineluctable problems with the current mechanical licensing schemes, would preclude any recovery by Wixen for its current claims.

So will the Music Modernization Act remedy the extant problems and allow those in the music licensing world to “be excellent to each other”? For now, it is unclear. HR 4706, sec. 2(d) proposes a blanket licensing scheme and a “mechanical licensing collective” that among other functions, is intended to administer blanket licenses; collect and distribute royalties; engage in efforts to identify musical works embodied in sound recordings; maintain a publically accessible database of musical works and copyright owners, including “other information relevant to the administration of licensing activities[,]”; and the like. In theory, the mechanical rights collective idea certainly sounds “excellent,” but also somewhat reminiscent of Harry Fox’s role in the mechanical rights world. Wixen has already made itself clear as to how well it feels the Harry Fox model is working.

If the Music Modernization Act is passed in something close to its current draft form, will it, and in particular, the “mechanical licensing collective” it proposes, change the playing field, and allow Bill and Ted’s “excellent” vision to come to pass? Perhaps. There is no question that the current system is woefully unsuited for the current technology, but in its current draft, whether the Music Modernization Act or any similar legislation can be a saving grace remains to be seen.

For now, the Wixen lawsuit will plod on, with the rights of those who hold the copyrights in the musical compositions at issue unresolved and in flux.

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