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Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Library of Congress
Washington, D.C.

In re Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords IV)	Docket No. 21-CRB-0001-PR (2023–2027)

GEO'S NOTICE OF CONTROVERSY REGARDING SPOTIFY'S PLANNED §106 COPYRIGHT INFRINGEMENT IN VIOLATION OF COMPULSORY LICENSE, MMA, COPYRIGHT ACT, AND CRB §115 RULINGS, INCLUDING ANTICOMPETITIVE AND DISCRIMINATORY BEHAVIOR

Participant George Johnson ("GEO"), a *pro se* Appellant songwriter respectfully submits this Notice of Controversy regarding participant Spotify's planned §106 copyright infringement of §115 works in violation of U.S. compulsory license laws, the Music Modernization Act ("MMA"), and CRB rulings for both *Phonorecords III* and *IV,* and is therefore *unreasonable.* Spotify's behavior also seems anticompetitive as well as discriminatory towards American §115 authors.

Recent press reports[1] state that starting in 2024 *Spotify will stop paying* artists, songwriters, DIY publishers, and indy labels for songs that do not reach 1,000 streams on the Spotify platform within 12 months, and this seems unlawful.

A November 3, 2023 Billboard article states, "*According to Spotify's Loud & Clear website, 37.5 million tracks had surpassed 1,000 all-time streams as of 2022.*

[1] https://www.billboard.com/pro/spotify-new-royalty-scheme-most-songs-wont-earn-payouts/ November 3, 2023 by Glenn Peoples for Billboard, *Most Tracks on Spotify Won't Earn a Royalty Under New Scheme.*

That's out of a catalog of 100 million tracks at the end of 2022, per Spotify's 2022 annual report. In other words, ***almost two-thirds of Spotify's catalog*** *has never reached the 12-month minimum stream count to be eligible to receive royalties. Given that's all-time streams since the company launched in 2008, it stands to reason that fewer yet will reach 1,000 streams within a 12-month period*." (emphasis added)

While §115 works are the focus in this proceeding, this new Spotify "policy" apparently covers both §114 and §115 performances, reproductions, and distribution. GEO is not sure how §115 mechanicals and performances are exempt.

Spotify's behavior seems completely contrary to §106 (and Art. I) exclusive rights, the Copyright Act, CRB code, including §385, other copyright law, the compulsory license for §115, the MMA blanket license for §115 works, and the final rules and determinations by the CRB in both *Phonorecords III* and *IV,* et al.

This fraudulent scheme is apparently a way for Spotify to *not pay* almost two-thirds of *all* American music copyright authors for their performances, reproductions, and distribution of their *individual works* already licensed to Spotify.

While I'm not an attorney, there does not seem to be an "exception" to payment for 1,000 plays found in the compulsory license, Subpart C, copyright law, Your Honor's rulings, administrative procedures, and rate-court precedent.

Therefore, if Spotify is required to pay, I respectfully request that Your Honors please take some type of internal legal relief or *sua sponte* ruling to preserve our §115 exclusive rights and payments here in *Phonorecords IV* and to stop Spotify from willfully stealing income from American songwriters, once again.

Spotify is known for it's brazen and willful mass copyright infringement, especially in the current *8 Mile Style v. Spotify* (Case No. 19-CV-00736) where Spotify streamed artist Eminem's works billions of times with no pay. Spotify and participant NMPA's own Harry Fox Agency ("HFA") fraudulently claimed they couldn't find Eminem nor his publisher to get a good address to pay them!

8 Mile's July 1, 2020 First Amended Complaint[2] states "*Spotify did not have any mechanical licenses*", "*their "royalty statements" were themselves fraudulent"*, "*did not account for literally billions of streams of the Eight Mile Compositions*", "*they also falsely represented that the statutory royalty rate was applicable when they knew it was not,*" and could not pay "*because HFA supposedly does not know who is the copyright owner or how to contact the copyright owner of the song*."

While this is a separate action in a civil trial, Spotify's pattern of infringement, deception, and fraudulent behavior in *8 Mile* is relevant here since it is evidence of the same exact brazen infringement with the same "catch me if you can" tactics by Spotify and their counsel — who *all know better* as attorneys.

It would also seem the terms in § 385.21 *Royalty rates and calculations,* especially § 385.21(b)(4) Step 4: *Calculate the per-work royalty allocation* are relevant here stating, "*This is the amount payable for the reproduction and distribution of each musical work,*" and "*each Play shall be counted*", et al.

> "This is the amount payable for the reproduction and distribution of each musical work used by the Service Provider by virtue of its Licensed Activity through a

[2] https://musictechpolicy.files.wordpress.com/2020/07/eight-mile-style-amended-complaint.pdf July 1, 2020 *First Amended Complaint, Nature of the Action.* (Also See *David Lowery v. Spotify*)

particular Offering during the Accounting Period. To determine this amount, the result determined in step 3 in paragraph (b)(3) of this section must be allocated to each musical work used through the Offering. The allocation shall be accomplished by the Mechanical Licensing Collective by dividing the payable royalty pool determined in step 3 for the Offering by the total number of Plays of all musical works through the Offering during the Accounting Period (other than Plays subject to subpart D of this part) to yield a per-Play allocation, and multiplying that result by the number of Plays of each musical work (other than Plays subject to subpart D of this part) through the Offering during the Accounting Period. For purposes of determining the per-work royalty allocation in all calculations under step 4 in this paragraph (b)(4) only (*i.e.,* after the payable royalty pool has been determined), for sound recordings of musical works with a playing time of over 5 minutes, each Play shall be counted as provided in paragraph (c) of this section. Notwithstanding the foregoing, if the Service Provider is not capable of tracking Play information because of bona fide limitations of the available technology for Offerings of that nature or of devices useable with the Offering, the per-work royalty allocation may instead be accomplished in a manner consistent with the methodology used for making royalty payment allocations for the use of individual sound recordings."[3]

Finally, while I'm not sure if any of these cases are considered precedent, they do seem relevant and might possibly apply, including; *Eldred v. Ashcroft*, containing quotes from *Mazer v. Stein, American Geophysical Union v. Texaco Inc.*, and James Madison, as well as *Herbert v. Shanley Co.* regarding individual authors having an *incentive to create* and *actually profit*, not just work for free, or work for free for billionaire Daniel Ek in Sweden and other wealthy Spotify stockholders.

Eldred v. Ashcroft 537 U.S. 186 (2003)

"18. Justice Stevens' characterization of reward to the author as "a secondary consideration" of copyright law, *post*, at 6, n. 4 (internal quotation marks omitted), understates the relationship between such rewards and the "Progress of Science." As we have explained, "**[t]he economic philosophy behind the [Copyright] [C]lause ... is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and**

[3] https://www.ecfr.gov/current/title-37/chapter-III/subchapter-E/part-385/subpart-C

inventors." *Mazer* v. *Stein,* 347 U.S. 201, 219 (1954). **Accordingly,** "**copyright law *celebrates* the profit motive, recognizing that the incentive to profit from the exploitation of copyrights will redound to the public benefit by resulting in the proliferation of knowledge... . The profit motive is the engine that ensures the progress of science.**" *American Geophysical Union* v. *Texaco Inc.*, 802 F. Supp. 1, 27 (SDNY 1992), aj'd, 60 F.3d 913 (CA2 1994). **Rewarding authors for their creative labor and "promot[ing] ... Progress" are thus complementary**; as James Madison observed, in copyright "**[t]he public good fully coincides ... with the claims of individuals.**" The Federalist No. 43, p. 272 (C. Rossiter ed. 1961). Justice Breyer's assertion that "copyright statutes must serve public, not private, ends" *post*, at 6, **similarly misses the mark. The two ends are not mutually exclusive; copyright law serves public ends by providing individuals with an incentive to pursue private ones**."[4]

Herbert v. Shanley Co. 242 U.S. 591 (1917)

"If the rights under the copyright are infringed only by a performance where money is taken at the door, they are very imperfectly protected. Performances not different in kind from those of the defendants could be given that might compete with and even destroy the success of the monopoly that the law intends the plaintiffs to have. It is enough to say that there is no need to construe the statute so narrowly. The defendants' performances are not eleemosynary. They are part of a total for which the public pays, and the fact that the price of the whole is attributed to a particular item which those present are expected to order is not important. It is true that the music is not the sole object, but neither is the food, which probably could be got cheaper elsewhere. The object is a repast in surroundings that to people having limited powers of conversation, or disliking the rival noise, give a luxurious pleasure not to be had from eating a silent meal. **If music did not pay, it would be given up. If it pays, it pays out of the public's pocket. Whether it pays or not, the purpose of employing it is profit, and that is enough."** Decree reversed.[5] (emphasis added)

$.0000 per-stream is no incentive, nor profit, just *unreasonable* and contrary to CRB rulings and code as far as I know. If the CRB had ruled for $.0000 it would be called "arbitrary and capricious". Spotify has never been *profitable* for 99% of

[4] https://supreme.justia.com/cases/federal/us/537/186/ *Eldred v. Ashcroft* 537 U.S. 186 (2003)

[5] https://supreme.justia.com/cases/federal/us/242/591/ *Herbert v. Shanley Co.* 242 U.S. 591 (1917)

the music creators on their platform since their *access model,* that Spotify, Google, et al., created, was designed to *substitute for the sales model* so streamers like them *wouldn't have to pay songwriters their lawful 9.1 cents.* Now, $.00012 is too much.

GEO respectfully requests that Your Honors not allow Spotify to commit this brazen mass copyright infringement on §115 songwriters which is also unreasonable, discriminatory, and anticompetitive. GEO also respectfully requests that my bad lawyering not hurt our request and dire need for relief here. Please advise if Your Honors need further briefing, evidence, or argument.

CONCLUSION

For the above and additional good reasons, good cause, and at Your Honors' discretion, GEO respectfully requests relief from Spotify's planned copyright infringement of individual Subpart C interactive streams for §115 underlying works — all in violation of CRB rulings, rate court precedent, the Copyright Act, §106, the compulsory license, blanket MMA license, and Art 1, Cl. 8, §8 exclusive right.

Respectfully,

By: */s/ George D. Johnson*

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George D. Johnson (GEO), an individual songwriter and music publisher

Monday, November 6, 2023

Proof of Delivery

I hereby certify that on Monday, November 06, 2023, I provided a true and correct copy of the 2023-11-06 GEO's Notice of of Controversy Regarding Spotify's Planned §106 Copyright Infringement in Violation of Compulsory License Law, MMA, CRB §115 rulings, Including Anticompetitive and Discriminatory Behavior to the following:

Joint Record Company Participants, represented by Steven R. Englund, served via E-Service at senglund@jenner.com

Zisk, Brian, represented by Brian Zisk, served via E-Service at brianzisk@gmail.com

Copyright Owners, represented by Benjamin K Semel, served via E-Service at Bsemel@pryorcashman.com

Sony Music Entertainment, represented by Steven R. Englund, served via E-Service at senglund@jenner.com

Amazon.com Services LLC, represented by Joshua D Branson, served via E-Service at jbranson@kellogghansen.com

UMG Recordings, Inc., represented by Steven R. Englund, served via E-Service at senglund@jenner.com

Powell, David, represented by David Powell, served via E-Service at davidpowell008@yahoo.com

Pandora Media, LLC, represented by Benjamin E. Marks, served via E-Service at benjamin.marks@weil.com

Spotify USA Inc., represented by Joseph Wetzel, served via E-Service at joe.wetzel@lw.com

Warner Music Group Corp., represented by Steven R. Englund, served via E-Service at senglund@jenner.com

Apple Inc., represented by Mary C Mazzello, served via E-Service at mary.mazzello@kirkland.com

Google LLC, represented by Gary R Greenstein, served via E-Service at ggreenstein@wsgr.com

Signed: /s/ George D Johnson