

Guess Who’s Going to Jail Tonight: Ye and Eminem Highlight Legal Issues with Spotify and the Music Modernization Act

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Eminem publisher Eight Mile Style LLC is waging war against Spotify in the Middle District of Tennessee for alleged copyright infringement and unpaid royalties.¹ Eminem is accusing Spotify of going public “off the back” of streaming songs like “Lose Yourself” without the appropriate licenses.² The fascinating Complaint argues that Spotify leveraged Eminem’s fame and popularity to increase paid subscriptions without properly paying out royalties.³ Eight Mile Style directly mentions Spotify’s involvement in drafting the Music Modernization Act of 2018 (MMA) claiming Spotify intentionally drafted a clause limiting its liability for past copyright infringements.⁴

Meanwhile, Kanye West’s initial “Donda” release highlighted a potentially new issue the MMA created. Prior to the MMA, for an artist’s work to be streamed, the song had to “have previously been distributed to the public.”⁵ But now, for streaming services like Spotify, first use of songs may be streamed with permission from the artists and owners of the sound recordings.⁶ If you don’t remember Kanye’s now deleted Instagram post:



¹ See First Amended Complaint for Copyright Infringement at 1, 10, Eight Mile Style v. Spotify, No. 19-CV-00736, 2020 WL 9814372 (M.D. Tenn.) [hereinafter *The Complaint*] (describing complaint).

² See *id.* at 7.

³ See *id.* at 5.

⁴ See *id.* at 15.

⁵ 17 U.S.C. § 15(a)(1)(A)(i).

⁶ See Music Modernization Act, Pub. L. No. 115-264, § 102, 132 Stat. 3676 (2018) (codified as amended at 17 U.S.C. § 15) (2018)) (adding new provision to Copyright Act).

⁷ Navjosh, *Kanye Says Universal Released ‘DONDA’ Without His Approval*, HIPHOP-N-MORE (Aug. 30, 2021), <https://hiphop-n-more.com/2021/08/kanye-says-universal-released-donda->

This initial outrage and lack of control over the initial *Donda* release may very well have paved the way for Kanye’s development of the new Stem Player platform for his *Donda 2* release, which cuts out Spotify entirely. Before we dive deeper into the issues, let’s discuss music copyright and what exactly the MMA changed.

I. Music Copyright

Whenever an artist writes or records a song, two separate copyrights are created. The first copyright is the musical composition copyright, which includes the written lyrics and sheet music.⁸ The second copyright is the actual sound recording copyright, sometimes called a “Master.”⁹ Typically, songwriters or artists own the musical composition, while a record label that funded the production of the song will own the sound recording.¹⁰

The popular example used to explain this distinction is the song “I Will Always Love You,” written by Dolly Parton, but made famous by Whitney Houston. Parton, who wrote the song, owns the musical composition copyright (lyrics), while Sony, Whitney Houston’s label, owns the sound recording copyright for Houston’s version.¹¹ Accordingly, to stream the Whitney Houston version of the song, Spotify would have to pay both Parton for the composition copyright and Sony for the sound recording copyright.¹²

Under the United States Copyright Act, copyright holders automatically get a set of exclusive rights when they create a song, including the rights to reproduce, prepare derivative work, distribute, and perform publicly.¹³ Typically, established songwriters will have negotiated contracts in place that assign these rights to a publisher or record company in exchange for royalty and licensing agreements.¹⁴ These are called voluntary licenses because both parties agree on the negotiated rates. But what happens when they disagree?

To prevent Beyonce from truly running the world and not letting anyone reproduce her music, Congress developed compulsory licenses. Compulsory licenses require artists to issue

without-his-approval/ [<https://perma.cc/MKP5-DN8L>] (capturing Kanye’s now deleted Instagram post).

⁸ See *Copyright Registration of Musical Compositions and Sound Recordings*, U.S. COPYRIGHT OFF. (Mar. 2021), <https://www.copyright.gov/circs/circ56a.pdf> [<https://perma.cc/5JYS-2SSD>] (describing musical composition copyright).

⁹ See Donald S. Passman, *ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS* 78 (10th ed. 2019).

¹⁰ See Mark Peterson, *A Necessary Shift of Focus: Moving Digital Music Rights Away from Efficiency and Towards Fair Compensation*, King Hall Intellectual Prop. Law Assoc. (Jan. 29, 2016), https://students.law.ucdavis.edu/ip/ip_news/posts/a-necessary-shift-of-focus-moving-digital-music-rights-away-from-efficiency-and-towards-fair-compensation.html [<https://perma.cc/3LLA-WS8P>].

¹¹ See Michelle Castillo, *How Spotify Licenses and Pays for Music Rights*, CNBC (Apr. 27, 2018), <https://www.cnbc.com/2018/02/28/how-spotify-licenses-and-pays-for-music-rights.html> [<https://perma.cc/BV98-6YXG>] (providing example of copyright complexity).

¹² See *id.*

¹³ See 17 U.S.C. § 106 (listing exclusive rights); *id.* § 101 (providing definitions of rights).

¹⁴ See Daniel S. Hess, *The Waiting Is the Hardest Part: The Music Modernization Act's Attempt to Fix Music Licensing*, U. ILL. J.L. TECH. & POL'Y 187, 190 (2019).

licenses for some of those exclusive rights just mentioned—even when they don’t want to.¹⁵ In return, the artist or copyright owner receives a mechanical royalty, which is a royalty paid at a set rate by law whenever the music is reproduced or streamed.¹⁶ But to receive a valid compulsory license and not infringe on someone’s copyright, certain criteria must be met.

Prior to the MMA, Section 115 of the Copyright Act required a Notice of Intent (NOI) be sent to a copyright owner if anyone reproduced a song via compulsory license.¹⁷ If you could not track down the copyright owner, at the very least, a notice had to be filed with the Copyright Office within thirty days of distribution.¹⁸ Due to the complexity and volume of the number of songs created, services like Spotify often didn’t know who to pay the required statutory fees to for a compulsory license.¹⁹ In response, the MMA established a Mechanical Licensing Collective (MLC) essentially granting blanket licenses to streaming services.²⁰ Rather than pay different copyright owners, now streaming services can pay directly into the MLC, which then distributes 100% of the royalties accordingly.²¹

II. Back to Eminem

Eight Mile LLC alleges that Harry Fox Agency, the music industry’s largest mechanical licensing entity, circulated fraudulent and backdated NOIs to “conceal Spotify’s failure to acquire timely mechanical compulsory licenses for Eight Mile compositions.”²² The Complaint goes so far as to allege that Harry Fox and Spotify conspired to pay Kobalt—the entity in charge of collecting royalties on behalf of Eight Mile—statutory royalties at the rate of valid compulsory licenses in order to make Kobalt believe that Spotify had secured the appropriate licenses.²³ This would mean that Spotify and Harry Fox committed copyright infringement by streaming Eminem’s music, despite lacking valid compulsory licenses.²⁴ Therefore, Eminem should have had the opportunity to negotiate a voluntary license at far higher rates than the statutory mechanical royalties given the popularity of his music because the alleged invalid NOIs would have missed the thirty-day compulsory license window.

Eight Mile LLC also alleged that Spotify and Harry Fox Agency placed songs like “Lose Yourself” in something called “Copyright Control.”²⁵ When something is in Copyright Control the entities do not know who the copyright owner of the composition is or how to contact that person.²⁶ For small-time artists on Spotify, the concept of Copyright Control makes sense. But

¹⁵ See Passman, *supra* note 9, at 215.

¹⁶ See *id.* at 216.

¹⁷ See 17 U.S.C. § 15(b) (discussing notice of intent).

¹⁸ See *id.*

¹⁹ See Passman, *supra* note 9, at 240.

²⁰ See 17 U.S.C. § 15(d) (explaining blanket licenses).

²¹ See 17 U.S.C. § 15(d)(3)(c) (providing mechanical license collective authorities and functions); Passman, *supra* note 9 at 241.

²² See *The Complaint*, *supra* note 1, at 2.

²³ See *id.* at 36.

²⁴ See *id.* at 2.

²⁵ *Id.* at 5.

²⁶ See *The Complaint*, *supra* note 1, at 5.

for “one of the most famous and popular songs in the world,” it is highly unlikely.²⁷ In Spotify’s defense, there may be multiple entities that own portions of a copyrighted composition.²⁸

If it is true that Spotify knew Harry Fox Agency failed to file timely NOIs with the Copyright Office and placed the song in “Copyright Control” to avoid voluntary licenses, then Spotify likely distributed the music without the appropriate composition copyright licenses. As the Complaint alleges: “Spotify made the deliberate decision to distribute sound recordings without building any internal infrastructure to license compositions properly or comply with the requirements of Section 115 of the Copyright Act.”²⁹

The Complaint also accuses Spotify of helping Congress draft the MMA to cover its past copyright infringements, essentially “clear[ing] the last hurdle for Spotify to go public.”³⁰ Many streaming services had been on the receiving end of class action lawsuits about royalty payouts, as there are many moving parts. But the MMA now has a statutory cut-off for copyright infringement of December 31, 2017, which the Complaint alleges is an “unconstitutional taking.”³¹

How this lawsuit shakes out will impact not just Eight Mile LLC on behalf of Eminem, but thousands of other smaller composition copyright owners.

III. What about Kanye?

Kanye’s accusation that Universal “released” Donda without his permission highlight an important new distinction in the MMA.³² Before the MMA, for a copyright owner to be “compelled” to issue a compulsory license, the song had to among other things, have been previously distributed or released.³³ In other words, the song couldn’t be a recording’s “first use.” But the pre-MMA Copyright Act compulsory licenses only dealt with physical records and not streaming services like Spotify.³⁴

Now, streaming services may stream music *before* a song is publicly distributed or released. But the “first fixation” must be made under the authority of the musical copyright owner, and “the sound recording copyright owner” (in this case Universal) “has the authority of the musical [composition] copyright owner” (in this case Kanye) to distribute the music.³⁵ But Kanye claimed in his Instagram post that the album was released without his approval.

Unfortunately, we don’t have the details of Kanye’s Universal contract. And it would be highly unlikely that one of the largest record labels in the world would not have negotiated these details prior to “Donda’s” development. But for the sake of this article (and maybe Kanye if he is reading), Kanye could argue that the release, or “first fixation” of all of the songs on “Donda,” were not made under his authority as the MMA requires.³⁶

²⁷ *Id.*

²⁸ See Passman, *supra* note 9, at 241 (explaining mainstream publishers may own some but not all interests for songs).

²⁹ *Id.*

³⁰ *The Complaint*, *supra* note 1, at 15.

³¹ *Id.*

³² See Navjosh, *supra* note 7 (screenshotting Kanye’s Instagram post).

³³ See 17 U.S.C. § 15(a)(1)(A)(i); Passman, *supra* note 15 at 214-15.

³⁴ See Passman, *supra* note 9, at 217.

³⁵ 17 U.S.C. § 15 (a)(1)(A)(ii)(I).

³⁶ *Id.*

Kanye was adamant that the songs and album were not finished. Each listening party slightly altered the order of songs, verses of songs, and sometimes the featured contributor. For example, after performing Jail pt. 2 with Jay-Z at a listening party at the Mercedes-Benz stadium in Atlanta, Kanye replaced Jay-Z with DaBaby and Marilyn Manson at Soldier Field in Chicago.³⁷ Kanye, who has a history of challenging record and streaming companies from taking advantage of artists, could argue that he was still developing the songs when Universal released them.³⁸ Like Eminem, this would have violated his musical composition copyright, but on different grounds. It would be Universal, not Spotify, either violating his copyright or breaching the contract (if Kanye had final approval, for example).

It's not a secret that ticket sales, merchandising, and downloads are far more lucrative for artists than streaming royalties.³⁹ Kanye reportedly made \$7 million alone at one listening party, and many speculated he would continue to push the release indefinitely.⁴⁰ It would be fascinating to know if Universal had to cover Kanye's reported \$150,000 per day stay at Mercedes-Benz stadium—record labels and publishing companies often foot the bill for tour costs.⁴¹ Kanye the businessman likely knew all of this. So instead of an on-time release, he generated millions off listening parties, merchandise, and presales of downloadable versions of the album on iTunes.

Kanye doubled down on his strategy of generating revenue outside of streaming platforms by exclusively releasing *Donda 2* on his new Stem Player, which is a physical device

³⁷ See Ian Spiegelman, *Controversy Loves Company: Kanye West Brings out Marilyn Manson and DaBaby for 'Donda' Show*, L.A. MAG. (Aug. 27, 2021), <https://www.lamag.com/culturefiles/kanye-west-marilyn-manson/> [<https://perma.cc/7MMH-2AUH>].

³⁸ See Tim Ingham, *Kanye West's War Against Record Contracts Could Actually Work — for Kanye, Anyway*, ROLLING STONE MAG. (Sep. 21, 2021), <https://www.rollingstone.com/pro/features/kanye-west-universal-masters-war-1064225/> [<https://perma.cc/T9WG-TWWS>] (mentioning Kanye's challenge to Universal to regain control of his early music's Master licenses); Matt Wille, *Kanye Takes Swing At Spotify*, INPUT MAG. (Feb. 18, 2022), <https://www.inputmag.com/culture/kanye-west-spotify-donda-2-stem-player-streaming-apple-music-amazon> [<https://perma.cc/T5UD-E583>] (discussing *Donda 2*'s release on Stem Player and not Spotify).

³⁹ See Devin Delfino, *How Musicians Really Make Their Money*, BUSINESS INSIDER (Oct. 19, 2018), <https://www.businessinsider.com/how-do-musicians-make-money-2018-10> [<https://perma.cc/46U8-G77Z>] (highlighting U2's 94% of earnings from touring and only 6% from streaming).

⁴⁰ See Aja Romano, *Donda: The Hype, the Controversy, the Music, the Kanye of It All, Explained*, VOX (Sep. 3, 2021), <https://www.vox.com/culture/22652228/donda-kanye-west-album-controversy-explained> [<https://perma.cc/G3Q5-TLLL>].

⁴¹ See Gray Trock, *Kanye West Is Paying 150k Per Day to Live at Mercedes-Benz Stadium*, BLAST (Aug. 5, 2021), <https://theblast.com/81579/kanye-west-is-paying-150k-per-day-to-live-at-mercedes-benz-stadium/> [<https://perma.cc/LDK8-P4BD>] (discussing Kanye's stay at Mercedes-Benz Stadium).

that avoids Spotify's compulsory licenses entirely.⁴² This single move generated more than 2 million dollars before the album was even released, and perhaps gave Kanye the control back that he felt he lost with the initial *Donda* release.⁴³ As Kanye explained, "We did more revenue on Stem Player, without the album even being out, than we would have done with the album being out on streaming."⁴⁴ This new platform will likely lead to an entire new host of copyright issues, but for now, the move was successful as a way to generate revenue outside of streaming services.

Contrary to the title, no one is actually going to jail tonight. But maybe Kanye and Eminem have a future collaborating—not to make music, but to take on the major labels and streaming services. That is something we'd all listen to on repeat.

⁴² See Sam Mangioni, *Kanye West Says Stem Player Sales Made \$3 Million in First Day Ahead of Exclusive 'Donda 2' Release*, MAN OF MANY (Feb. 24, 2022), <https://manofmany.com/entertainment/music/kanye-west-stem-player-3-million-first-day-exclusive-donda-2-release> [<https://perma.cc/T4G3-G3E8>].

⁴³ See *id.* (quoting Kanye).

⁴⁴ *Id.*