

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

MELISSA FERRICK, *et. al.*,

Plaintiffs,

vs.

SPOTIFY USA INC, *et. al.*

Defendants.

Case No. 1:16-cv-08412 (AJN)

**DEFENDANT SPOTIFY USA INC.'S
MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION FOR FINAL
APPROVAL OF CLASS ACTION
SETTLEMENT**

Mayer Brown LLP
1221 Avenue of Americas
New York, New York 10020
(212) 506-2500

Attorneys for Spotify USA Inc.

TABLE OF CONTENTS

	Page
INTRODUCTION	1
ARGUMENT	2
I. Litigating The Proposed Class Claims Would Pose A Fail-Safe Problem.	5
II. The Individualized Inquiries Required To Litigate The Infringement Claims Would Overwhelm Any Common Issues.	6
A. Identification of Compositions and Copyright Ownership.	7
B. Whether A Work Has a Valid Copyright.....	14
C. Whether Spotify Has A License Or Authorization To Distribute Any Particular Composition.	16
D. Whether And How Spotify Has Reproduced Or Distributed Any Particular Composition.....	18
E. The Basis and Method for Assessing Damages.....	20
F. Whether Any Infringement Was Willful.	23
CONCLUSION.....	24

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>In re Am. Int’l Grp., Inc. Secs. Litig.</i> , 689 F.3d 229 (2d Cir. 2012).....	1
<i>Amchem Prods., Inc. v. Windsor</i> , 521 U.S. 591 (1997).....	1, 7
<i>Appalseed Prods., Inc. v. MediaNet Digital, Inc.</i> , 2012 WL 2700383 (S.D.N.Y. July 6, 2012).....	3
<i>Atl. Recording Corp. v. Howell</i> , 554 F. Supp. 2d 976 (D. Ariz. 2008)	20
<i>BMI v. Bayside Boys, Inc.</i> , 2013 WL 5352599 (E.D.N.Y. Sept. 23, 2013)	23
<i>BMW of North Am., Inc. v. Gore</i> , 517 U.S. 559 (1996).....	23
<i>Brecher v. Republic of Argentina</i> , 806 F.3d 22 (2d Cir. 2015).....	7, 8
<i>Bryant v. Media Right Prods., Inc.</i> , 603 F.3d 135 (2d Cir. 2010).....	22
<i>Capital Records, Inc. v. Thomas</i> , 579 F. Supp. 2d 1210 (D. Minn. 2008).....	20
<i>Cartoon Network LP, LLLP v. CSC Holdings, Inc.</i> , 536 F.3d 121 (2d Cir. 2008).....	19
<i>In re Cellco P’Ship</i> , 663 F. Supp. 2d 363 (S.D.N.Y. 2009).....	8
<i>City of Detroit v. Grinnell Corp.</i> , 495 F.2d 448 (2d Cir. 1974).....	1, 24
<i>Davis v. Blige</i> , 505 F.3d 90 (2d Cir. 2007).....	13
<i>Edward B. Marks Music Corp. v. Jerry Vogel Music Co.</i> , 140 F.2d 268 (2d Cir. 1944).....	22
<i>Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.</i> , 499 U.S. 340 (1991).....	14

TABLE OF AUTHORITIES
(continued)

	Page
<i>Feltner v. Columbia Pictures Television</i> , 523 U.S. 340 (1998).....	2
<i>Fitzgerald Pub. Co., Inc. v. Baylor Pub. Co., Inc.</i> , 807 F.2d 1110 (2d Cir. 1986).....	21
<i>Football Ass’n Premier League Ltd. v. YouTube, Inc.</i> , 297 F.R.D. 64 (S.D.N.Y. 2013)	2, 3
<i>Hicks v. T.L. Cannon Corp.</i> , 35 F. Supp. 3d 329 (W.D.N.Y. 2014).....	5
<i>Island Software & Computer v. Microsoft, Inc.</i> , 413 F.3d 257 (2d Cir. 2005).....	23
<i>Johnson v. Nextel Commc’ns, Inc.</i> , 780 F.3d 128 (2d Cir. 2015).....	7
<i>Keane Dealer Servs., Inc. v. Harts</i> , 968 F. Supp. 944 (S.D.N.Y. 1997)	17
<i>Lindsey v. Normet</i> , 405 U.S. 56 (1972).....	6
<i>Manno v. Tenn. Prod. Ctr.</i> , 657 F. Supp. 2d 425 (S.D.N.Y. 2009).....	22
<i>Marya v. Warner/Chappell Music, Inc.</i> , 2015 WL 5568497 (C.D. Cal. Sept. 22, 2015)	12, 13, 15, 16
<i>McDonald v. West</i> , 138 F. Supp. 3d 448 (S.D.N.Y. 2015).....	15
<i>Meredith v. Smith</i> , 145 F.2d 620 (9th Cir. 1944)	11
<i>Parker v. Time Warner Entm’t Co., L.P.</i> , 331 F.3d 13 (2d Cir. 2003).....	23
<i>In re Petrobras Secs.</i> , 862 F.3d 250 (2d Cir. 2017).....	7, 8
<i>Poindexter v. EMI Record Grp., Inc.</i> , 2012 WL 1027639 (S.D.N.Y. Mar. 27, 2012)	8

TABLE OF AUTHORITIES
(continued)

	Page
<i>Reed Elsevier, Inc. v. Muchnick</i> , 559 U.S. 154 (2010).....	14
<i>Resnick v. Copyright Clearance Ctr., Inc.</i> , 2003 WL 22176619 (D. Mass. Sept. 22, 2003)	2
<i>Royal Park Investments SA/NV v. Deutsche Bank Nat’l Trust Co.</i> , 2017 WL 1331288 (S.D.N.Y. Apr. 4, 2017).....	8
<i>Solid Oak Sketches, LLC v. 2K Games, Inc.</i> , 2016 WL 4126543 (S.D.N.Y. Aug. 2, 2016).....	21
<i>Spread Enters., Inc. v. First Data Merchant Servs., Corp.</i> , 298 F.R.D. 54 (E.D.N.Y. 2014)	5, 8
<i>State Farm Mut. Auto. Ins. Co. v. Campbell</i> , 538 U.S. 408 (2003).....	23
<i>Stumm v. Drive Entm’t</i> , 2002 WL 5589 (S.D.N.Y. 2002).....	8
<i>TufAmerica, Inc. v. Diamond</i> , 2015 WL 10846075 (S.D.N.Y. Mar. 24, 2015)	13
<i>Tyson Foods, Inc. v. Bouaphakeo</i> , 136 S. Ct. 1036 (2016).....	6
<i>Wal-Mart Stores, Inc. v. Dukes</i> , 564 U.S. 338 (2011).....	6
<i>WB Music Corp. v. Rykodisc, Inc.</i> , 1995 WL 631690 (E.D. Pa. Oct. 26, 1995).....	2
<i>Wu v. Pearson Educ. Inc.</i> , 2012 WL 6681701 (S.D.N.Y. Dec. 21, 2012)	2

TABLE OF AUTHORITIES
(continued)

	Page
Statutes and Rules	
17 U.S.C.	
§ 10.....	15
§ 101.....	19
§ 102(a)(2)	3
§ 102(a)(7)	3
§ 104.....	15
§ 104A.....	15
§ 106.....	3
§ 115.....	16, 17
§ 115(c)(3)(G).....	4, 18
§ 205.....	10
§ 302.....	15
§ 303.....	15
§ 405.....	15
§ 412.....	21
§ 504(c).....	21, 22
28 U.S.C. § 2072(b).....	6
Fed. R. Civ. P. 23(a).....	7
Fed. R. Civ. P. 23(b)(3).....	7, 8
Other Authorities	
<i>Nimmer on Copyright</i>	11, 16, 22
Dan Rys, “A Brief History of the Ownership of the Beatles Catalog,” <i>Billboard</i> (Jan. 20, 2017).....	12
U.S. Copyright Office, <i>Copyright and the Music Marketplace, A Report of the Register of Copyrights</i>	8
U.S. Copyright Office, <i>DMCA Section 104 Report</i> (2001)	20
U.S. Copyright Office, <i>Review of Copyright Royalty Judges Determination,</i> 74 Fed. Reg. 4537, 4541 (Jan. 26, 2009).....	19
U.S. Copyright Office, <i>Termination of Transfers and Licenses Under 17 U.S.C. § 203</i>	10
U.S. Copyright Office Circular 22, <i>How to Investigate the Copyright Status of a Work</i>	10

INTRODUCTION

Plaintiffs' motion for final approval explains in detail why the settlement in this case should be approved. Plaintiffs are correct: The settlement is procedurally sound and substantively fair, adequate, and reasonable under the factors articulated by the Second Circuit in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974). Defendant Spotify USA Inc. submits this brief to describe with more specificity the substantial risks Plaintiffs would face in litigating both class certification and the merits—risks that provide strong support for this Court's final approval of the settlement.

Every settlement embodies the fundamental compromise that, in exchange for finality—including the avoidance of additional litigation costs—a defendant waives its due process right to raise defenses that it would otherwise assert in a litigated case. That is certainly true here: As Spotify discussed in its motion to strike the class allegations (Dkt. No. 150), actually litigating each putative class member's infringement claim consistent with Spotify's due process rights would require numerous legal and factual inquiries specific to *each and every one* of the compositions potentially at issue—which would bar class certification because it would, at the minimum, necessitate untold thousands (or more) mini-trials on a composition-by-composition basis.

These very substantial obstacles to any recovery by the plaintiff class drop out in the settlement context, because “the proposal is that there be no trial.” *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997). As the Second Circuit has pointed out, “with a settlement class, the manageability concerns posed by numerous individual questions . . . disappear.” *In re Am. Int'l Grp., Inc. Secs. Litig.*, 689 F.3d 229, 241 (2d Cir. 2012). Absent a settlement, however, Spotify would be entitled to defend itself vigorously. And as detailed below, Spotify's defenses

would at a minimum generate considerable uncertainty about whether a litigated class could be certified and whether, and to what extent, any potential class member has the right to recover.¹ The pitched battle necessary to resolve these issues would be a massive and expensive undertaking—with no guarantee of recovery at all for members of the Settlement Class.

Moreover, these legal and factual issues are of course relevant to the merits as well as class certification. If a potential class member were unable to prove her claim with respect to any of her asserted compositions, or Spotify prevails on any of the numerous individual defenses below, that potential class member would recover nothing for that composition.

Under these circumstances, the settlement reached in this case is eminently reasonable.

ARGUMENT

Courts have recognized that, “[g]enerally speaking, copyright claims are poor candidates for class-action treatment” in *litigated* cases because of the highly individualized factual and legal inquiries that they entail. *Football Ass’n Premier League Ltd. v. YouTube, Inc.*, 297 F.R.D. 64, 65 (S.D.N.Y. 2013); *see also Wu v. Pearson Educ. Inc.*, 2012 WL 6681701 (S.D.N.Y. Dec. 21, 2012); *Resnick v. Copyright Clearance Ctr., Inc.*, 2003 WL 22176619 (D. Mass. Sept. 22, 2003); *WB Music Corp. v. Rykodisc, Inc.*, 1995 WL 631690 (E.D. Pa. Oct. 26, 1995).

As Judge Stanton explained in *Premier League*, most issues in a copyright infringement claim—including “ownership,” “authorization,” and “knowledge or awareness of the infringing action”—“must be resolved upon facts which are particular to that single claim of infringement, and separate from all the other claims.” 297 F.R.D. at 65-66. “Thus, accumulation of all the copyright claims, and claimants, into one action will not simplify or unify the process of their

¹ Notably, Plaintiffs would bear the burden of proof—and Spotify would have the right to present its defenses to a jury—on each and every claim of infringement: In copyright infringement cases, the “Seventh Amendment provides a right to a jury trial, which includes a right to a jury determination of the amount of statutory damages.” *Feltner v. Columbia Pictures Television*, 523 U.S. 340, 342 (1998).

resolution, but multiply its difficulties over the normal one-by-one adjudications of copyright cases.” *Id.* at 66. Without the settlement, the same would be true here, for at least two reasons.

First, an attempt to litigate the class claims would at the outset face a “fail-safe” problem, because the class is defined in such a way that any potential class member against whom Spotify successfully defends itself would simply drop out of the class and not be bound by an adverse finding. Courts have consistently refused to certify such “fail safe” classes. This problem does not arise in the settlement context because every member of the Settlement Class is releasing its claims in exchange for the benefits provided by the settlement.

Second, bringing infringement claims to trial would present numerous additional individualized issues that would predominate over common issues and therefore preclude class treatment. To begin with, if the case were litigated, identifying owners of registered musical works who are potentially members of the class would require adjudicating several highly fact-intensive questions. In particular, identifying potential class members would require:

- matching the sound recordings allegedly distributed on Spotify’s service to the underlying musical composition or compositions they embody; and
- accurately identifying the owners of the mechanical rights in that composition.²

² Typically, a music recording implicates at least **two** distinct kinds of intellectual property rights: (1) **the composition**, which reflects the copyright in the underlying song (*i.e.*, the words and music composed by a songwriter); and (2) **the sound recording**, which involves the particular sounds that are fixed or embodied in a recording. *See* 17 U.S.C. § 102(a)(2) (copyright in “musical works”); *id.* § 102(a)(7) (same for “sound recordings”). Rights in the sound recordings themselves typically belong to the record label responsible for making the recording. Rights in the musical composition are typically owned by the songwriter or by what is known as a music publisher. As with any copyright, the copyright in the composition itself has multiple components; the right to distribute or reproduce the composition is referred to as the “mechanical right.” *Id.* §§ 106(1), 106(3). The mechanical right is distinct from the right to perform the composition publicly (the “performance right”). *Id.* § 106(4); *see Appalseed Prods., Inc. v. MediaNet Digital, Inc.*, 2012 WL 2700383, at *2 (S.D.N.Y. July 6, 2012). And there are numerous mechanisms by which a mechanical right might be licensed. *See* pp. 16-18, *infra*.

These issues could not realistically be litigated in a class-wide trial, but would instead require an unmanageable series of mini-trials on the merits. Not only do these difficulties disappear in the settlement context, but as part of the settlement Spotify will undertake substantial efforts to improve the long-standing problem of unmatched works. And members of the Settlement Class will receive assistance in identifying and claiming ownership over their compositions.

Moreover, even assuming that it were feasible to identify *en masse* the set of works that are the subjects of the alleged infringement, as well as the owner(s) of the mechanical rights in each such work, bringing infringement claims to trial would require numerous additional composition-by-composition inquiries:

- whether there is a valid copyright registration (and if so, *when* registration occurred, which would be highly relevant to any claim for statutory damages);
- whether Spotify had an express, implied, or compulsory license to reproduce and/or distribute the work—which itself depends on a number of complicated inquiries, including but not limited to questions of ownership;
- whether Spotify is authorized to distribute the work under Section 115(c)(3)(G) of the Copyright Act as a result of being authorized to distribute sound recordings;
- whether and how the work was reproduced and/or distributed by Spotify;
- whether, if there was an infringement, that infringement was willful; and
- what damages, if any, are appropriate.

Again, one of the significant benefits to Plaintiffs and the Settlement Class is that—for settlement purposes only—Spotify is willing to waive its due process right to litigate these issues, paving the way for an efficient resolution of what would otherwise be a litigation morass.

I. Litigating The Proposed Class Claims Would Pose A Fail-Safe Problem.

At the outset, litigating the proposed class claims would have been unworkable because of the “fail-safe” problem. “A fail-safe class is one whose definition shields the putative class members from receiving an adverse judgment.” *Spread Enters., Inc. v. First Data Merchant Servs., Corp.*, 298 F.R.D. 54, 69 (E.D.N.Y. 2014) (quotation marks omitted). When the class is defined in terms of the defendant’s liability, “either the class members win or, by virtue of losing, they are not in the class, and therefore not bound by the judgment.” *Id.* As courts in this Circuit have recognized in the context of litigated motions for class certification, “[a] proposed ‘fail-safe’ class should not be certified because it is unfair to defendants, it prevents an adverse judgment being entered against plaintiffs, and it is unmanageable because the members of the class could only be known after a determination of liability.” *Id.*; *Hicks v. T.L. Cannon Corp.*, 35 F. Supp. 3d 329, 357 (W.D.N.Y. 2014) (same).

The proposed class definition in the operative complaint includes “[a]ll persons or entities *who own the copyright in a musical composition*: (a) for which a certificate of registration has been issued or applied for; and (b) *that was reproduced and distributed* through interactive streaming and/or limited downloads by Defendants *without a license* during the last three years.” Consol. Compl. ¶ 30 (emphases added). These criteria for class membership—(i) ownership of (ii) a valid mechanical right in a (iii) registered composition that (iv) the defendant has distributed or reproduced (v) without a license—state the key elements that a plaintiff must prove to establish liability in *any* claim for copyright infringement.

Based on the class definition in the complaint, if this case were litigated and Spotify prevailed against a potential class member on a defense to its infringement claim—for example, by showing that the potential class member does not own a valid mechanical right, or that the

potential class member did not meet its burden of showing that Spotify distributed or reproduced the work, or that Spotify possessed a license—the potential class member would simply drop out (never becoming a class member at all) and not be bound by the finding. That non-class member would thus be free to re-litigate its claims without the risk of preclusion under *res judicata* principles. And this “heads-I-win, tails-you-lose” result is precisely what the prohibition on fail-safe classes is meant to prevent.

This issue does not arise in the settlement context, because the entire Settlement Class releases its claims in exchange for the benefits provided by the settlement. The defendant accordingly does not face any risk of future litigation from parties whose claims were resolved adversely on the merits.

II. The Individualized Inquiries Required To Litigate The Infringement Claims Would Overwhelm Any Common Issues.

Outside of the settlement context, “a class cannot be certified” if the defendant “will not be entitled to litigate its . . . defenses to individual claims.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011). Indeed, the Court’s rejection of certification in *Dukes* rested on its conclusion that the lower courts had smoothed the way for class certification only by “depriv[ing] defendants of their right to litigate statutory defenses to individual claims.” *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1048 (2016). The Supreme Court reiterated in *Tyson Foods* that the Rules Enabling Act, 28 U.S.C. § 2072(b), bars courts from “giving plaintiffs and defendants different rights in a class proceeding than they could have asserted in an individual action.” *Id.* After all, “[d]ue process requires that there be an opportunity to present every available defense.” *Lindsey v. Normet*, 405 U.S. 56, 66 (1972).

Certification of a litigated class would be impermissible here, as the numerous individualized issues raised by Spotify’s defenses would prevent Plaintiffs from demonstrating

that common issues predominate over individualized ones, as required to satisfy Rule 23(b)(3).

The Supreme Court has explained that “the predominance criterion is far more demanding” than “Rule 23(a)’s commonality requirement.” *Amchem Prods.*, 521 U.S. at 624. And when “liability for a significant bloc of the class members and damages for the entire class must be decided on an individual basis, common issues do not predominate over individual ones.” *Johnson v. Nextel Commc’ns, Inc.*, 780 F.3d 128, 148 (2d Cir. 2015); *see also In re Petrobras Secs.*, 862 F.3d 250, 270 (2d Cir. 2017) (holding that the predominance inquiry, “a core feature of the Rule 23(b)(3) class mechanism,” is not satisfied “[w]here individualized questions permeate the litigation”).

That is precisely the case here: litigating virtually every aspect of this case consistent with Spotify’s due process rights would require individualized inquiries. Of course, those inquiries would not only preclude class certification; they pose difficult obstacles for each class member’s claims on the merits that would have to be surmounted for each and every asserted composition.

A. Identification of Compositions and Copyright Ownership.

Two of the fundamental predicates for class membership—identifying (a) the musical compositions embodied in the sound recordings on Spotify’s service and (b) all of the correct owners of the mechanical rights in a given composition—would, in the context of a litigated case, require resolution of significant factual issues. These individualized issues surrounding composition identification and copyright ownership—for which Plaintiffs or potential class members bear the burden on every single composition—would pose a substantial hurdle to certification of a litigated class.³

³ In its brief in support of the motion to strike (Dkt. No. 150, at 9-15), Spotify described these questions as issues of ascertainability and manageability. *See Brecher v. Republic of*

First, identifying the musical composition (the copyrighted work at issue) that is embodied in a digital sound recording in the context of a litigated case presents a highly difficult, fact-intensive task.

“Sound recordings and their underlying musical compositions are ‘separate works with their own distinct copyrights.’” *Poindexter v. EMI Record Grp., Inc.*, 2012 WL 1027639, at *2 n.3 (S.D.N.Y. Mar. 27, 2012) (quoting *In re Cellco P’Ship*, 663 F. Supp. 2d 363, 368-69 (S.D.N.Y. 2009)); accord, e.g., *Stumm v. Drive Entm’t*, 2002 WL 5589, at *1 n.1 (S.D.N.Y. 2002) (noting the “well-established distinction between sound recordings and musical compositions under the Copyright Act”) (quotation marks omitted).

This distinction matters for purposes of identification. As the Register of Copyrights has explained, “digital music files often do not include the standard identifiers for the copyrighted works the files embody.” U.S. Copyright Office, *Copyright and the Music Marketplace, A Report of the Register of Copyrights*, Feb. 2015, available at <http://copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf> (Dkt. No. 149-1), at 123. Digital recordings may have standard *sound recording* identifiers, although many do not, but “there is no

Argentina, 806 F.3d 22, 24-25 (2d Cir. 2015); see also *Royal Park Investments SA/NV v. Deutsche Bank Nat’l Trust Co.*, 2017 WL 1331288, at *4-9 (S.D.N.Y. Apr. 4, 2017) (denying class certification on ascertainability grounds under *Brecher*).

More recently, the Second Circuit concluded that ascertainability does not require an “administratively feasible” method of identifying class members. *In re Petrobras Secs.*, 862 F.3d at 264-65. But in the same opinion, the Second Circuit explained that Rule 23 still requires a feasible way to demonstrate class membership—locating that inquiry in Rule 23(b)(3)’s predominance requirement. As the *Petrobras* panel put it, “classes that require highly individualized determinations of member eligibility” risk running afoul of “the predominance requirement.” *Id.* at 268. Indeed, the panel vacated the class certification order on predominance grounds, remanding for the district court to conduct “the robust predominance inquiry that Rule 23 demands.” *Id.* at 274-75.

However classified (ascertainability, manageability, or predominance), the individualized issues surrounding composition identification and copyright ownership would pose a substantial hurdle to certification of a litigated class.

comprehensive publicly accessible database that can be used to match” the standard identifying codes of a *sound recording* to a *musical work* (and vice versa). *Id.*⁴

One example of the many difficulties in linking a sound recording to the underlying composition is that many songs have the same name. For example, “Hello” on a list of sound recording titles could be the Adele megahit, the Lionel Richie classic, or other songs by Evanescence, Ice Cube, and many others. “Jolene” could be the Dolly Parton song, or it could be the entirely different composition by Ray LaMontagne. Is “California Girls” the song by the Beach Boys or the Katy Perry hit? Does “One” refer to the song by U2, the show tune from *A Chorus Line*, or one of many others (such as hits by the Bee Gees and Metallica)? And which recording embodies the same composition as John Legend’s “All of Me”: “All of Me (Instrumental)”; “All of Me – Solo Piano”; “All of Me – UK Radio Remix Edit”; or “All of Me (Bumper’s Audition) – From ‘Pitch Perfect 2’ Soundtrack”?

These questions cannot be answered on a class-wide basis. Because there is no simple, accurate methodology for linking sound recordings to underlying musical compositions, an individualized factual inquiry must be undertaken for each sound recording. And that individualized inquiry is not simple. For example, the title of the song does not itself have legal significance; what matters is the underlying composition—that is, what the song actually *sounds* like. There is accordingly no shortcut to verify the composition embodied in any given sound recording other than by listening to each recording—and even then, identifying the underlying composition may not be obvious for many tracks.

Second, even apart from accurately identifying the compositions at issue, accurately

⁴ The Register prepared this report on the basis of “an exhaustive analysis of industry practices and considerable dialogue with music creators and the businesses that represent and invest in their interests, as well as music services and distributors and other interested parties.” *Copyright and the Music Marketplace, supra*, at “Acknowledgements.”

identifying the owners of those compositions is a separate, but also extremely difficult, task.

There is no comprehensive database of ownership information. The Copyright Office itself explains that its records “cannot be regarded as conclusive in all cases” (U.S. Copyright Office Circular 22, *How to Investigate the Copyright Status of a Work*, at 3, available at <http://www.copyright.gov/circs/circ22.pdf> (Dkt. No. 149-2)) for many reasons. To begin with, there is no legal requirement to file assignments of copyrights with the Copyright Office (*see* 17 U.S.C. § 205), so the Copyright Office cannot be counted on to provide sufficient information to track down post-registration changes of ownership over the course of decades. And the uncertainty is further compounded by the inability to track all co-ownership agreements and reversion rights (*i.e.*, when a license or transfer of certain rights in a copyrighted work expires or is terminated such that those rights revert back to the grantor, or the grantor’s heirs). *See* U.S. Copyright Office, *Termination of Transfers and Licenses Under 17 U.S.C. § 203*, available at <http://www.copyright.gov/docs/203.html> (Dkt. No. 149-3).

Ownership matters not only for standing but also because it is inextricably linked to determining whether a copyright has been infringed at all. Infringement requires the absence of a license, and knowing whether Spotify has a license for a given work often requires identifying the owner of that work.

That is because copyright owners often grant a “blanket license” covering all compositions owned by a rightsholder (or group of rightsholders), rather than identifying by name each licensed work (a list that would frequently change in any event). For example, Spotify has a blanket license covering all compositions owned or administered by Warner/Chappell Music. So, for Warner/Chappell songwriters like Katy Perry and Green Day, for instance, it will be impossible to determine whether a work is covered by that license without

first knowing whether Katy Perry or Green Day own the work. In other words, the existence of a license will often depend on relationships between Spotify and the owner of the work (either directly or through a publisher).

These questions, which are difficult to address as to any particular composition, would be impossible to litigate on a class basis. The Register of Copyrights has detailed the “lack of publicly accessible, authoritative identification and ownership data” for compositions: “[I]t is difficult to identify and keep track of musical work ownership due to changes when musical works and catalogs change hands.’ Further complicating the situation is that the rights to musical works are often split among multiple songwriters, with differing publishers and [performing rights societies], making musical work data harder to track and maintain.” *Copyright and the Music Marketplace, supra*, at 123. “Unlike sound recordings—which are typically wholly owned by an individual label—many musical works are controlled by two, three or even more publishers.” *Id.* at 163.⁵ And because ownership often changes hands, the name of a songwriter is not a reliable identifier of the owner of a composition—even where the owner, too, is a famous songwriter. For example, Michael Jackson famously purchased the publishing rights to the Beatles catalog in 1985, leaving him the owner of a trove of compositions written by

⁵ The often-fractional ownership of the rights to musical compositions further complicates an already complex and individualized inquiry. The default common-law rule is that a joint owner may grant a nonexclusive license in the entire work *without* the consent of the other joint owners. See 1 M. Nimmer & D. Nimmer, *Nimmer on Copyright* § 6.10 (2006). Thus, it may be necessary to identify *all* of the owners of a given composition in order to determine whether any *one* of those owners has licensed or authorized Spotify to distribute it. And while the co-owners of the copyright in a composition can override that default rule by contract, there is no way to determine through litigation whether such contracts exist, the terms of such contracts, and which works they cover without further individualized inquiries (and likely third-party discovery). What is more, an agreement among co-owners to override the default rule would “bind any third party licensee” such as Spotify only if it has “notice of such a restriction.” *Id.* (citing *Meredith v. Smith*, 145 F.2d 620 (9th Cir. 1944)). Thus, litigating whether Spotify was on notice of any such agreement among co-owners would be yet another individualized and complicated inquiry unsuitable for class treatment.

John Lennon and Paul McCartney—along with others by Bruce Springsteen and the Rolling Stones. Earlier this year, Paul McCartney brought suit to reclaim his ownership share in some of that catalog.⁶

As the Register has put it, “there can be little doubt that the current music licensing landscape is severely hampered by the lack of publicly accessible, authoritative identification and ownership data.” *Copyright and the Music Marketplace, supra*, at 123. What is more, “[f]lawed or missing data is not a problem unique to major labels or famous artists”; on the contrary, “inaccurate data is especially problematic for the independent label community because it is harder to identify lesser-known artists without accurate data.” *Id.* at 125 (quotation marks omitted).

The difficulties and burdens of litigating copyright ownership on even an individual level are far from hypothetical. The recent dispute over the validity of the copyright and ownership in the song *Happy Birthday To You* (one of the most famous songs in history) powerfully illustrates the challenges presented in trying to resolve these questions through litigation—and demonstrates how the questions of copyright ownership and liability are intertwined.

In *Marya v. Warner/Chappell Music, Inc.* (and for decades prior to that litigation), Warner/Chappell claimed a copyright in the composition, contending that the original authors, who wrote the song around the turn of the last century, held onto the common law rights for decades and then transferred them to Warner/Chappell’s predecessor publishing company, which registered the copyright in 1935. 2015 WL 5568497, at *2 (C.D. Cal. Sept. 22, 2015).

The plaintiff argued that the registration was invalid, asserting that the lyrics may have been written by someone else, that the common law rights were lost due to general publication or

⁶ See generally Dan Rys, “A Brief History of the Ownership of the Beatles Catalog,” *Billboard* (Jan. 20, 2017), available at <http://www.billboard.com/articles/columns/rock/7662519/beatles-catalog-paul-mccartney-brief-history-ownership> (last visited Nov. 13, 2017).

abandonment before registration, and that the rights were never transferred from the authors to the publishing company. *Id.* at *5. Further complicating matters, a charitable organization with ties to the original songwriters later intervened, claiming that *it* was the rightful owner. Dkt. No. 266-1, *Marya v. Warner/Chappell Music, Inc.*, No. 2:13-cv-04460 (Nov. 9, 2015). The parties subsequently agreed to settle—after two-and-a-half years of hard-fought litigation over this one song—with the result that *Happy Birthday* has entered into the public domain. *See* Final Order and Judgment, ¶ 6, Dkt. No. 349, *id.*

The *Marya* case is far from the only example of a copyright action involving complex issues of ownership. Indeed, this Court’s opinion in *TufAmerica, Inc. v. Diamond*, 2015 WL 10846075 (S.D.N.Y. Mar. 24, 2015), further underscores the difficulties of litigating this issue. After years of litigation, the Court granted summary judgment to the defendants (members of the Beastie Boys) because the plaintiffs did not have an exclusive license in the copyrighted works at issue. Instead, they had received only a non-exclusive license from some of the co-owners of the copyrighted works. *See id.* at *1. That determination was based on an in-depth interpretation of three different contracts (*id.* at *3-5)—precisely the kind of highly specific, fact-bound inquiry that would be unworkable on a class-wide basis.⁷

The *Marya* litigation involved just *one* song, and *TufAmerica* a small handful of songs. Here, litigating copyright ownership on a class-wide basis would be entirely unmanageable—it would require litigating variations of these already complex cases thousands of times over.

Under the settlement, by contrast, there is no requirement to prove ownership unless there is an ownership dispute between members of the Settlement Class—and the settlement provides a mechanism to resolve such disputes. Settlement Agreement (Dkt. No. 176-3), §§ 3.4, 4.4. In

⁷ Another example is *Davis v. Blige*, 505 F.3d 90, 94-95 (2d Cir. 2007), a complex infringement dispute involving co-ownership, transfer, and oral assignment of the copyrights in two compositions embodied in songs on Mary J. Blige’s hit 2001 album, “No More Drama.”

addition, Spotify will undertake substantial efforts to improve the long-standing problem of unmatched works and assist members of the Settlement Class in claiming works on Spotify's service.

B. Whether A Work Has a Valid Copyright.

Infringement can only be asserted as to a work with a valid registered copyright. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991); *see also Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 158 (2010) (“[Section 411] establishes a condition—copyright registration—that plaintiffs ordinarily must satisfy before filing an infringement claim and invoking the Act’s remedial provisions.”). And while the scope of the proposed class in the complaint is limited to works with registered copyrights (or for which a registration application is pending), individual inquiries would still be required to ensure that the registration requirement has been satisfied for each claimed work. A few examples from the attempted opt-out requests by Wixen Music Publishing, Inc. illustrate the point. Even a modest search of the Wixen clients whose names begin with the letter “B” reveals that a number of songs included in Wixen’s requests for exclusion do not appear to be registered:

- Benjamin Tench, “Uncross My Heart”;
- Brad Gillis, “Brothers”;
- Brad Wilk, “Daniel”;
- Brian Macleod, “Love is Surrender”;
- Bruce Willis, “Slow Burn”;
- Bryce Soderberg, “Chemical Warfare.”⁸

Moreover, a jury would have to undertake a fact-intensive inquiry with respect to each

⁸ Spotify’s brief in support of the motion challenging the validity of Wixen’s opt-outs provided a similar list of unregistered works by Wixen clients whose names begin with the letter “A.” Dkt. No. 257, at 24.

and every work, even when registration information is available from the Copyright Office. As Spotify has previously detailed, investigating the copyright validity of a work in the context of a litigated case is an inherently fact-specific, individualized inquiry that does not stop with the registration of the work. *See* Dkt. No. 150, at 17-18.

Finally, there is no claim of infringement if the work has fallen into the public domain (and thus has lost copyright protection)—something that could have happened in a variety of ways, especially for older works. *See, e.g.*, 17 U.S.C. §§ 302, 303. Federal copyright law creates an additional patchwork of regulations and formalities that can lead to works landing in the public domain.⁹

When a work falls into the public domain, moreover, complex questions arise regarding arrangements based on that public domain work. Determining whether a claimed arrangement qualifies for copyright protection will require a close analysis of whether the arrangement meets the threshold standards of creativity and originality (*see McDonald v. West*, 138 F. Supp. 3d 448, 454-55 (S.D.N.Y. 2015))—another highly fact-intensive inquiry that requires listening to each and every arrangement. These fact-bound disputes often cannot be resolved without competing testimony by music experts.

Marya again illustrates how complex these inquiries can be for a single song. As noted above, the plaintiff had argued that the common law rights in *Happy Birthday* were lost due to, among other reasons, general publication or abandonment before registration. 2015 WL

⁹ Examples of works that fall into the public domain under this patchwork include works created between 1923 and 1977 that were first published without notice (17 U.S.C. § 10 (1958, 1964)); works first published without notice between 1978 and March 1, 1989 and not registered within five years (17 U.S.C. § 405); works initially published abroad without notice and in the public domain in the source country as of January 1, 1996 (*id.* § 104A); and works first published after March 1, 1989 in a country that does not have a treaty relationship with the U.S., and authored by citizens of such a country, absent a Presidential proclamation that the other country adequately protects U.S. works (*id.* § 104).

5568497, at *8-13. And the court ultimately ruled—after extensive fact discovery—that the resolution of these issues would have required a further jury trial but for the court’s determination that Warner/Chappell did not own a valid copyright to the song on other grounds (because its predecessor never acquired the rights to the song in the first place). *Id.* at *13-19.

In sum, resolution by litigation over whether a particular musical composition has copyright protection would require extensive, individualized factual determinations for *each and every musical work* that Spotify is alleged to have infringed.

C. Whether Spotify Has A License Or Authorization To Distribute Any Particular Composition.

In order to prevail on a claim for infringement for any particular work, the claimant would also have to show that Spotify lacked a license or other form of authorization to reproduce, distribute, or otherwise exploit that work.

To begin with, it would be necessary to determine whether the song was expressly licensed, which can occur through any one of a number of potentially available mechanisms. These mechanisms include:

- controlled composition licenses from a record label—*i.e.*, the record label distributing the recording also has the right to pass along the mechanical license to the underlying composition (*see* 2 M. Nimmer & D. Nimmer, *Nimmer on Copyright* § 8.23[E] (2005));
- direct blanket license by a publisher or its representative, such as another publisher serving as an administrator or an agency such as the Harry Fox Agency;
- the compulsory license mechanism provided by Section 115 of the Copyright Act;¹⁰ and

¹⁰ Section 115 offers a compulsory license to make and distribute phonorecords of musical

- blanket releases provided as part of arrangements like the agreement between Spotify and the NMPA.¹¹

Assessing whether an effective license or release was secured through any of these means may require—for each song—third-party testimony and other evidence from the licensor as well as an analysis of documentary evidence (such as Section 115 notices of intent).

In addition, even if there is no evidence of an express or compulsory license, there may well be facts demonstrating an implied license with respect to a particular work. For example, a copyright owner’s knowledge of and acquiescence in a defendant’s use of her copyrighted material provides grounds for finding an implied license. *See Keane Dealer Servs., Inc. v. Harts*, 968 F. Supp. 944, 947 (S.D.N.Y. 1997) (“[K]nowledge . . . coupled with [plaintiff’s] silence in the face of [defendant’s] use” of copyrighted material constituted implied license).

Here, some holders of mechanical rights likely knew for a long period of time that Spotify was distributing their works on its service, but did not ask Spotify to remove their works from the service. And there is a substantial argument that their knowledge of Spotify’s alleged distribution of their works on its service coupled with their failure to contact Spotify to request removal from the service constitutes acquiescence that forms a basis for an implied license. *Keane Dealer*, 968 F. Supp. at 947. That is especially the case because many holders of mechanical rights received and accepted royalty payments that indicated that the payments were for works on the Spotify service. Decl. of John Raso ¶¶ 2-4. Indeed, these rightsholders may have accepted royalty payments for *years*, potentially dating all the way back to Spotify’s U.S.

works. 17 U.S.C. § 115. The license is obtained by sending a notice of intent to the copyright owner or to the Copyright Office and paying prescribed royalties.

¹¹ As Plaintiffs have noted, “[t]he NMPA agreement already resolved the royalty rights as to a substantial portion, and likely the majority, of the music streamed on Spotify,” with potentially “‘over 96% of the music publishing community’ . . . participating.” Prelim. Approval Mot. (Dkt. No. 166), at 12 (quoting a statement by NMPA President David Israelite).

launch in 2011. *Id.* ¶ 2. At minimum, whether there is such an implied license is a mixed issue of law and fact that would have to be tried with respect to *each* and *every* member of the putative class—and with respect to *each* and *every* allegedly infringed composition.

Finally, Spotify may also be authorized to distribute a given work by Section 115(c)(3)(G) of the Copyright Act, which sets forth circumstances under which authorization for “digital phonorecord delivery” of a sound recording automatically *also* authorizes distribution of the underlying work, as is common for singer/songwriters who own both the sound recording and the underlying work. The issue requires individualized inquiries into the particular contracts—often entered into decades ago—between each musical work owner and the record labels or aggregators who typically hold the digital distribution rights. For each individual sound recording based on each individual musical work owned by each individual class member, the Court or jury would have to decide, among other things, whether the text of any negotiated license between the musical work owner and label or aggregator authorized, either explicitly or implicitly, the digital distribution of the work. *See* 17 U.S.C. § 115(c)(3)(G)(i)(II).

D. Whether And How Spotify Has Reproduced Or Distributed Any Particular Composition.

There are several other reasons why any given claim for infringement might fail—and these issues too would have to be applied and litigated on a composition-specific basis.

To begin with, it is quite possible that potential class members would claim infringement for works that are not (and never were) on Spotify’s U.S. service at all. The attempted opt-outs by Wixen again illustrate the point. For example, even a quick review of works associated with the most well-known artists identified in Wixen’s requests for exclusion—which are therefore most likely to be on Spotify’s service—yields examples of works that do not appear to have been available on Spotify’s service in the U.S. during the class period:

- Neil Young, “Lorraine’s Car”;
- Doors Music Company, “Art Deco Fandango”;
- Doors Music Company, “Love Thy Customer”;
- Tom Petty, “Harry Green”;
- Tom Petty, “Since You Say You Love Me.”

Decl. of Daniel Kanner ¶¶ 2-4. A complete inquiry into the entire body of works identified in Wixen’s requests would be certain to reveal many other works that were not available on Spotify’s service in the U.S. during the class period.

In addition, because Plaintiffs have the burden of proving infringement, they would have to show that Spotify’s streaming of music implicates the rights within the bundle of copyright rights that Plaintiffs allegedly own (as opposed to, for example, the performance rights that have been licensed separately). The Copyright Office and Copyright Royalty Board have said that a *per se* rule that all on-demand streaming constitutes digital phonorecord delivery would be “an erroneous conclusion of law”: whether a mechanical license is required “is not dictated by the characterization of the transmission that delivers the phonorecord as interactive or noninteractive.” U.S. Copyright Office, *Review of Copyright Royalty Judges Determination*, 74 Fed. Reg. 4537, 4541 (Jan. 26, 2009). *See also Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 125-131 (2d Cir. 2008) (buffering a video in memory for “no more than 1.2 seconds” is not “sufficiently permanent or stable” storage to qualify as a “fixed” copy under Section 101 of the Copyright Act, and thus is not a potentially infringing “reproduction”). Accordingly, this legal issue would present an additional challenge for Plaintiffs in litigating the case going forward and may require fact-intensive individualized inquiries into *how* each alleged instance of infringement occurred.

Finally, there are many works that are available on Spotify's service that have never been streamed. Even if Spotify's streaming of music implicates Plaintiffs' reproduction or distribution rights, there is a strong legal argument that the mere availability of works that have never been streamed does not constitute actionable reproduction or distribution, because no dissemination has occurred and any incidental reproduction on the server is fair or *de minimis* use. See *Capital Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210, 1216-25 (D. Minn. 2008); *Atl. Recording Corp. v. Howell*, 554 F. Supp. 2d 976, 981-85 (D. Ariz. 2008); U.S. Copyright Office, *DMCA Section 104 Report*, at 136, 139 (2001), available at <https://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf> (suggesting that a server copy that exists "solely to render a performance that is fully licensed" has "no economic value independent of the performance it enables" and "merely facilitates an already existing market for the authorized and lawful streaming of works"). These authorities strongly suggest that tracks available on Spotify's platform but that have never been streamed at all could not be subject to an infringement claim.

E. The Basis and Method for Assessing Damages.

Even assuming for the sake of argument that liability were found for some claims of infringement, fixing the amount of damages would require additional composition-specific inquiries. Actual damages are inherently individualized, and the same is true of statutory damages in copyright infringement cases, which cannot be computed mechanically on a class-wide basis.

At the outset, whether statutory damages for any particular composition are even available would turn on a composition-specific comparison between the date of the alleged first infringement and the date on which that work was effectively registered with the Copyright Office—*i.e.*, when the complete application for a copyright for that work was submitted to the

Copyright Office. That is because the Copyright Act prohibits statutory damages (and attorneys' fees) for "any infringement of copyright commenced after first publication of the work and before the effective date of its registration, unless such registration is made within three months after the first publication of the work." 17 U.S.C. § 412(2). "Courts in this district have held that Section 412 of the Copyright Act imposes a bright-line rule that precludes recovery of statutory damages and attorneys' fees where *the first act of infringement* in a series of ongoing infringements occurred prior to the work's copyright registration, finding such a bright-line rule preferable to case-by-case analyses." *Solid Oak Sketches, LLC v. 2K Games, Inc.*, 2016 WL 4126543, at *2 (S.D.N.Y. Aug. 2, 2016) (emphasis added).

This point would hardly be academic in a litigated case: many of the compositions listed in the exhibits to Plaintiffs' complaint are marked as "Registration Pending." For instance, the vast majority of the compositions listed for plaintiff Gerencia 360 Publishing bear that status, suggesting that the applications for registration of those works, if submitted at all, were submitted close in time to the filing of the operative amended complaint. Many other Settlement Class members will surely be in a similar position. Accordingly, there are serious doubts about whether statutory damages would be available for any infringement of those works. *See* Consol. Compl. Ex. C; *see also id.* Ex. A.

Even when statutory damages are available, the Copyright Act provides for a range of statutory damages to be determined "as the court considers just." 17 U.S.C. § 504(c)(1). The factors that a court must evaluate in order to determine the correct amount—which must be awarded per infringed work—include: (i) the expenses saved and the profits reaped by the infringers; (ii) revenues lost by the owner of the work; and (iii) the value of the copyright. *Fitzgerald Pub. Co., Inc. v. Baylor Pub. Co., Inc.*, 807 F.2d 1110, 1117 (2d Cir. 1986). These

factors plainly require individual inquiry into each and every claim of infringement.

Other complications would necessitate still further individualized inquiries. For instance, it has long been the rule in the Second Circuit that the recovery of a fractional copyright owner is “confine[d] to the [plaintiff co-owner’s] own part; that is to say, to its own actual damages, to its proper share of any statutory damages, and to its proper share of the profits.” *Edward B. Marks Music Corp. v. Jerry Vogel Music Co.*, 140 F.2d 268, 270 (2d Cir. 1944); *accord, e.g., Manno v. Tenn. Prod. Ctr.*, 657 F. Supp. 2d 425, 432-33 (S.D.N.Y. 2009) (holding that owner in “one-half interest” is “limited to 50%” of statutory damage award); 3 *Nimmer on Copyright* § 12.03. Thus, each potential class member would be required to demonstrate its percentage of ownership in each work at issue—another individualized showing. Again, the settlement avoids this issue by requiring such a showing of ownership only if a dispute arises between members of the Settlement Class—and provides a detailed mechanism for resolving any disputes that do arise.

In addition, in this Circuit statutory damages are not available for each individual composition if the compositions are issued in a compilation. *See, e.g., Bryant v. Media Right Prods., Inc.*, 603 F.3d 135, 140-141 (2d Cir. 2010). This factor thus requires further individualized inquiries into the manner in which each composition was issued.

Spotify would also have strong arguments that any award of statutory damages would have to be at the lower end of the statutory damages spectrum (the minimum is \$750 per work, *see* 17 U.S.C. § 504(c)(1)-(2)). Spotify has undertaken considerable efforts to identify rightsholders and has obtained compulsory licenses for vast numbers of works and indeed has paid significant royalties to class members. Any actual damages based on accrued but unpaid royalties are likely to be low. Courts confronted with analogous circumstances have awarded statutory damages near the bottom of the range. *See, e.g., Bryant*, 603 F.3d at 143-44 (affirming

district court's award of \$1,200 per compilation where plaintiffs' "profits from infringing sales of the Albums and songs were meager"); *BMI v. Bayside Boys, Inc.*, 2013 WL 5352599, at *6 (E.D.N.Y. Sept. 23, 2013) (awarding \$1,471 per work and rejecting plaintiff's demand for nearly twelve times what a license would have cost the defendant).

Finally, even if statutory damages were at or near the minimum, Spotify would have a substantial argument that aggregating claims for statutory damages on behalf of a class would be likely to violate Spotify's due process rights by creating the risk of a "grossly excessive" damages award that is unconstitutionally punitive. As the Second Circuit has noted, combining "minimum statutory damages awards . . . with the class action mechanism . . . may expand the potential statutory damages so far beyond the actual damages suffered that the statutory damages come to resemble punitive damages—yet ones that are awarded as a matter of strict liability, rather than for the egregious conduct typically necessary to support a punitive damages award." *Parker v. Time Warner Entm't Co., L.P.*, 331 F.3d 13, 22 (2d Cir. 2003) (citing *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003) ("Due Process . . . prohibits the imposition of grossly excessive or arbitrary punishments"); *BMW of North Am., Inc. v. Gore*, 517 U.S. 559, 580 (1996)). This legal argument, while not an individualized inquiry, would pose yet another obstacle to a large award of statutory damages in the context of a litigated class action.

F. Whether Any Infringement Was Willful.

"To prove willfulness under the Copyright Act, the plaintiff must show (1) that the defendant was actually aware of the infringing activity, or (2) that the defendant's actions were the result of reckless disregard for, or willful blindness to, the copyright holder's rights." *Island Software & Computer v. Microsoft, Inc.*, 413 F.3d 257, 263 (2d Cir. 2005).

As explained above, the circumstances surrounding the use and licensing of musical compositions on the Spotify service differ from composition to composition, and therefore even

if an instance of infringement were found (after the requisite individualized inquiry) with respect to one or more works, the elements of willfulness will require individual factual determinations as well.

* * *

In short, attempting to litigate the infringement claims in this case would be unmanageable, expensive and extremely time consuming for both the parties and this Court. In light of the many individualized inquiries, there is a very high likelihood that a class could not be certified. And there is a strong chance, given Spotify's substantial defenses, that many putative class members would not recover *at all*, let alone at an amount in excess of what members of the Settlement Class stand to recover through participation in the settlement. Given the serious risks and uncertainties Plaintiffs would face in litigating both class certification and the merits, the settlement easily clears the fair, adequate, and reasonable standard under the *Grinnell* factors.

CONCLUSION

For all of the foregoing reasons, Spotify respectfully requests that the Court grant Plaintiffs' Motion for Final Approval of the Class Settlement.

Dated: November 13, 2017

MAYER BROWN LLP

By: /s/Andrew J. Pincus
Andrew J. Pincus (*pro hac vice*)
Archis A. Parasharami
Daniel E. Jones (*pro hac vice*)
1999 K Street, N.W.
Washington, D.C. 20006
apincus@mayerbrown.com
aparasharami@mayerbrown.com
djones@mayerbrown.com
T 202.263.3220
F 202.263.5220

Allison Levine Stillman
1221 Avenue of Americas
New York, New York 10020
astillman@mayerbrown.com
T 212.506.2209
F 212.849.5509

Attorneys for Defendant Spotify USA Inc.