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Copyright Licensing: Ignorance is Expensive

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It may come as a surprise to the unwary, but music is not free. At least, not *all* music is free, and businesses especially cannot use most music for free. Many business owners recognize that music is critical to their store, waiting room, hair salon, or restaurant —even if most guests don't consciously realize music is on. While we don't think twice about streaming music online or playing a CD at home, in the car, or out for a run, businesses need to be aware of the music ownership rights before playing any music at all or they risk falling prey to one or more of the Performing Rights Organizations ("PROs") that owns the rights to the music being played.

Basic Liability

The Copyright Act is a complicated piece of legislation that does not lend itself to easy interpretation or application. The Copyright Act grants the owner of a copyright in a musical work the exclusive right "to perform the copyrighted work publicly." PROs are entities that own the rights to, among other things, perform music publicly, and typically act as the licensor on behalf of musical artists for a fee. These PROs may enforce the exclusive performance right against anyone who engages in an unlicensed public performance of the music.

The Copyright Act includes several definitions of what a "public performance" is and it often depends on how and where music is being played reflecting concessions to various industry lobbyist. A "public performance" includes any rendering of a musical work by means of any "device or process" in any business establishment or restaurant generally.

Section 504 of the Copyright Act provides that for each act of infringement, establishments are subject to actual and statutory damages ranging between $750 and $30,000 per song. Business owners playing music without a license should be cringing at those figures. Thankfully, there are a few narrow exceptions which can alleviate some liability.

Exceptions

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The Fairness in Music Licensing Act of 1998 establishes several exemptions based on the square footage of the business and the equipment on which music is played. For example, an establishment with less than 2,000 gross square feet or a food service establishment with less than 3,750 square feet (including seasonal outdoor space) may play broadcast radio or television without music concern as long as it complies with certain requirements with respect to the equipment used to play the music. This exemption has become known as the "home -system defense." The home -system defense provides an exemption for music played privately on a "single receiving apparatus of a kind commonly used in private homes" in most situations. Neither of these exemptions apply to playing live music.

Additional requirements that must be met to qualify for the home-system exemption include:

- The music must originate from a radio or television broadcast station licensed by the Federal Communications Commission ("FCC").
- The establishment cannot charge patrons to see or hear the music. This includes cover charges and may also include food and drink minimums.
- The music may not be further transmitted beyond the establishment where it is received. This means that the venue cannot rebroadcast the music to another location.
- The radio or television station being transmitted must have a license to play the music in the first place.

If the business or restaurant exceeds the square footage requirements, then it may still qualify for the exemption:

> (I) if the performance is by audio means only, and the performance is communicated by not more than 6 loudspeakers, with not more than 4 loudspeakers located in any 1 room or adjoining outdoor space; and
>
> (II) if the performance is by audiovisual means, any visual portion of the performance involves no more than 4 audiovisual devices, there is not more than 1 audiovisual device in any 1 room, and no audiovisual device has a diagonal screen size greater than 55 inches.

As the above example illustrates, the exemptions are quite complicated and specific. Unfortunately, the Fairness in Music Licensing Act also makes clear that a restaurant's confusion over how to comply with the specific exemption is not a defense even if the restaurant intended to comply.

Live Music

There is also no exemption for restaurants hosting non-original live music or playing music by any means other than broadcast radio. Currently, the only way to host non-original live music is by obtaining a license from the appropriate PRO(s). Live music may include disc jockeys in addition to cover bands. If a musical group plays only original music which they have not licensed to a PRO, then the performance agreement should provide for the appropriate license from the band itself.

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How it Plays Out

Infringing businesses can find themselves in what feels like a hostage situation very quickly. Proof of infringement is frighteningly simple. With the sophistication of song-identifying software today, PROs need only send an agent to a business with a recording device, such as a cell phone, record the music being played in the establishment for any length of time, and print out a list of songs played that are owned by that PRO.

Typically, a business owner is confronted by an agent of a PRO who shows the business owner the cost of their infringement in statutory damages —between $750 and $30,000 per song. The PRO's agent then proceeds to offer the business owner a chance to avoid those damages by enrolling in a licensing arrangement —often a yearly fee paid by month. Business owners who don't respond to such demands are subject to suit in a federal district court which can quickly become a lien against the business —and in the meantime, if the business continues to play music, the business may continue to infringe on the PRO's copyrights, subject to further damages.

There are three PROs that own nearly all of the music played today: the American Society of Composers, Authors, and Publishers ("ASCAP"), Broadcast Music, Inc. ("BMI"), and the Society of European Stage Authors and Composers ("SESAC"). While ASCAP and BMI are significantly larger than SESAC, SESAC still owns the music of several artists likely to be played in a restaurant or retail setting such as Bob Dylan, Neil Diamond, and Mumford and Sons. This adds another layer of complication to resolution: does an infringing business owner negotiate with only one PRO and wait for the others to catch him, or go completely above-board and pay the licensing fee to all three PROs right then and there?

Digital Developments

Digital technology has complicated the licensing process even further. The Digital Millennium Copyright Act of 1998 provided for separate rights in the *digital* public performance of music, such as non-interactive streaming services like Pandora or SiriusXM. This means that an additional license may be required to use a streaming music service (as opposed to a broadcast music service such as FM radio or playing a physical CD). For example, radio stations which also offer digital broadcasts on a counterpart digital station have to pay digital performance royalties to the digital rights holder (primarily an entity known as SoundExchange). This bizarre result further complicates the music-playing landscape for business owners.

Practical Options

For the small business owner who merely requires background music, a subscription service such as SiriusXM Music for Business or Pandora for Business may be the simplest option. These services provide a variety of commercial- free music "channels" designed for businesses and licensed appropriately. However, the only way to garner complete control and flexibility over the music to be played —i.e. be it from a CD, iPod, or other source—is to secure the necessary license from the PROs. Additionally, if the business plays live music, a

license from the PROs who own the specific songs to be played will be required. The PROs typically offer packages which allow the business to purchase a certain number of live performances and may calculate the fees on the occupancy of the establishment.

Conclusion

In conclusion, the PROs have made a living out of enforcing copyright laws in the name of paying artists. They have a large legal team that fights and defends these cases day in and day out. Whether one agrees with the convoluted licensing scheme under the Copyright Act or not, it is certainly wise not *to try to beat the PROs at their own game.*

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