



## Music in the Marketplace

### PREFACE

This advisory is intended as a general explanation of the nature and functions of music performing rights organizations. It is designed to help businesses that use music in any way in their dealings with the public to understand their rights and obligations under the copyright law. Information presented here is not intended to be legal advice and should not be considered as a substitute for legal counsel on specific copyright issues.

### PERFORMING RIGHTS ORGANIZATIONS

In order to effectively and efficiently enforce their rights under the copyright laws, American composers, lyricists, and publishers usually join one of three performing rights organizations. These groups grant licensees the right to publicly perform the works of all their members or affiliates, for whom the societies collect and distribute fees for the licenses granted. More than 80% of the fees collected by the two largest organizations are paid to composers and publishers as royalties for the performance of their copyrighted works. Three organizations license performance rights for most of the music copyright holders in the United States. They are: the American Society of Composers, Authors and Publishers (ASCAP); Broadcast Music, Inc. (BMI); and SESAC, Inc.

Many businesses are often surprised and skeptical when representatives of performing rights licensing organizations inform them that they need to "pay to play."

### WHY DO I HAVE TO PAY ROYALTIES?

The short answer to the question above is: **Because the law says you do. But, clearly, some further explanation is needed as to why, for example, a merchant has to pay to play radio music in his or her store, when playing the radio or listening to tapes at home or in one's car is "free."**

The long answer starts with the United States Constitution, which gives Congress the power to grant patents and copyrights. Pursuant to that power, Congress has enacted and amended various copyright laws. The Copyright Law of the U.S. today gives copyright owners the exclusive right to publicly perform or authorize performance of their works.

Generally speaking, public performances are very broadly construed under the law and are defined as performing "at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered." This has been interpreted to mean that most performances at so called private clubs and fraternal organizations are "public" under the copyright law.

Early versions of the copyright law limited the exclusive right to performances given "publicly for profit." Today, however, the "for profit" limitation has been repealed and only an explicit list of exempt performances do not require a license from the copyright owner. These include performances by instructors or students during face to face teaching activities of nonprofit educational institutions, performances of music in the course of religious services at a place of worship, and performances by the public communication of a radio or television transmission by eating, drinking, or retail establishments of a certain size which use a limited number of speakers or televisions and if no charge is made to see or hear the transmission (See Section 110(5) of the Copyright Act as revised. See [www.lcweb.loc.gov/copyright](http://www.lcweb.loc.gov/copyright)).

A list of places and events at which licensing could be required includes, but is not necessarily limited to: restaurants, bars, clubs and hotels where live or recorded music is played; shopping malls; stores that play broadcast or recorded music; spas, gyms or other sites that offer exercise to music; trade shows; conventions; dance studios; skating rinks; private clubs or fraternal organizations; offices and stores that use "music on hold" for telephone customers; sports teams; colleges and universities; amusement parks; bowling centers; and the Internet.

### **WHO IS RESPONSIBLE FOR THE LICENSE?**

The proprietor of the business in which the copyrighted music is performed is liable for any infringement of copyrighted music in his or her place of business. **If a business contracts for a service that "pipes in" background music, either by providing tapes or transmitting to subscribers' premises through radio or satellite special equipment, the service, which collects its fees from subscribers, is responsible for obtaining the appropriate licenses;** unless the establishment itself charges for admission, in which case the owner must obtain the licenses.

The cost of performing copyrighted musical works without a license can be far greater than the cost of the license.

### **WHAT HAPPENS IF I DON'T GET A LICENSE?**

The cost of performing copyrighted musical works without a license can be far greater than the cost of the license. Failure to obtain a license to perform publicly copyrighted music is copyright infringement under the copyright law. The copyright infringer is subject to a civil suit in federal court. **Sanctions against an infringer can include an injunction and the copyright owner's actual damages, as well as the infringer's profits, or "statutory damages" of up to \$20,000 for each copyrighted song**

**performed without a license (up to \$100,000 if the infringement is willful). The infringer can also be required to pay the copyright owners' legal fees. The law further provides for criminal sanctions against those who willfully infringe on a copyright for commercial advantage or private gain. Criminal violations are punishable by up to a \$25,000 fine and/or up to a year in prison.**

### **WILL BMI, ASCAP, OR SESAC CONTACT ME IF I'M PLAYING MUSIC?**

In the past decade new technologies, pastimes, and merchandising techniques have been accompanied by the performance of music in nontraditional places such as malls, aerobic studios, restaurants and all types of retail establishments. Performance rights organizations have responded to this music explosion by contacting more and more businesses that use music on a regular basis in an effort to educate them to the rights of the copyright holders and to see to it that their members get paid for the performance of their copyrighted works.

It is undoubtedly true that, because of the difficulty of monitoring the millions of performances of copyrighted music which take place every day, royalties are not paid by every small and large business. But, given the changes in the commercial use of music, business owners should not be surprised if they are contacted and offered music licensing agreements by ASCAP, BMI, and SESAC, representatives—either by mail, phone or in person.

### **WHY BUSINESSES "PAY TO PLAY"**

Whether played as background or used to impart a special feel and ambiance, music has become an essential part of many modern retail and service businesses. But the use of such music programming is almost never free. Below are important points regarding why businesses buy a license from a performing rights organization:

- 1. The majority of music a business plays is protected by copyright law;**
- 2. Music copyright holders have the constitutionally created and federally protected right to demand royalties for public performances of their music, whether by live musicians, recordings, or broadcasts;**
- 3. The legal rights given to music copyright holders under the copyright law are substantially the same as those given to authors or creators of literary works, dramas, choreographic works, films, pictures, graphics, and sculptures;**
- 4. More than 80% of all fees collected by the two largest performing rights organizations are paid to composers and publishers as royalties for the performance of their copyrighted works.**

**Summary:**

**US Copyright Law**

(Section 110)

**No license to play over-the-air “broadcast” radio /TV is required if:**

The establishment (other than bars or restaurants) is

- Less than 2,000 square feet in size
- Or, if greater than 2,000 square feet, has no more than 6 speakers total and no more than 4 in any room

For bars and restaurants, if the establishment is:

- Less than 3,750 square feet in size
- Or, if greater than 3,750 square feet, has no more than 6 speakers total and no more than 4 in any room

**A license is always required to play Satellite Radio, CD’s, DVD’s, MP3’s, downloads etc, under all circumstances no matter what the size of the business.**

**A license is required for all Music on Hold.**

**Civil Penalties: Up to \$20,000 per song. (Up to \$100,000 if the infringement is willful)**

**Criminal Penalties: up to a \$25,000 fine and/or up to a year in prison**