

BBB Brochure- Music in the Market Place

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Music in the Marketplace

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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 85% of the fees collected by the two largest organizations are paid to composers and publishers as royalties for the performance of their copyrighted works.

Foreign writers and publishers are also represented by these organizations. Under this system, composers and publishers are relieved of the burden of monitoring their copyrights throughout the world. Moreover, those who wish to publicly perform copyrighted works need not negotiate royalties with each composer or publisher whose works they want to use.

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.

American Society of Composers, Authors, and Publishers (ASCAP)

ASCAP is headquartered in New York City, with offices in Nashville, Atlanta, Chicago, Los Angeles, Miami, London & Puerto Rico and licensing managers located throughout the country. It is the oldest performing rights organization in the U.S. founded in 1914 by a visionary group of songwriters including Victor Herbert, Irving Berlin, John Philip Sousa, Jerome Kern and James Weldon Johnson. ASCAP is a not for profit membership association owned by its members who are songwriters, composers and music publishers. ASCAP collects royalties on behalf of its 310,000 members and their 8.5 million copyrighted musical works, representing virtually every musical genre.

In addition, ASCAP has agreements with every performing rights organization in the world that licenses the right to perform copyrighted works in their countries. Consequently, ASCAP customers can use the works of foreign societies' members as well through an all-inclusive ASCAP blanket license.

Broadcast Music, Inc. (BMI)

BMI was formed in 1939. It is a non-profit making organization, headquartered in New York City with offices in Atlanta, Los Angeles, London, Miami, Nashville, and Puerto Rico. Its roster includes more than 350,000 songwriters, composers and publishers. BMI's repertory includes more than 6.5 million copyrighted musical works which run the gamut of musical types from pop, rock, country, and folk to gospel, Broadway, jazz, rhythm and blues, and popular ballads. BMI acts as a clearinghouse for its affiliates' music performances. In addition, BMI has reciprocal agreements

with virtually every performing rights organization in the world, enabling BMI license holders to perform foreign works from around the globe.

SESAC

SESAC, a for-profit corporation headquartered in Nashville, Tennessee, with offices in Atlanta, Los Angeles, New York City and London, and licensing representatives and consultants throughout the country, was founded in 1930. SESAC tracks music usage in several different ways; most recently by utilizing the state-of-the-art monitoring technology of Broadcast Data Systems. SESAC has international agreements with many foreign performing rights organizations. In recent years SESAC's repertory has grown substantially, with performing artists and songwriters in virtually every genre of music.

The above performing rights organizations serve as clearinghouses for the royalties collected on their writers' and publishers' copyrighted works. A composer or publisher who owns copyrights to musical works grants these organizations the right to license performances of the works, and the right to prevent others from doing so without permission. The organization, SESAC, ASCAP, or BMI, will issue, for a fee, a license to individuals and organizations that use music in public places. Whether music is performed live, recorded, or broadcast, a license allows a licensee to use such copyrighted music in their repertory.

Performance rights

ASCAP's, SESAC's, and BMI's performance rights are non-exclusive; individuals or entities that wish to may negotiate separate royalty agreements with individual composers and/or publishers to perform their music. However, when faced with the prospect of expending time, effort, and money in trying to negotiate separate licenses directly with each composer or publisher whose music will be performed, most businesses using publicly performed music will choose to get a blanket license from one or more of the performing rights organizations.

A blanket license permits the license holder to perform any or all the works in the performing rights organization's repertory. If a choice is made to publicly perform only music that is in the public domain—that is, music that is no longer or never was protected by copyright—no license is necessary.

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. 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 interpreted 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 performance 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/).

Performances at charitable functions are exempt from license or royalty requirements only if the performances have no direct or indirect commercial advantage and if no one involved with the performance, including any of the events' performers, organizers, or promoters, is paid, and there is no direct or indirect admission charge.

Given the broad scope of the protection given copyright holders and those assigned their rights, anyone whose business in one way or another performs music for its customers or members should be aware that they may be called upon by one or more of the major performing rights organizations to license the performance of copyrighted works in their respective repertoires. Buying a license from one performing rights organization, say BMI, does not protect a business from liability for unauthorized performance of songs in ASCAP's or SESAC's repertoires.

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.

In addition, licensing is also required for those businesses traditionally associated with the performance of music such as radio and television networks and stations, concert promoters, and the like. The organizations license only the "non-dramatic" performance of their writers' and publishers' music. They do not have the right to license public performance of "dramatico-musical works" such as operas, musical comedies, or other forms of musical theatre, which are licensed directly through publishers or other copyright holders. A business person should consult with an attorney about any questions as to whether the music he or she plans to play publicly is exempt from liability for royalty payments.

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. Technically, everyone responsible for an infringing performance can be sued as an infringer, including musicians and independent contractors. However, when copyright owners sue, they often go after the owner of the establishment rather than anyone who actually gave the unauthorized performance.

Federal courts have rejected a wide range of defenses in copyright infringement cases brought against music users. Courts have held that it is no defense in an infringement suit to claim that performers were hired as independent contractors; or were not paid by the club owner and worked only for tips; or that the owner specifically instructed the musicians not to play copyrighted music; or not to play specific songs; or not to play music in the repertory of a particular performing rights organization; or even that the owner did not know the music actually performed was copyrighted.

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.

How Are License Fees Determined?

ASCAP and BMI operate under federal consent decrees that prevent them from charging discriminatory fees for licenses. While an organization's fee schedules and methods of fee computation may differ, each treat like entities alike. BMI, SESAC, and ASCAP maintain standard fee schedules for different classes of businesses and organizations that set out the basis for fees and from which businesses can determine their cost of an annual license. These organizations have different rate schedules for various industries. For specific information, contact them at the addresses listed on the back of this brochure.

Are There Alternatives to Getting ASCAP, BMI, and SESAC Licenses?

Proprietors who wish to may negotiate separate licenses with the individual owners of the copyrights, i.e., the composers or publishers, for each piece of music they want to use. Businesses may also limit music performed to works in the public domain (where the copyright has expired or the works were never copyrighted). This alternative, which avoids the playing of copyrighted music, is not as easy to achieve as one might think. While classical symphonic pieces or traditional folk songs may be in the public domain, arrangements of the pieces may have copyrights in effect. Using a copyrighted arrangement requires the payment of royalties.

Another option often considered by businesses seeking recorded music for use in an advertising message or at meetings is to license music from a company that represents one or more music libraries. A music library is a collection of copyrighted works owned or controlled by the music library company, just as any publisher owns or controls the copyrighted songs in its catalog. Most music libraries are affiliated with one or more of the PROs. It is a common misconception to think that using themes from a music library will avoid the performing rights issue. Unless a business owner has negotiated a separate license with the library that owns the copyrights, he or she will still have to obtain a performance license from the organization that represents the library.

What Happens If I Don't Get a License?

Failure to obtain a license to perform copyrighted music publicly is copyright infringement under the copyright law. The 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 \$30,000 for each copyrighted song performed without a license (up to \$150,000 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.

Will BMI, ASCAP, or SESAC Contact Me If I'm Playing Music?

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 development by contacting more and more businesses that regularly use music in an effort to educate them to the rights of copyright holders and to assure that their members are paid for the playing of their copyrighted works.

It is true that, because of the difficulty of monitoring the millions of performances of copyrighted music taking 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 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 85% 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.

For More information

Anyone with questions about performing rights organizations, their license agreements, or rights and responsibilities under the United States Copyright Law should contact their attorney or the following organizations of the offices below:

BMI

10 Music Square East
Nashville, TN 37203
800.925.8451
www.bmi.com

SESAC

55 Music Square East
Nashville, TN 37203
800.826.9996
www.sesac.com

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

2675 Paces Ferry Road, SE, Suite 350
Atlanta, GA 30339
800.505.4052
www.ascap.com

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202.707.3000
www.lcweb.loc.gov/copyright