SPECIAL ISSUE

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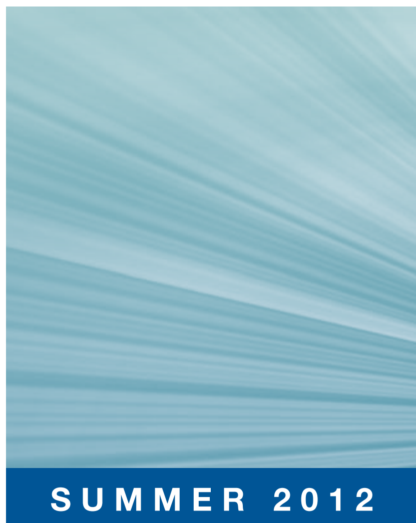

SUMMER 2012

LEGAL IMPLICATIONS OF MUSIC IN SENIORS HOUSING

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Music can be heard in many businesses, establishments, and communities — including through a range of seniors housing. As just a few examples, seniors housing might use music for parties and social events, dance and exercise classes, and "sing alongs," for music performances ranging from professional musicians to resident talent shows, or even for ambience during mealtimes, while "on hold" during a telephone call, or in elevators. Some seniors housing organizations have begun reviewing the legal implications of using music in their communities; some have been specifically prompted to do so after having been contacted by a performing rights organization, such as ASCAP (short for "American Society of Composers, Authors and Publishers"), BMI (short for "Broadcast Music, Inc."), or SESAC (which is now just "SESAC"). These organizations charge fees in exchange for license agreements that expressly allow a community to publicly perform music covered by their catalogs of artists.

There can be a range of legal considerations as to whether a particular organization might want or need such music licenses — and of course many business considerations whether a particular fee is worth the value being received. Every organization's circumstances are unique and dictate tailored consideration. This article can, however, give you some general information regarding these types of issues.

Copyright in Music

Music is generally protected under federal copyright law. When an individual buys a recording of a song protected by copyright, she has only bought a copy of the song and can enjoy it privately — she cannot necessarily do anything she might wish with her copy of the song. This applies equally to buying a copy of sheet music or music in other forms.

There is, however, "public domain" music that is not or is no longer protected by copyright. This might come up most often, for example, with music for which the copyright has expired. It can be complicated to determine whether copyright has expired due to difficulty in quickly identifying exact dates pertaining to particular music and changes in the Copyright Act over the years. Music first published in the early 1900s (and before) is more likely to be in the public domain.

"Public Performance" of Music

For music that is protected by copyright, the Copyright Act states that the owner of the copyright in a song has the exclusive right to perform the song *publicly*. To perform music protected by copyright publicly usually requires a license or similar permission from the copyright owner.

The Copyright Act defines what it means to perform a song and what it means for that performance to be public. To perform a song means to "recite, render, play, dance, or act it, either directly or by means of any device."[1] This would include playing a recording on a stereo system. This would also include any live performances such as singing or playing an instrument and any live performers such as vocalists and bands—including singers or groups that emulate the style of a famous performer or cover songs of other bands (e.g., a Frank Sinatra or Elvis impersonator); and this would include the above-mentioned examples of telephone and elevator music.

To perform a song *publicly* means:

(1) to perform… it 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 are gathered; or

(2) to transmit or communicate a performance… of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or different times.[2]

Of course, whether a particular performance falls under this legal definition is not always clear. The three main performing rights organizations mainly echo the statute in discussing what constitutes a "public performance" on their websites: ASCAP discusses it as "one that occurs either in a public place or any place where people gather (other than a small circle of a family or its social acquaintances)"; BMI discusses it as "any music played *outside a normal circle of friends and family*"; and SESAC discusses it as "anytime music is performed, played, broadcasted or otherwise communicated to the public."

Although these definitions may not always be clear, there are court decisions that help interpret them, and for the most part, the definitions should be considered fairly broad. A seniors housing residence may not be public in the way that a public park or shopping mall is, but they are places where substantial numbers of unrelated people gather and certainly can be places where public performances can occur. When reviewing its use of music, a seniors housing residence could look at how it uses music, who has access to each event or activity using music, and specifically what music is used. Events and activities that are formally organized or sponsored by the seniors housing residence or that take place in common areas may be especially likely to draw scrutiny.

[1] 17 U.S.C. § 101.

Exemptions

There may be some exemptions in the Copyright Act that may allow certain organizations to undertake certain public performances of music more freely, without seeking licenses.[3] In particular, there are exemptions relating to playing radio broadcasts publicly, which could relate to some seniors housing communities.[4] To qualify, a residence must be an "establishment," defined in the Copyright Act as "a store, shop, or any similar place of business open to the general public for the primary purpose of selling goods or services in which the majority of the… [nonresidential] space… is used for that purpose…"[5]; and a residence must not be charging for or further transmitting the performance. Under those circumstances, an establishment with less than 2000 square feet of non-residential space is generally exempt for playing radio broadcasts; and an establishment with more than 2000 square feet is generally exempt for playing radio broadcasts if it is using no more than six speakers, with no more than four speakers in any one room or adjoining outdoor space.[6]

While this article does not try to discuss all the possible exemptions, it is worth noting that there is *no* statutory exemption based on the fact that an organization is not making money (e.g., by charging separate admission for the music performance at issue) or that an organization is a non-profit.[7] Under now-outdated copyright law, there used to be a broad exception for non-profit or charitable performances. Today, there is only a much narrower exemption; it may apply to certain public performances of musical works when there is no "direct or indirect commercial advantage" to the person putting on the performance and there is no "payment of any fee or other compensation for the performance to any of its performers, promoters, or organizers.[8] Also, there can be no direct or indirect admission charge or, if there is one, the proceeds must go to an educational, religious, or charitable purpose.

Options for Licensed or Other Permitted Use

An organization seeking to manage the legal issues around public performances of music has several main options, which are not all mutually exclusive:

(1) stop or reduce public performances of music;

(2) use only or mostly public-domain music for public performances;

[2] 17 U.S.C. § 101.

[3] See generally 17 U.S.C. § 110.

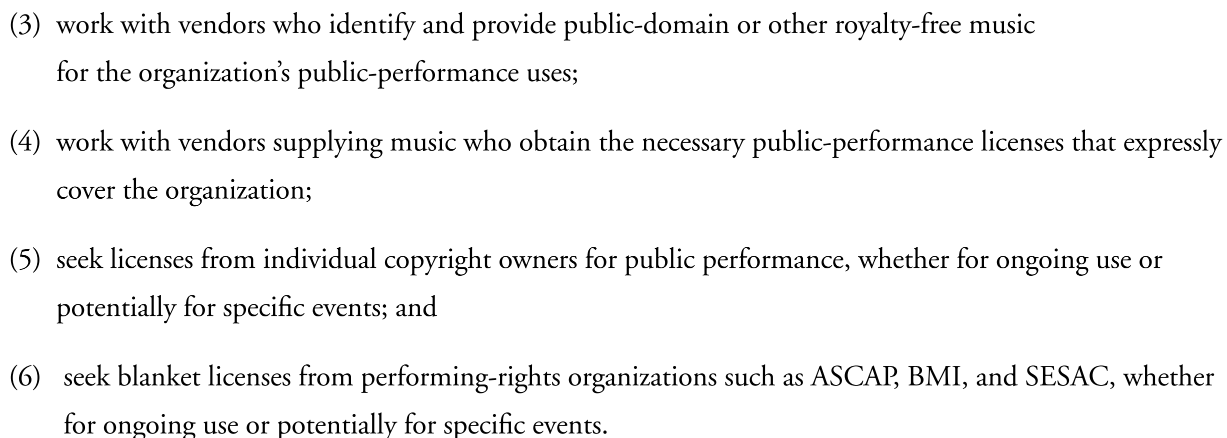
[4] See 17 U.S.C. § 110(5).

[5] 17 U.S.C. § 101.

[6] See 17 U.S.C. § 110(5)(B).

[7] See 17 U.S.C. § 106(4).

[8] 17 U.S.C. § 110(4).



(3) work with vendors who identify and provide public-domain or other royalty-free music for the organization's public-performance uses;

(4) work with vendors supplying music who obtain the necessary public-performance licenses that expressly cover the organization;

(5) seek licenses from individual copyright owners for public performance, whether for ongoing use or potentially for specific events; and

(6) seek blanket licenses from performing-rights organizations such as ASCAP, BMI, and SESAC, whether for ongoing use or potentially for specific events.

Navigating this web of options can be a chore, admittedly. There are online and print resources that have more extensive discussion of the related issues, and there may be advisors (legal or non-legal) that can help.

One important note is that the legal responsibility for handling these issues may well be joint or shared between owners and managers of properties in many instances. Similarly, an organization may try to use a vendor to identify public-domain or royalty-free music or to line up licenses or contractually require a performer to carry the appropriate licenses; but the residence is likely to continue bearing significant legal responsibility regarding its use of music – these types of options do not eliminate risk.

If a residence has many music public-performance needs and wishes to use copyrighted music, performing-rights organizations can be a practical option. As mentioned, there are three main performing-rights organizations, ASCAP, BMI, and SESAC. These groups can grant licenses, often called "blanket licenses," for public performance of all of their artists' music. Each organization has a unique collection of songs in its repertoire, covering many genres, and can grant a license only with respect to its particular catalog. Importantly, obtaining a license from one organization does not cover all copyrighted music. In fact, obtaining licenses from all three organizations does not cover all copyrighted music — but it would cover a rather significant amount of copyrighted music. ASCAP and BMI collectively represent almost one million songwriters, composers, and music publishers of approximately 16 million songs and musical works. SESAC is considered by many to be the smallest of the three and is estimated to have a smaller market share. Generally, the performing-rights organizations charge annual fees for their blanket licenses; and they may also offer single-event licenses.

Other Issues

To be clear, this article concentrates on the types of "public performance" of music that seem most commonly applicable to seniors housing. Jukeboxes are a special case for which an organization may be able to purchase a single license from the Jukebox License Office; and public performance of music by digital transmission is also a separate situation for which an organization can obtain a statutory license. Other uses of music may not involve public performance or performing-rights organizations – and may require different licenses or permissions. For example, making and distributing a "mix tape" or CD with a compilation of music may require a separate license of "mechanical rights", and adding music to video may require a separate license of "synchronization rights."

This article is for general informational purposes only. It does not constitute specific legal advice or create an attorney-client relationship. Readers are encouraged to seek appropriate legal and professional counsel based on their particular circumstances before acting or refraining from acting regarding any of the topics addressed in this article.

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