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Music Licensing

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Ignore ASCAP or BMI Licensing Offers at Your Peril

In the music world, performance rights organizations (PROs) serve an intermediary function between songwriters and music publishers and third parties who perform the protected works publicly. Among the largest PROs in the United States are the American Society of Composers, Authors, and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and SESAC (originally, the Society of European Stage Authors and Composers).

According to § 106(4) of the Copyright Act, the owner of a copyright in musical works has the exclusive right to “perform the copyrighted work publicly.” Third parties who wish to perform copyrighted material registered with these PROs may obtain a nonexclusive license. Performance, in this case, does not only mean live performances (i.e., musicians playing songs on stage), but it also means playing recorded music, such as background music in a restaurant or dance music in a bar. After acquiring public performance rights from songwriters and publishers, the PROs grant music users the right to publicly perform the copyrighted music. The PROs collect license fees on behalf of the songwriters and music publishers and distribute them as royalties to those member copyright holders whose works have been performed. Licensees frequently include television

networks and radio stations, podcasts and other new media, clubs, dance studios, bars, restaurants, and hotels. In its catalog, for example, BMI administers rights for over 14 million compositions.

Performance Rights Organizations Not Afraid to Litigate

One only needs to take a quick look at the news to conclude that the PROs take their licensing rights seriously. For example, BMI is currently suing Freelon’s Restaurant, Bar & Groove in Jackson, Mississippi for failing to pay license permit fees which allow the nightclub to play copyrighted songs. (See <https://www.clarionledger.com/story/news/local/2019/03/28/bmi-sues-mississippi-nightclub-freelons-bar-and-groove-licensing-fees-copyright-jackson/3234611002/>). In June of 2019, BMI also brought suit against a Wichita, Kansas bar for copyright infringement for playing five songs that BMI owned the rights to. (See <https://www.kansas.com/news/local/crime/article231834033.html>). Colorado bar Meadowlark found itself on the receiving end of a lawsuit by ASCAP for profiting from the works of various musicians without permission. (See <https://theknow.denverpost.com/2019/11/01/meadowlark-bar-ascap-copyright/227843/>). Also, ASCAP again took legal action against Nook Amphitheater for nonpayment of songwriter royalties. (See <https://www.austinchronicle.com/daily/music/2019-02-26/ascap-levels-lawsuit-against-the-nook/>).

Two cases from 2019 offer further illustration of the perils of not securing public performance licenses.

First, in March, the Eastern District of Kentucky ruled on the public performance issue, after BMI and the owners of four compositions took action against the owner and manager of the Blue Moon, a bar located in Richmond, Kentucky. BMI became aware that Blue Moon was unlicensed and performing live music publicly. Blue Moon previously had a license with BMI, which had expired, and BMI offered to enter into a new license on multiple occasions. Despite notice from BMI, Blue Moon continued performing unlicensed music.

The court ruled in favor of BMI on summary judgment, stating that Blue Moon publicly performed four copyrighted works without authorization. BMI proved that the defendants had publicly performed the works based on an affidavit from their investigator. (Note that the PROs employ private investigators who visit unlicensed establishments to observe whether a license is needed and then report back to the PROs). The defendants argued that they were exempt from the licensing requirements based on a statutory exemption found in the Copyright Act, in this case that the compositions were performed without “any purpose of direct or indirect commercial advantage.” The defendants argued that there is no cover charge when bands play, the band receives no compensation, and thus there is no cash generated from the performance. The court disagreed with this reasoning, and found that because Blue Moon was a profit-making enterprise, the exception did not apply. The court

also enjoined Blue Moon from performing music held by BMI, and awarded BMI attorney's fees, costs, and \$14,000 in statutory damages.

A few weeks before publication of this article, ASCAP artists scored a victory against an establishment in Nashville called "Frisky Frogs." Beginning in 2016, ASCAP representatives repeatedly warned Frisky Frogs of the consequences of performing unlicensed ASCAP songs, and even attempted to arrange a license agreement with Frisky Frogs. Despite making over 80 attempts to contact Frisky Frogs, ASCAP's requests were ignored. This included the owner of Frisky Frogs' failure to appear at a pre-arranged meeting with ASCAP representatives. Despite ASCAP's numerous warnings, Frisky Frogs continued to present unlicensed music through performances by a live band, piped-in music, and a disc jockey.

The Middle District of Tennessee ruled that Frisky Frogs was directly liable for copyright infringement, stating that Frisky Frogs publicly performed four

copyrighted works without authorization. The artists proved that the defendants had publicly performed the works based on the findings of ASCAP's independent investigator. The principals of Frisky Frogs were also held vicariously liable for the copyright infringement, as they had the right and ability to supervise and control the public performance of the works at Frisky Frogs, and derived a direct financial benefit from the performance of these works. Moreover, given the number of times the defendants dodged ASCAP, and because of their continuous performance of the works despite continuous warning, the court determined that the defendants' infringement of ASCAP's rights was a "glaring example of willful infringement." The court also stated that this willful infringement was exacerbated by the defendants' failure to cooperate after the initiation of proceedings. The court enjoined Frisky Frogs from performing music held by ASCAP, and awarded the artists' attorney's fees, costs, and \$40,000 in statutory damages.

These cases illustrate that the PROs—and the courts—take music public performance rights seriously. In both cases, the rulings were based on the defendants' performance of only four songs. These instances serve as reminders that establishments that feature live or recorded music must properly secure public performance licenses prior to performance of the licensed music.

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