Don't Ruin a Perfect Evening: Get the Appropriate Licenses for Radio and TV in Restaurants and Bars

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Music can help set the stage for a great dinner, and the decision about the coffee shop you patronize may depend on the music they play or whether they have live performances from time to time. Your choice of the location for a casual weekend lunch may be influenced by whether a restaurant or bar has the big game on their TV sets. While music and audiovisual content (i.e., DVDs, live television, Internet videos, streaming television and movies, etc.) may influence the choice of your eating or drinking venue or set the mood once you are there, they need to be part of the business and legal compliance plan for food entrepreneurs looking to open the next hot restaurant or bar. In most cases, rights for music and audiovisual content need to be secured, and the failure to do so can cause as much heartburn as a bad meal.

From time to time, the popular press picks up on tales of woe from owners of restaurants who do not take copyright issues into account when opening their business and end up facing a demand from a representative of copyright holders looking for their payments, or worse, a lawsuit when the payments are not forthcoming.[1] In 2014, a 55-seat coffee shop in Missouri that featured live music about once a month was surprised when it got hit with calls from songwriter's organizations asking for nearly $2,000 a year for the rights to perform live music (on top of the monthly fee that the owners already paid to a music service for the music that regularly played in their venue).[2] Given that the live music did not contribute to the bottom line—it was reportedly being done as an accommodation to local artists to give them a place to play—rather than pay the fees, the shop pulled the plug on the monthly live music event. Stories like this are common.[3]

Copyright Law Performance Rights

To know what issues venues need to consider in deciding what music and audiovisual materials they can perform for their customers, first, a detour into the basics of copyright. Under copyright law, any copyrighted work—including a song or an audiovisual production—is a collection of exclusive, statutorily created rights in the work. Perhaps most obvious is the right to reproduce the work[4]: you cannot make copies of the work without first having permission from the copyright owner. Nor can you distribute copies without permission.[5]

What is perhaps somewhat less intuitive is that most copyright holders also have the right to control the "public performance" of their works.[6] That means that the copyright owner usually has the right to approve when his or her work is performed in a public venue. The public performance right is implicated whenever a copyrighted work is shown or heard outside of a user's small circle of friends and family. So, you can play a CD at a party in your house or have family over to watch the football game on TV at Thanksgiving without any copyright implications as there is no "public performance."[7] But, if you play that same CD at a New Year's Eve party at your restaurant, or show that game on TV at that restaurant to entertain your customers, then a public performance right is likely implicated.

For music, the restaurant is licensing the public performance of the "musical work" (i.e., the words and music of any song).[8] When you secure a license to perform the musical work, you are paying the songwriter or the owner of the copyright.[9] Thus, whenever a song is played in your restaurant or bar, even if played live by a local singer, a royalty is due to the copyright holder. Note that a local artist, singing his own song in your bar or restaurant, may waive his or her rights to collect a performance royalty. But, once he or she sings a song that someone else wrote, your obligation arises to secure the public performance rights.

For audiovisual works, what you are licensing can be more complicated, because such works can contain multiple copyrights. For instance, music is often used in video productions, and that music usually has its own copyright. If you were to play a movie from a DVD in your bar or restaurant, you could probably clear all the rights by going to the copyright owner of the movie, as most movie producers, according to industry practice, clear all elements to their movie, including musical works. But it is not the same for TV programs: getting rights to a TV show may or may not include all rights to the music in that show. Be sure to check with the party with whom you are negotiating to get the rights to a video production to see if they can convey all the rights necessary for the public performance of that work.

So let us look at the rights issues for music and audiovisual works in more detail.

Performance Licenses: Music

To play music, a restaurant or bar needs the right to publicly perform the musical work. In the United States, the public performance right to most musical works is administered by three "performing rights organizations" (PROs).[10] The PROs have a nonexclusive[11] right to license public performances of a vast catalog of musical works. The two biggest PROs are ASCAP and BMI. Both are nonprofit organizations, and because of the number of works that they administer, they have long been subject to antitrust consent decrees that require that they license each song in their catalog on the same terms, and provide the same license to all similarly situated licensees.[12] The rates to be charged by these organizations are also subject to review in the Southern District of New York, which acts as a "rate court." Where the PRO and the licensee cannot agree on rates, the parties can ask the court to hear a case and establish reasonable rates.[13]

Because of the consent decree limitations, all bars and restaurants get the same terms from each of these organizations. Rates and contracts, available for review on the PROs' websites, are based on a number of factors including the size of the restaurant or bar, how big a role music plays in that restaurant's operations (e.g., live performances, karaoke, and other featured roles will require a bigger fee), and whether there is a cover charge to enter the venue and hear the music.

SESAC is the smallest of the PROs; it is a for-profit entity and is currently not subject to any antitrust consent decrees.[14] Thus, its rates are not necessarily uniform, can be subject to negotiation, and are not public.

Restaurants that play their own selection of music, or those that feature live music, will typically need licenses from all of the PROs. However, if the restaurant or bar uses a music service, sometimes referred to as "background music" or "business establishment" services, typically those fees are covered by the service with which they contract. These music services usually deal directly with the PROs, and the costs of the rights fees are bundled into the restaurant's monthly fee charged by the music service.[15]

Performance Licenses: Audiovisual Content

Performance licenses for audiovisual content are not as straightforward as licenses for music. While most cable and satellite TV providers offer packages for restaurants and bars that cover the rights to the programming, be sure to check what is included in those packages. If they have not covered the music licenses for the music (i.e., theme songs, jingles, etc.) that appears in programs, you probably will need licenses from the PROs if you do not already have them.

The packages offered by cable and satellite TV providers are special packages for businesses;[16] they are not the standard residential packages. Business packages may have a more limited channel lineup, as they may not have been able to clear all of their programming to be licensed for business uses. They are also, for the most part, more expensive than residential packages. If you use a residential package for your commercial business, then you are likely looking at a lawsuit from the cable or satellite provider.

And don't try a movie night at your bar or restaurant using your own stock of videos from your DVD collection. Public performance of movies is strictly licensed—you must obtain permission from companies or their licensing agents to play movies in your establishment.[17] Similarly, video from Internet sources can also get you in trouble, as the copyrights in audiovisual content are not abandoned simply because it is posted to YouTube or some other online site.[18] Many broadcasters and website operators have faced legal claims after finding pictures or video on the Internet and reusing it, assuming that once it was online it was in the public domain. A restaurant or bar should not make that mistake by running video found on the Internet without obtaining the rights.

Enforcement

A bar or restaurant in a remote location is not safe from any rights issues: the PROs actually hire people to travel the country and listen for music that is being played without a license. As "statutory damages" (ones where no actual damage needs to be proven) can go as high as $150,000 per copyrighted work, seemingly no business would want to risk getting caught without a license.[19] PROs raise many claims

each year trying to collect from commercial establishments that, either though ignorance or intention, fail to obtain performance rights. Cable and satellite providers of video programming also aggressively enforce their rights. As many claims are made each year, it is clear that the traveling inspectors are busy.

Small Business Exemption

There are limited circumstances where small restaurants or bars do not need to obtain performance rights at all. The Copyright Act makes some exceptions for small businesses. Originally adopted to exempt businesses that used radio or TV principally to entertain their employees, these exemptions have grown to encompass somewhat bigger businesses where over-the-air radio or TV, or cable or satellite TV, is used to provide atmosphere—but not where any charge is made to enter the premises. The rules that provide these small business exemptions are very precise, limiting the source of the copyrighted material, the number of speakers, and the number and size of TV screens, so a restaurant or bar must be very careful to follow them all to avoid potential liability.

The initial exception to the public performance right is the "homestyle exception," adopted to cover employees and customers of very small businesses.[20] It allows use of a single device typically found in a home to perform copyrighted works without royalties.[21] So playing a radio or watching a single TV in a small establishment is covered as an exception to the performance rights.

About 20 years ago, Congress adopted copyright reforms to allow other slightly larger businesses to play radio or TV in their establishments without performance fee obligations.[22] These exemptions allow restaurants and bars to play programming from over-the-air, FCC-licensed radio and TV stations, and programming from cable and satellite TV providers, in their establishments if they do not charge admission, and if the criteria set out below are met.

To qualify for these exceptions, a restaurant or bar must have less than 3,750 gross square feet of space. That excludes parking spaces as long as those spaces are used exclusively for parking (and do not, for instance, turn into a patio in nice weather). The establishments are limited in the equipment that they can use to provide the radio or TV programming. Specifically:

- If they are playing the radio, they can have a total of no more than six speakers, no more than four of which are in any single room or adjoining outdoor space.
- If they are providing TV programming, they can have no more than four TVs, with no more than one in each room, and no TV can have a diagonal screen size of more than 55 inches. The same rules that apply to radio limit the number of speakers that can be used to play the TV sound.[23]

If an establishment does not satisfy these requirements, then performance licenses are needed. Note that, for audio, the exception applies only to the in-restaurant performance of an over-the-air radio station. It does not apply to Internet radio or even satellite radio or cable music channels. And, while the exception does encompass satellite and cable TV as well as broadcast TV, it does not permit restaurants or bars to play Internet video or DVDs. Additionally, even though copyright law may permit you to rebroadcast cable or satellite TV in a smaller venue, the contracts with the service providers may restrict

their use in commercial settings—requiring restaurants or bars to buy a more expensive commercial license rather than using a residential subscription.[24] So read those contracts carefully, as they may require that more expensive license.

Conclusion

Restaurants and bars have no reason to spoil a perfect evening by being hit with a lawsuit for a copyright violation because they did not get the rights to play music or audiovisual content in their establishments. Do your research and follow the rules to ensure that the music will play on. n

Endnotes

1. *See* **Kristi Heim**, *Music Licensing Group's Targets Include Local Restaurants*, SEATTLE TIMES **(Aug. 1, 2007), http://old.seattletimes.com/html/businesstechnology/2003815486_royalty01.html (reporting that ASCAP "filed 26 separate infringement actions against nightclubs, bars and restaurants in 17 states"); T.J. Jacobberger**, *Restaurants and Their Battle with Music Licensing and Copyright Infringement*, SFGATE INSIDE SCOOP **(Sept. 9, 2011), http://insidescoopsf.sfgate.com/blog/2011/09/09/restaurants-and-their-battle-with-music-licensing-and-copyright-infringement (noting the author's experience managing a restaurant and receiving a call and then a demand letter from ASCAP);** *Music Company Suit Triggers 19 Nervous Breakdowns*, **TMZ (June 5, 2013), http://www.tmz.com/2013/06/05/bmi-lawsuit-michael-jackson-lil-wayne-lady-gaga-rolling-stones-small-bars (reporting that BMI filed suits against 12 bars and restaurants around the country);** *Special Report: Local Restaurants Fined for Playing Music*, FOX61 **(May 6, 2015), http://fox61.com/2015/05/06/special-report-local-restaurants-fined-for-play-music (reporting that the owner of Vazzy's Brick Oven in Bridgeport, Connecticut, said of letters from BMI that ultimately led to an $18,000 settlement, "We ignored it. It'll go away, you know . . . . It didn't go away.").**

2. **Ari Herstand**, *ASCAP, BMI and SESAC Force Local Coffee Shop to Shut Down Live Music*, DIGITAL MUSIC NEWS **(Oct. 29, 2014), http://www.digitalmusicnews.com/2014/10/29/ascap-bmi-sesac-force-local-coffee-shop-shut-live-music.**

3. *See Special Report*, *supra* **note 1 (noting that Bill Pere of the Connecticut Songwriter's Association told Fox61, "I know of many restaurants and venues that used to have live music that have just shut it down" because of confusion over who needed to be paid music royalties).**

4. 17 U.S.C. § 106(1).

5. *Id.* § 106(3).

6. *Id.* § 106(4); *see also id.* § 101 (defining what it means to perform or display a work "publicly").

7. *See* H.R. REP. NO. **94-1476, at 64–65 (1976) (discussing Congress's intention to capture "semipublic" places such as "clubs, lodges, factories, summer camps, and schools" within the public performance right); ABC, Inc. v. Aereo, Inc., 134 S. Ct. 2498 (2014) (interpreting the public performance right in the content of a cable system's performance of audiovisual works to the public).**

8. For any recorded song, there are actually two copyrights. One is in the musical work—the words and music of the song. The second is to the "sound recording" (also referred to as the "master recording")—the musical work as recorded by a particular band or singer. In the United States, there is currently no public performance right in the "sound recording," except in the limited context of a performance by digital means, which in most cases will not affect a restaurant owner. The sound recording performance royalty applies principally to operators of services such as Internet radio and other Internet audio platforms, satellite radio, and digital cable music stations. When the performance right was adopted for these digital music services in the Digital Millennium Copyright Act, Congress noted that businesses themselves that play music, even if that music is digitally recorded, were exempt from any sound recording performance royalty. However, services that provide a digital delivery of music to businesses so that businesses may play music on their premises do pay a royalty for making "ephemeral copies" of the songs that they play. Ephemeral copies are the server and buffer copies of the music made in the digital transmission of the music. They pay the copyright holder not for the public performance of the music, but for the reproductions of the songs that are theoretically made in the digital transmission process.

9. In most cases, the songwriters assign their copyrights in their songs to a publishing company which in turn handles the business aspects of exploiting the musical work.

10. Note that there is a new PRO, Global Music Rights (GMR), formed to try to get premium royalties for certain big name songwriters. As some of the GMR music is covered under existing PRO agreements, restaurants should consult their attorneys periodically as to the status of those agreements. GMR may well represent a fourth PRO from which a license will need to be obtained to ensure that any establishment has cleared the public performance rights for all of the music that it plays.

11. "Nonexclusive" means that the copyright owner can itself license the work outside of the PRO. Thus, a local singer-songwriter who still owns the copyrights to his own songs can sing them in a coffee shop royalty free, if he agrees to license the coffee shop directly, even if he has signed with a PRO. The shop should get the release in writing as proof for the PROs. The restaurant or bar also needs to make sure that the artist does not perform any "covers" of someone else's songs to fully avoid any PRO obligations.

12. These consent decrees are currently being reviewed by the Department of Justice to determine if changes are needed. While the review was prompted by concerns over licensing by digital music services, the results could have an impact on other aspects of the music licensing process.

13. Under § 513 of the Copyright Act, an individual proprietor of up to seven establishments can bring an action to determine an appropriate rate for ASCAP or BMI in any United States district court. However, as the proprietor has the burden of showing why his or her rate should be different than the industry rate, and as these cases can be very expensive to try, this provision is rarely if ever invoked.

14. SESAC was sued by both radio and television licensees in separate actions claiming that SESAC had violated the antitrust laws. In both cases, allegations were made that SESAC's rates were too high as the result of monopoly pricing. Settlements have been reached in both cases where SESAC has agreed to negotiate its rates with the organizations representing radio and TV broadcasters and, if negotiations fail, to set rates by arbitration.

15. *See, e.g.*, PANDORA FOR BUS., **http://pandora.moodmedia.com (last visited July 18, 2016);** SIRIUSXM MUSIC FOR BUS., **http://www.siriusxm.com/siriusxmforbusiness (last visited July 18, 2016).**

16. *See, e.g.*, *TV for Bars and Restaurants*, COMCAST BUS., **http://business.comcast.com/tv/restaurants/plans-pricing (last visited July 18, 2016).**

17. **17 U.S.C. §§ 106, 110;** *see, e.g.*, *How Do I Find Out If a Movie Has Public Performance Rights?*, ENCOCH PRATT FREE LIBRARY, **http://www.prattlibrary.org/locations/sightsandsounds/?id=11096 (last visited July 18, 2016) (providing the names and contact details for several licensing agents).**

18. *See, e.g.*, **Lenz v. Universal Music Corp., 801 F.3d 1126 (9th Cir. 2015) (the never-ending tale of the "Prince dancing baby" video).**

19. **17 U.S.C. § 504(c). Many reported cases have settled in the low tens of thousands of dollars, which is still substantial for independent businesses.** *See supra* **notes 1–2.**

20. 17 U.S.C. § 110(5)(B)(i)–(ii).

21. *See, e.g.*, **Edison Bros. Stores v. Broad. Music, Inc., 954 F.2d 1419, 1421 (8th Cir. 1992) (discussing the "so-called homestyle exemption").**

22. **Digital Performance Right in Sound Recordings Act of 1995 (DPRA), Pub. L. No. 104-39, 109 Stat. 336;** *see also* **Digital Millennium Copyright Act, Pub. L. No. 104-39, 109 Stat. 336 (1998) (amending the various sections added by the DPRA).**

23. 17 U.S.C. § 110.

24. *See, e.g.*, *Comcast Agreement for Residential Services*, XFINITY, **http://www.xfinity.com/Corporate/Customers/Policies/SubscriberAgreement.html (last visited July 18, 2016) ("You agree that the Service(s) and the XFINITY Equipment will be used only for personal, residential, non-commercial purposes, unless otherwise specifically authorized by us in writing.").**