Pay to Play?

Music Licensing for Residential Communities

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I. Executive Summary

Residential communities often play music in a common area, leasing/sales office, fitness center, and other locations. Because music is available easily over the Internet through services such as Spotify, Pandora and Apple Music, it is easy to assume that it can be played wherever and whenever one wants. However, most music is protected by copyright law and the use of a song or recording without the owner's permission could be copyright infringement. It is important for single- and multifamily communities to be aware of the legal requirements when playing music on the premises.

One right copyright owners have is the right to prohibit others from "publicly performing" their song. This includes playing the song from any number of sources, such as though CDs, mp3 players and computers. Obviously, it would be impossible for owners to enforce this on their own. Copyright owners most often use independent performance rights organizations (PROs) to act on their behalf to grant public performance licenses to others and collect royalties.

The most common way for a residential community to steer clear of copyright infringement is to obtain a "blanket license" from each of the three major PROs: BMI, ASCAP and SESAC. A blanket license allows the community to pay an annual fee in exchange for the right to play songs covered under each PRO. It is important to note that each PRO has a different catalog of songs. As a practical matter, communities should obtain blanket licenses from all three.

The PROs are represented by large networks of agents who patrol places where music is typically performed. If a PRO suspects that a community is playing music without appropriate licensing, the PRO will typically send a letter to the property owner demanding the owner obtain a public performance license. But they won't stop there. If you receive such a letter, act promptly to avoid costly fines.

Under certain circumstances, a residential community may be permitted to lawfully play music without a public performance license. These exceptions are limited. However, there are a number of subscription-based services, including Mood Media, Cloud Cover Music and Pandora for Business, which provide access to a large amount of music for subscribers.

The information in the paper is general in nature and is not intended to be legal advice. It is intended to provide a background to owners and managers of residential community in understanding copyright law. For specific legal advice, consult your attorney.

II. Introduction

These days, music is so easily accessible and commonly used that it is easy to assume, mistakenly, that music can be played wherever and however one wants simply because it is available for free over the Internet, radio, television or other means. Music is not so simple and free, however, and playing music without certain rights and permissions can violate copyright law.

Multifamily and single-family residential communities often play music, or enable residents to play music, in common areas, such as lobbies and reception areas, hallways and pathways, offices, elevators, pool facilities, fitness centers, lounges, social rooms and event spaces. The music is played from a number of different sources and devices, including mp3 players, smartphones, computers, tablets, CDs, DVDs, records, or tapes; via the Internet, radio, or television; or from a live band, DJ or other performer.

Playing music in such common areas by any of these means without the proper rights and permissions could infringe the rights owner's copyrights.

Furthermore, where the property owner provides the music, such as by playing background music around the premises or on a website, or enables the music, such as by providing a stereo, TV or docking station in common areas for residents to use, the property owner may be responsible for obtaining the necessary licenses and could be held liable for any infringement. Thus, it is important for residential communities to be aware of where and how music is being played on the premises and to make sure to consider and address the legal requirements.

This memorandum provides some background on copyright law for music and explains when a license may be needed to play music in a residential community and, if so, how and where to obtain a license.

III. Overview of Copyrights in Music

In general, music is protected by copyright law and use of a song or a recording of music without the owner's permission could be copyright infringement. Copyright owners have the option to grant permission for others to use their songs in the form of a written license. Determining what permission is needed and where and how to obtain it depends on a number of factors, including where, how, by whom, and for whom the song will be used.

Copyright owners have a number of exclusive rights to use and exploit their copyrighted works, including the right to authorize others to do so.[1] For example, owners of song copyrights have the exclusive rights to:

(1) Copy or reproduce the song, such as by burning it to a CD, creating a digital audio file, or writing sheet music;

(2) Distribute the song, such as by selling a CD or sheet music, or transferring or sharing an audio file on the Internet;

(3) Prepare a derivative work based on the song, such as by synchronizing the song with video, like in a movie or commercial; and

(4) Publicly perform the song, which includes playing the song from a number of different sources and devices (e.g., mp3 players, smartphones, computers, tablets, CDs, DVDs, records, and tapes) and by any means (e.g., the internet, radio, television, a live band, DJ or other performer).

In other words, copyright owners have the right to permit or prohibit others from doing any of these things. As a result, using a song in any of these ways without the copyright owner's permission, such as through a license, could violate the owner's exclusive rights under copyright law, and thus could constitute copyright infringement. It is important to note that copyright infringement can occur regardless of whether the user intended to infringe, knew that the use was infringing, or knew that the work was protected. Furthermore, the copyright owner does not even need a copyright registration for the song to be protected or for there to be an infringement, although most copyrights in songs are registered.

IV. The Public Performance Right

As mentioned above, copyright law grants copyright owners the exclusive right to authorize others to *perform* their songs *publicly*.

A song is "performed" when it is played either live or through any form of media. Music is typically "performed" from the following sources:

[1] Under the Copyright Act, there are two types of copyrights for music: the copyrights in the musical composition (a "song"), consisting of the underlying music and lyrics; and the copyrights in the sound recordings (a "sound recording"), which are specific recorded versions of a song. These two types of copyrights are generally owned and controlled by different entities. The song copyrights are usually owned and administered by music publishers who license the songs and collect royalties on behalf of the songwriters. Because of certain quirks in U.S. copyright law, the right to publicly perform a sound recording is not relevant to residential communities. Therefore, for the purposes of this memo, only song copyrights are discussed.

- Music stored on an mp3 player, smartphone, computer, tablet, DVD, CD, tape, record, or any other device;
- Music performed live by a band, DJ, or other performer;
- Broadcast or satellite radio services, such as AM/FM radio, Pandora, SiriusXM, etc.;
- Background music from a service provider such as Muzak, DMX, etc.;
- Streaming from the Internet, such as via Spotify, Netflix, and webcasts;
- Television and video content; and
- Video games, whether through a console like PlayStation or Xbox, a software program, or over the Internet.

A song is performed "publicly" when it either takes place in an area that is open or accessible to the public (i.e., to a group that is larger than one family and its small circle of friends); or is transmitted or otherwise made available to many people, regardless of whether they receive it at the same time or at different times, and in one place or many. In residential communities, music is considered to be performed "publicly" when it is played:

- In common areas and shared spaces, such as lobbies and reception areas, hallways and pathways, elevators, pool facilities, playgrounds, fitness centers, business centers, lounges, social rooms, and event spaces;
- In staff and other internal offices, such as leasing offices, break rooms, and maintenance/utility rooms; and
- On a website, on-hold music, or in a commercial.

Generally, music is considered to be performed "privately," and thus outside of the scope of the public performance right, when played by residents in their own private residences.[2] In contrast, playing music through any means in any of the common areas could be a public performance, if provided by or enabled by the property owner or manager, requiring the copyright owner's permission.

[2] Playing music on a personal device with headphones could also be deemed a private performance even if listened to in a common area. The main issue is whether the music is provided by or enabled by the property owner or manager.

V. The Public Performance License

The exclusive right to publicly perform songs is usually administered by independent performance rights organizations, or PROs. PROs act on behalf of the song copyright owners to grant public performance licenses to others, to collect royalties for public performances, and to enforce the public performance right against infringers.

In the U.S., there are three main PROs: ASCAP, BMI and SESAC, which among them administer the public performance rights to the vast majority of songs.[3] Song copyright owners select and join one, and only one, of the PROs to administer and enforce the public performance rights to all of the songs in their music catalogs. For example, Bob Dylan has the public performance rights to all of his songs administered by SESAC.

The PROs grant blanket licenses that permit the licensee to publicly perform any and all of the songs in the PRO's music catalog, any number of times, and for any type of performance, whether live, recorded or broadcast, during the term of the license. Each PRO has an established, but different, schedule of licensing rates, though the rates must be the same for all similarly situated users.[4] In other words, ASCAP's licensing rates are different from BMI's, but both of their rate schedules are fixed at a given time and each of them must charge the same rates to all businesses of a similar size in a similar field. Specifics on the PROs' music catalogs and licensing rates can be found on their websites at ascap.com, bmi.com, and sesac.com.

By obtaining blanket licenses from each of the three PROs, a residential community would have the right to publicly perform the vast majority of songs on its premises. A license from just one PRO would only cover the songs in that PRO's catalog, requiring the user to keep track of which songwriters' songs are covered by the license and being performed. In that case, publicly performing any song from outside the PRO's catalog could be an infringement. Thus, as a practical matter, it may be safest and most convenient to obtain blanket licenses from all the PROs.

[3] While the public performance rights for songs are administered by the three main PROs, the rights to publicly perform digital audio transmissions of sound recordings (e.g., recordings played over satellite, Internet radio, and cable television music channels) are licensed by SoundExchange. As mentioned earlier, due to certain quirks in U.S. copyright law, the right to publicly perform a sound recording is not relevant to residential communities, and so is beyond the scope of this memo.

[4] Generally speaking, for recorded music, the annual licensing fee for a residential community can range from approximately $300 to $500, depending on various factors such as the number of units, the size and capacity of the common areas, and the means of transmission. If the residential community also performs live music, there is a separate fee that can range from approximately $300 to $1,000, depending on the number of events held per year.

VI. How the PROs Enforce Public Performance Rights for Residential Communities

The PROs are represented by large networks of agents who patrol places where music is typically performed, such as music venues, restaurants, bars, retail stores and other commercial establishments, to hear if music is being performed from the PRO's catalog without a license. These days, it is also common for the PROs to investigate online.

In residential communities, the PROs look for common areas where it is likely that music is played. The PRO will often browse the community's website, commercials, and other promotional materials to look for photos, videos or descriptions of speakers or TVs in the lobby, fitness center, event rooms and the like. If the premises are not licensed and the PRO notices or suspects that its music is being played on the premises, the PRO will typically send a demand letter to the property owner alleging that its music is being publicly performed without a license and demanding that the property owner obtain a public performance license.

The PROs are persistent and have the resources to bring suit, but will usually drop a claim if and when the residential community obtains a license. In addition, the PROs don't react well to stonewalling, so failure to respond at all to a PRO demand can increase the adversarial nature of the communications and make it more complicated and expensive to resolve.

A license may not always be needed in every situation, as the premises may already be covered by a license, or an exemption or defense may apply. Even if a license is needed, it may not be necessary to obtain one directly from the PRO, as there are music services, identified below, which negotiate and secure the public performance rights for their subscribers. Nevertheless, if you receive a letter from a PRO, it should be taken seriously and carefully considered to determine the appropriate way to respond under the circumstances.

VII. Exemptions to Public Performance Licenses

Under U.S. copyright law, there are certain exemptions, limitations and defenses that may permit a residential community to lawfully play music without a public performance license. Perhaps the most applicable for residential communities is a limited exemption that applies to public performances of music by commercial establishments if specific criteria are satisfied. To qualify for the exemption, the residential community must satisfy one of the following:

(1) The property plays music only from TV, radio, cable and satellite sources, it does not re-transmit the music beyond its premises, it does not charge admission, and the size of the premises as a whole (excluding parking areas) does not exceed

2,000 gross square feet; or

(2) If the premises as a whole exceed 2,000 gross square feet:

(a) The property uses an audio-only transmission and has no more than six speakers in the establishment, with no more than four speakers in any single room or space; or

(b) The property uses an audiovisual transmission and has no more than four televisions in the establishment, with no more than one TV in each room, no TV having a diagonal screen size greater than 55 inches, and having no more than six total speakers in the establishment, with no more than fourr speakers in any room or space.[5]

A public performance license is also not required to play music that is in the "public domain," meaning songs not protected by copyright law either because the copyrights expired, were lost, or protection never existed for some other reason. Just because a song is freely and publicly available, however, whether online or in any other form of media, does not mean that it is in the "public domain." Songs in the public domain are often very old, generally having been first published in the U.S. prior to 1923.[6] In other words, virtually no contemporary popular music is in the public domain. So, unless you are very carefully selecting and controlling the songs being performed, it is best not to rely on public domain music to avoid licensing requirements.

Lastly, in response to a claim of copyright infringement, a user can assert that it was making a "fair use" of the work. The fair use doctrine normally applies to uses of copyrighted works for purposes such as teaching, research, criticism, news reporting, or parody, although it can also apply to other purposes. It is difficult to predict, however, whether a given use would be deemed a fair use or not by a court. Considering fair use is a defense to copyright infringement, rather than an exemption to licensing requirements, and is very fact-specific and difficult to predict, it too should not be relied on in advance to avoid licensing.

VIII. Music Services

There are a number of subscription-based services which provide background music for businesses, such as for elevator, lobby or on-hold music in residential communities, and which secure the necessary licenses for the business to publicly perform the music for that purpose. Some examples include Mood Media, Cloud Cover Music, and Pandora for Business. These music services can provide access to a large amount of music covering different genres, and the subscriber can tailor how it will play the music

[5] There are different requirements for food service and drinking establishments which are beyond the scope of this memo.
[6] Also, even if an original song has fallen into the public domain, a public performance license may still be needed to play a derivative version of the song, which may still be protected by copyright.

at its locations, whether through recorded hard disks or satellite or Internet streaming.

For property owners with multiple residential communities, the owner can subscribe to one of these services and obtain the rights to publicly perform background music for some or all of its locations under one contract, rather than having to obtain separate licenses from each of the PROs for each individual location. Subscribing to such services, however, would only cover the right to use the music in the background, and would not cover performances where the music is featured, such as at a dance, in live music, or where a DJ is playing, or other prominent uses of the music.

IX. Other Important Considerations

For residential communities where the property owner provides the music, such as by playing background music around the premises or on a website, or enables the music, such as by providing a stereo, TV or docking station in common areas for residents to use, the property owner is responsible for obtaining the necessary public performance license and could be held liable for any infringement. For liability to arise, it would not be necessary that the music be performed for profit, that the performance be open to non-residents, or that the property owner knew that it was unlicensed.

Hiring a band or DJ to perform live does not mean that the residential community is authorized to host the performance: The community could still need a public performance license and it would be the property owner's responsibility, not the performer's, to obtain the license. Likewise, owning a copy of music, such as on a CD or mp3, does not mean that the owner is authorized to play the song in common areas of the community. Purchasing the recording only entitles the owner to play it "privately," but a separate performance license typically would be needed to play it publicly.

Similarly, just because an internet streaming service (such as Pandora or Spotify) is freely available to users, and even if the service itself has obtained a license from the copyright owners allowing it to publicly stream the music, that does not mean that the residential community is covered by the service's license and authorized to stream the music publicly. While such music services often provide options for businesses to secure licenses through the service rather than directly through the PROs, a paid subscription is most likely needed. There may be certain restrictions on how the music can be played, so it is important to carefully review the contract to see what types of performances are covered.

Finally, if the residential community uses music in other ways, such as synchronizing it with an employee training video, creating a jingle for promotional purposes, or quoting lyrics in materials, an additional and separate type of license may also be needed. In such cases, a public performance license would not cover the right to reproduce, distribute, create derivative works, or publicly display the song.

X. Conclusion

A public performance license is often required to play music in the common areas of a residential community. When music is publicly performed without a license and the music is provided, controlled, or encouraged by the property owner or manager, such owner or manager could be held liable for copyright infringement. The PROs can be aggressive in policing public performance rights against businesses and individuals, potentially resulting in large monetary penalties.[7]

The safest approach for a residential community to be able to play any music in common areas is to obtain blanket licenses from each of the PROs, as there are risks and limits to relying on the copyright defenses discussed above. If your residential community receives a demand letter from a PRO and you are not sure if the property is licensed or if the performance is unlawful, it is best to seek legal counsel to review and analyze the specific facts to determine if a license is needed or not.

The information in this memo is general in nature and is not intended to be legal advice. It is intended to assist owners and managers of residential communities in understanding this area, and it may not apply to the specific fact circumstances or business situations of all owners and managers. For specific legal advice, consult your attorney.

[7] As most song copyrights are timely registered with the U.S. Copyright Office, the copyright owners would be able to seek statutory damages of between $750 to $30,000 per work infringed. For innocent infringement, courts can reduce the amount of damages to as low as $200 per work infringed, and for willful infringement, courts can raise the amount to as high as $150,000 per work infringed. Alternatively, if the copyright is not registered, the copyright owner can seek the amount by which the owner has been actually harmed by the infringement (which can be calculated based on lost sales, lost licensing revenue, or any other provable financial loss), in addition to any profits obtained by the infringer. The copyright owner can also seek to recover attorney's fees and costs incurred in enforcing the rights, but such amounts are awarded at the court's discretion and the owner does not always recover them.