



Guest Services

by Michael Gentile, J.D.

Pay to play: Beware that the cost of music for hotels is not necessarily free

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We have come to take it for granted these days. You walk into a commercial building such as an office building, restaurant, arena or hotel lobby and there is music playing over a sound system. We know the artist and we often know the words to the songs. While we often recognize the music, we have no idea as to the source in that particular building. Some business owners who visit such establishments may even want to incorporate music into their own business environments. But how do they do it? Do they have to pay for it? Is it worth the effort? And finally, how can they do it legally? As in all things legal, the answers revolve around the particular factual settings to which the law may apply. But first a review of the applicable law is in order.

The Copyright Act

That music you hear and the artist that recorded it is protected by the Copyright Act, Title 17 of the United States Code, which was originally enacted in 1909. Essentially, to retransmit that music, a license must be purchased. Section 101 of the Copyright Act places restrictions upon the public performance of music, videos, dramatic productions and so forth. Under the statute, a public performance or display is any place open to the public or where a substantial number of persons outside the normal circle of a family or social acquaintances are gathered. Section 110 of the Copyright Act, under the Fairness in Music Licensing Act of 1998, extends coverage of the law to music that may be retransmitted to the public. Court cases over time have extended the coverage of the Copyright Act to restaurants, health clubs, conferences, conventions and athletic events. Therefore, it would be safe to assume that in order for a hotel to transmit music throughout its property, it must comply with the Copyright Act as amended in 2005, either by purchasing a license to transmit the music or by qualifying for an exemption under the Act.

Transmitted music

The question becomes, when is a license required to transmit music received by an original public transmission? Section 110-5(B) (Title 17 of the U.S. Code) states that it is not a copyright infringement (that is, no license is required) for the “communication by an establishment of a transmission or retransmission embodying a performance or display of a non-dramatic musical work intended to be received by the general public, originated by a radio or television broadcast station licensed as such by the Federal Communications Commission” provided certain limits apply. Those limits are as follows

1. For other than food service or drinking establishments, the area where the “communication” occurs cannot be greater than 2,000 gross square feet.
2. For foodservice establishments, the area where the “communication” occurs cannot be greater than 3,750 square feet. Those less than 3,750 can play as many radios or televisions as they desire without paying royalty or licensing fees.
3. If the square footage restrictions are exceeded, if the hotel applies for and receives an exemption, then a performance by audio means only can be transmitted by not more than a total of six loudspeakers, of which, not more than four may be in any one room or adjoining outdoor space.

Hot tip

AH&LA member hotels in good standing can receive a discount of 1% - 5% on music licensing fees from BMI, ASCAP and SESAC. Additionally, AH&LA has arranged for master form agreements on behalf of its member properties with each of the associations that make it much easier for hotels seeking to obtain music licensing agreements.

4. No direct charge can be levied to hear or see the transmission, or re-transmission.
5. The communication is not transmitted beyond the establishment where it is received.
6. The transmission or retransmission is licensed by the copyright owner of the work.

It is apparent from these restrictions that a hotel property would have a difficult time fitting into the square footage requirements of the statute if the intention was to transmit music throughout the property. However, it is conceivable that a hotel could provide music in its lobby area only and utilize the six total and four in one room speaker requirements to provide such a service. While this would eliminate the availability of music in hallways, fitness centers and conference rooms, it may add the touch of ambiance that many properties desire in one or two selected areas.



Prerecorded music

It is appropriate to note here that while the previous discussion focused on the restriction transmission or retransmission of works by public reception using a single receiving apparatus, this does not give hoteliers carte blanche to the transmission of CDs, DVDs and cassette tapes that have been privately purchased. While many of the same limitations apply, the owner of the CD, etc. would not be permitted to play the music recorded on these devices in areas such as a health club where membership fees are charged or in a bar where a cover charge is assessed. In any case where revenue may be derived from the transmission or retransmission, a license must be purchased. This applies not only to music but to television and closed-circuit broadcasts, including pay-per-view concerts that might otherwise be made available on cable television.

Finally, if it becomes necessary or desired to purchase a license, it is important to note that first, this cannot be achieved by purchasing the music (e.g., the CD, DVD, or cassette) itself. The license to retransmit must be purchased from the owner of the copyrighted work. These licenses are generally not very expensive and are determined by the size of the facility, the anticipated amount of use, and the number of patrons or participants in a program or activity.

BMI, ASCAP, and SESAC

Most music played in the United States is licensed through music clearing houses such as Broadcast Music, Inc. (BMI), the American Society of Composers, Authors, and Publishers (ASCAP), or SESAC (originally known as the Society of European Stage Actors and Composers). Most owners of copyrights on musical compositions are affiliated with one of these three associations that will license, on a nonexclusive basis, the public performance rights of the copyrighted music. These associations, in turn, distribute revenue from the licensing fees to their members as royalties, less any administrative expenses.

Since a hotel may not easily restrict the music played on its premises to those works controlled by one of the aforementioned organizations, hoteliers should contact each of the three associations directly to secure licenses to play the music in their collection. Hotels that fail to secure licenses in advance are subject to fines and possible criminal or civil prosecution. From a legal standpoint, it is safest to purchase the license, especially if it is desired as a revenue enhancer. At that point, the provision of music on site will be determined by cost effectiveness and not the law. Generally, these licenses will likely only cost a few hundred dollars annually.

Final suggestions

While understanding the ins and outs of copyrighted music can be confusing and may seem onerous to the typical hotel manager, a few important practices should be consistently followed to avoid copyright infringement claims:

- Do not charge or collect admission or “cover fees” for any venue where music is being transmitted or played unless a license has been secured that covers all music that is presented.

- Require bands and disc jockeys to submit play lists in advance to ensure that the music to be played is covered under the hotel license from BMI, ASCAP, or SESAC. In lieu of this requirement, stipulate in writing that bands and disc jockeys must secure copyright licenses in advance before performing on hotel premises.
- Do not retransmit radio broadcasts through the entire lodging property such that it would exceed the limits specified in Title 17, Section 110-5(B) of the U.S. Code. If background music throughout an entire property is desired, consider purchasing pre-recorded music for business establishments from providers such as Muzak that already secure the licenses to the music they package.
- If purchasing music from satellite radio providers such as Sirius Satellite or XM Radio, the hotel must specify that it is intended for broadcast in a business setting and not for individual listening enjoyment. The subscription costs will obviously be higher in order to cover the licensing fees.
- Renew the hotel's licensing agreements with BMI, ASCAP and SESAC on an annual basis by providing accurate information and timely payments to these associations. Licensing information from BMI, ASCAP and SESAC can be obtained from the following websites: www.bmi.com; www.ascap.com; www.sesac.com ✧

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