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Copyrights and Public Music in Health Facilities Who is BMI, and Why Are They Telling Me I Have to Pay Them?

Musicians typically have little business acumen. This void of expertise created the need for individuals and business entities which manage the promotion, sales, and copyright enforcement of an artist's work. One type of organization that fills this void is the record label, like Warner Music or Sony BMG, which handles production and promotion of an artist's work. Another type of organization is known as a "performing rights society," such as Broadcast Music Incorporated ("BMI") and the American Society of Composers, Authors, and Publishers ("ASCAP"). A musician-songwriter or his or her record label grants permission to BMI or ASCAP to license copyrighted songs for public performances, typically to television and radio stations, in exchange for the collection of license fees and eventual royalty payments to the artist.¹ BMI, for example, represents over 300,000 artists, from Aguilera to Zevon.

BMI grants licenses that vary in price according to the specific use employed by the organization playing public music. For healthcare facilities, BMI provides licenses to its catalogue of music for a flat annual rate or a per bed rate.² Performance rights societies contact various organizations and businesses from time to time claiming that the organization's public music violates the copyrights that have been assigned to the performing rights society.

When a Healthcare Facility Might Need a Copyright License

Under the 1976 Copyright Act, the holder of the copyright or its assignee has the exclusive right to reproduce the work and, in the case of a sound recording, "to *perform* the copyrighted work *publicly*." For example, a radio station could not play a copyrighted Willie Nelson song on-air without paying BMI, his music publisher, and/or the "red-headed stranger" himself for the license to do so. A "performance" of a copyrighted song includes singing, broadcasting, transmitting, playing a CD, and turning on a radio receiver even in the confines of one's home, and this is the reason for some of the recent "MP3 download" disputes. To be sure, in order for the performance to infringe the copyright, it must occur *publicly*. Public performances are typically found where "a substantial number of persons

¹ BMI website, www.bmi.com. Transfer of copyrights, in whole or in part, e.g., a license, is permitted by 17 U.S.C. § 201(d).

² BMI website, Healthcare Facility License, http://www.bmi.com/licensing/entry/534832/pdf533657_1/.



Caplan and Earnest LLC
1800 Broadway, Suite 200
Boulder, CO 80302
303-443-8010

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CAHSA / Legal Lines
1888 Sherman St. #610,
Denver, CO 80203
303-837-8834



outside of a normal circle of family and its social acquaintance” hear the performance or where the performance is “open to the public.”³ Public performances have included radio broadcasts,⁴ playing movies in restaurants open to the public,⁵ and music in bars.⁶ The manner in which copyrighted material is “performed” in your institution will determine whether it is “public” and thus infringing on the copyright.

Some performances of music, despite being public, are exempted from copyright infringement. Exemptions often depend on the setting, nonprofit status of the organization, the type of recording being played, the source of the music (e.g., CD, MP3, radio or television), the size of your establishment, and the sophistication of the electronics and speakers used.

Playing CDs over Loud Speakers in a Healthcare Facility

Playing a CD of a musician’s copyrighted work over a general loudspeaker system to a substantial number of people across an institution is likely the clearest case of infringement on the exclusive right of public performance and does not fit neatly into an explicit exemption outlined by law. For example, a nursing home generally cannot play the new holiday CD it purchases at Best Buy™ throughout its halls and waiting rooms without some sort of licensing agreement from BMI. The performance might well be public, as many health care facilities are locations “open to the public” with a “substantial number of people outside the normal circle” present.⁷

Music for sale

Reportedly, BMI sometimes advises potential infringers to place the copyrighted music being played on sale to satisfy the need for a license. This may be true in one sense, because enforcing the copyright is at the discretion of BMI for a public performance. However, there may be protection to a potential infringer by another exemption. Public performances may be exempt from infringement if the music being played is used to promote its sale in the same location.⁸ The location must be a “vending establishment open to the public at large,” with the sole purpose of the played music “to promote the retail sale of the [music];” the music must be played “within the immediate area where the sale is occurring,” but not beyond the “place where the establishment is located.” This exemption may work for a hospital gift shop, but may not be as helpful to most elder care facilities that do not have an area for sales to the public.

Exemptions for Radio and Television Played Publicly in a Healthcare Facility

Important exemptions apply to radio and television broadcasts in “establishments” of a certain square footage that do not directly charge for the performance, do not further transmit the copyrighted work beyond the establishment, and where the original signal is licensed to play the music or program. An “establishment” is defined as a “store, shop, or any similar

³ 17 U.S.C. § 101 (statutory definition of “publicly”). *Broadcast Music, Inc. v. Regal Broadcasting Corp.*, 212 U.S.P.Q (BNA) 624 (N.D. N.Y. 1981).

⁴ *Broadcast Music, Inc. v. Regal Broadcasting Corp.*, 212 U.S.P.Q (BNA) 624 (N.D. N.Y. 1981).

⁵ *Paramount Pictures Corp. v. Sullivan*, 546 S. Supp. 397, 218 U.S.P.Q (BNA) 304 (D. Me. 1982).

⁶ *Lodge Hall Music, Inc. v. Waco Wrangler Club, Inc.*, 831 F.2d77 (5th Cir. 1987).

⁷ 17 U.S.C.A. § 101 (definition of “publicly”).

⁸ 17 U.S.C.A. § 110(7)

place of business open to the general public for the primary purpose of selling goods or services...where the majority of [the space] is used for that purpose, and in which [music is] performed publicly.”⁹ Modern healthcare institutions are often “places of business” open to the public for the delivery of services. If your facility is considered an “establishment” under copyright law, and it meets the specifications below, it may not need to obtain a license for radio or television broadcasts.

Transmission of Radio and Television to Less Than 2,000 Square Feet

If considered an “establishment,” a location playing radio or television broadcasts is exempt without further conditions if below 2,000 gross square feet (excluding residential space and customer parking space).¹⁰ This size exemption may be helpful to many smaller elder care facilities that have limited public space.

Transmission of Radio to More Than 2,000 Square Feet

Radio transmissions are exempt from copyright liability in an “establishment” of more than 2,000 non-residential square feet if the radio broadcast is communicated by no more than 6 speakers, of which no more than 4 speakers are located in any one room or adjoining outdoor space.¹¹ Thus, a particular healthcare establishment with more than 2,000 square feet might avoid copyright infringement liability by simply limiting the number of speakers playing radio station broadcasts to 6 speakers in separate rooms.

Transmission of Television to More Than 2,000 Square Feet

Often copyrighted music plays in the background of a television program. Performance rights organizations typically have granted a license to the program to use the song. For example, *Lost* and *Desperate Housewives* both play licensed BMI music. An “establishment” where television programming is being shown to the public might also be exempted from copyright infringement by limiting the size and layout of its televisions. A television broadcast displayed by no more than 4 displays, with no more than one display located in any 1 room, does not require a license.¹² Moreover, the displays must not be larger than 55 inches.¹³ Therefore, a healthcare establishment with 4 televisions of appropriate size in 4 public waiting rooms would be exempt from copyright infringement.

Video “Rentals” for Patient Rooms

Where a healthcare facility allows patients the chance to “rent” movies or videos it will also implicate copyright laws, but it is unlikely to infringe. Such “rentals” are likely not infringing on the copyrights because they are not public performances and the video “rental” is most certainly incidental to the patient’s stay.¹⁴

⁹ 17 U.S.C.A. § 110(5)(B).

¹⁰ 17 U.S.C.A. § 110(5)(B)(i)

¹¹ 17 U.S.C.A. § 110(5)(B)(i)(I)

¹² 17 U.S.C.A. § 110(5)(B)(i)(II)

¹³ *Id.*

Nonprofit or Religious Status

At one time, nonprofit status would save an organization from public performance infringement. The 1976 Copyright Act changed this blanket exemption, but nonprofit or religious status still may facilitate an exemption in certain very limited circumstances. Today, a nonprofit exemption will protect a public performance of copyrighted material if there is an actual live performance – e.g., a local high school choir singing copyrighted music for residents of a retirement community. Nonprofit performances must also not create any “direct or indirect commercial advantage,” such as attraction of patients or the creation of good will.¹⁵ Also, performers cannot receive a fee for their performance, but salaried individuals performing their job, like the school choir’s music teacher, are permissible.¹⁶ If an admission is charged, the proceeds must be used exclusively for an educational, religious, or charitable purpose outside of reasonable costs of production.¹⁷ Copyright owners may serve notice of objection to the performance, thereby allowing the copyright owner to avoid supporting an organization he or she may oppose.¹⁸ Thus, if a skilled nursing facility organized a fundraiser with a local choir providing the music and admission were charged, the choir must perform for free, any admission charge over production costs must go exclusively towards the charitable mission of the facility, and the audience should be limited to people who are in the “natural community” of the facility, rather than a large group drawn from the larger public.

Conclusion

Whether or not your healthcare facility requires a copyright license to play music for the public is a fact-sensitive inquiry. The copyright law does, however, require that facilities review and ensure compliance based upon their particular circumstances. Using the exemptions described above may help your facility avoid having to respond to a “copyright letter.”

¹⁴ *Columbia Pictures Industries, Inc. v. Professional Real Estate Investors, Inc.*, 866 F.2d 278 (9th Cir. 1989).

¹⁵ 17 U.S.C.A. § 110(4).

¹⁶ 17 U.S.C.A. § 110 (1).

¹⁷ 17 U.S.C.A. § 110(4)(B).

¹⁸ *Id.*