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CRS Report for Congress

Copyright Law's Public Performance Right: Exemptions for Certain Establishments

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Summary

The Copyright Act confers specific exclusive rights to the owners of copyrighted works. Among the rights conferred upon the composer of a musical work is the authority to "perform the work publicly." This right is implicated when bars, cafes, and restaurants play music from the radio or from audio cassettes and compact discs as background music.

While the general provisions of the Copyright Act require that businesses obtain licenses to play background music, there are exemptions, which were expanded by Title II of the "Sonny Bono Copyright Term Extension Act," Pub. L. No. 105-298. Those exemptions generally allow bars, cafes, and restaurants to play the radio and show television programing, but do not authorize them to play audio cassettes and CDs. Research does not uncover any other provisions that would definitively immunize public performances of audio tapes and musical CDs in food service establishments from possible liability for copyright infringement.

This report will be updated as circumstances warrant.

Overview. The Copyright Act confers upon composers of copyrighted musical works the exclusive right to publically perform their work. However, Title II of the "Sonny Bono Copyright Term Extension Act,"[1] which relates to the performance of copyrighted music in restaurants, exempts small businesses and certain food-service establishments from copyright infringement for playing radio and television programs for their customers. These establishments still need performance licenses if they host live music performances of copyrighted material, or if they play tapes or CDs of copyrighted music to their customers.

[1] Pub. L. No. 105-298, 112 Stat. 2827, 2830-2834 (1998)(codified as amended in scattered sections of title 17 of the United States Code.) Cf. CRS Report 98-904, Copyright Term Extension and Music Licensing: analysis of Sonny Bono Copyright Term Extension Act and Fairness in Music Licensing Act, P.L. 105-298, by Dorothy Schrader.

Copyright Holders' Exclusive Right to Authorize Performances. The Copyright Act grants certain exclusive rights to the owner of a copyrighted work, which are different from those enjoyed by a mere owner of a copy of the work. Those exclusive rights include (1) the right to reproduce the work, (2) the right to prepare derivative works based upon the original copyrighted work, (3) the right to distribute copies of the work to the public, (4) the right to publically display the work, and (5) the right to *publically perform* the work.[2]

The performance right allows the copyright holder to control the public performance of certain copyrighted works. These include musical works, literary works, dramatic works, choreographic works, pantomimes, motion pictures, and audio visual works.[3] A performance is considered "public" when the work is "performed in a place open to the public or at a place where a substantial number of persons outside of a normal circle of a family and its social acquaintances are gathered."[4] A performance is also considered "public" if it is transmitted to multiple locations, such as through radio or television.[5]

On its face, the public performance right is implicated when a restaurant plays copyrighted music over its speaker system to its customers from the radio or from audio cassettes or CDs. While listening to music on the radio or on a cassette or CD privately will not ordinarily constitute copyright infringement , it is the *public* performance aspect of using music in a business environment that is the basis for the need for permission from a songwriter or his agent.

Three major "performing rights" societies – BMI, ASCAP, and SESAC – generally act as a songwriter's agent and help enforce the songwriter's performance rights. These societies grant permission to utilize the music in their repertories through the issuance of licensing agreements, and they monitor businesses to discover infringing use of their members' songs and music.

Exemptions from the Composer's Performance Rights. The Copyright Act, as amended by Title II of the Sonny Bono Copyright Term Extension Act ("Fairness in Music Licensing"), limits authors' and publishers' exercise of their non-dramatic music performance rights with respect to bars, restaurants, and other small businesses.[6]

Prior to amendment, §110(5) of the Copyright Act provided for a special exception "for the communication of a transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind

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[2] 17 U.S.C. § 106 (2000).

[3] 17 U.S.C. § 106(4) (2000).

[4] 17 U.S.C. § 101 (2000).

[5] Id. ("public performance" means "to transmit or otherwise communicate a performance or display of the work to . . . the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.")

[6] Pub. L. No. 105-298, 202-205, 112 Stat. 2827, 2830-2834 (1998)(codified as amended in scattered sections of title 17 of the United States Code.)

commonly used in private homes."[7] Essentially, this exemption was limited to small businesses that turned on a home radio or television so that customers could hear or view the broadcast.[8] There was no exemption for small businesses who originated the performance, e.g. by playing compact discs on a home-style stereo.

The Sonny Bono Act expanded the reach of the § 110(5) exception by expressly covering:

> (1) any establishment with less than 2000 gross square feet, and
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> (2) any food service or drinking establishment (though how the exception may be exercised depends on the establishment's size).[9]

Now, an establishment under 2000 square feet or a food or drinking establishment under 3750 square feet may play broadcast radio or television programing without any apparent limit on the equipment uses. However, this extension does not authorize an establishment to originate its own broadcasts of copyrighted material. That is, an establishment may play the radio without violating copyright law, but the act still does not shield the same business when it plays, for example, CDs protected by the copyright laws.

If a food service or drinking establishment is 3750 gross square feet or more, the establishment will only be exempt if

> (1) the performance of the radio transmission incorporating non-dramatic musical compositions is "communicated by means of a total of not more than 6 loud speakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining space . . .,"[10] or,
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> (2) the performance of a television transmission incorporating non-dramatic musical compositions is "communicated by means of a total of not more than 4 audiovisual devices, of which not more than one audiovisual device is located in any 1 room, and no such audiovisual device has a diagonal screen size greater than 55 inches, and any audio portion of the performance or display is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining space . . ."[11]

Under these conditions, an extremely large restaurant with three seating areas may, for example, place two professional quality speakers in each area and play radio programing through them without incurring an obligation to pay performance royalties to the composers.

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[7] 17 U.S.C. § 110(5) (1994).

[8] See H.R. Rep. No. 94-1476 at 87 (1976). See also, Letter of Marybeth Peters, Register of Copyrights, included in floor debate on S. 505, 144 CONG. REC. at H9953-54.

[9] 17 U.S.C. § 110(5)(B)(2000).

[10] See id.

[11] Id.

Conclusion. While restaurants are exempt from copyright infringement when they play radio and television programs, they still need performance licenses to host live music performances of copyrighted material or publically play tapes or CDs to their customers. Research does not uncover any other provisions of the copyright act which would definitively immunize public performances of audio tapes and musical CDs in food service establishment from possible liability for copyright infringement.