

By: Karen Chadwell, Esq.
Doherty, Wallace, Pillsbury & Murphy, P.C.

Copyright Licensing Considerations for Restaurant and Bar Proprietors

Many restaurant and bar owners are unknowingly committing copyright infringement on a daily basis. Such infringement occurs where the proprietor is playing recorded music, or having live music performed, in the bar or restaurant without first having obtained a proper performance license.

The U.S. Copyright Law protects sound recordings. Sound recordings are defined under the U.S. Copyright Act as “works that result from the fixation of a series of musical, spoken, or other sounds...” Included among the many rights granted to the owner of a sound recording under the Copyright Act is the right to publicly perform the recording. Under copyright law, a “public performance” occurs when music is played “in a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered.”

Therefore, if a sound recording is protected under copyright law, which most sound recordings are, then the owner of such work has the exclusive right to play the sound recording in a public place by way of, for example, terrestrial, Internet or satellite radio, YouTube, online streaming, downloading, etc. What does this mean then for the restaurant or bar owner who wishes to play music on their premises? In theory, unless the business falls under the exceptions that are provided for under 17 U.S.C. §110(5), the restaurant or bar proprietor is obligated to obtain a license prior to playing the sound recording on his/her premises. Whether a restaurant or bar falls under the exceptions may depend, for example, on the size of the establishment, how many speakers or televisions the establishment has, and whether customers are charged to listen to the music.

Fortunately, if the exceptions do not apply to a particular proprietor, and a license to play the music is a legal requisite, there are relatively straightforward options available for obtaining a license. One such option includes obtaining a public performance license (“PPL”) to play the sound recording via a performing rights society, aka, a performing rights organization (“PRO”). Three well-known PROs include the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc (BMI), and SESAC, Inc.

PROs represent songwriters and publishers and assist them in protecting their copyrighted works by monitoring and licensing the use of the copyrighted works. In general, for a blanket licensing fee which is determined by the PRO and which is most commonly due on a yearly basis, the licensee of a PPL may play any of the music that is offered under the licensing agreement. Part of the licensing fee that is collected by the PRO is then paid out to the songwriter or publisher.

It is noted that no single PRO has the right to license out every copyrighted sound recording. The restaurant or bar proprietor, therefore, should ensure that the sound recordings that the proprietor plays in the establishment are in fact licensed to the proprietor by the

particular PRO named in the PPL and that no other PRO also has interests in the sound recordings. To maximize one's protection, it may be wise to have a PPL in effect with multiple PROs or to enter into a PPL with a third party that covers multiple PROs.

If signing up with a PRO is not economically feasible, or is otherwise impractical, then music streaming may provide a proprietor with a more reasonable option. Although the non-exempt proprietor cannot legally stream music in their restaurant or bar under their personal streaming account, as these licenses are restricted to home use, there are commercial streaming services that will provide the proprietor with a streaming music license under which the proprietor may play the music in the public setting and in which the streaming provider will pay the PRO fees on the proprietor's behalf. When considering whether a commercial streaming service is the best option, the proprietor should keep in mind that music covered under a streaming service license typically may be played as background music only, that is, no dancing and no cover charge is allowed.

Another consideration concerning the legal ramifications of music performances in a public venue centers around live music, and more specifically around live music performances of cover songs or songs that are not the live performer's original musical works. Is a proprietor liable for copyright infringement by a live performer's unauthorized performance of a song on the proprietor's premises? If the song is not covered under a PPL held by the proprietor, then yes. Additionally, for the musician to perform the song in public, unless the song is in the public domain, the musician must have permission from the song's copyright owner. It is imperative, then, that the restaurant or bar owner have an agreement in place with any musician who performs on their premises confirming that the musician has sought all permissions necessary to perform the songs and/or that the songs are in the public domain and/or that all songs to be performed by the musician are owned and freely usable by the musician.

Although seeking the proper licenses or contracting with musicians may seem unnecessary under the thought that the illegal public performance of a musical work or of a sound recording will not be discovered, such misconduct is in fact discovered every day. PRO agents visit bars and restaurants on a daily basis and routinely report infringements. PROs follow-up on these reports and send notices of copyright infringement to proprietors in which they demand heightened fees and threaten litigation. Under U.S. Copyright Law, the fines may range from \$750 to \$30,000 per violation. This amount may be significantly more if the conduct is found willful. Therefore, it is highly encouraged that proprietors take these matters seriously and that they seek and enter into the necessary legal agreements.