Music Licensing Basics for Long Term Care Providers and Their Attorneys

Christopher C. Puri
Jeffrey L. Allen
Bradley Arant Boult Cummings LLP
Nashville, TN

Nashville is home to a lot of musicians. It is also home to a number of organizations known as "performing rights organizations," or PROs. Within the United States, the three main PROs are Broadcast Music Incorporated (BMI), the American Society of Composers, Authors, and Publishers (ASCAP), and Society of European Songwriters, Artists and Composers (SESAC).[1] With increasing frequency over the last few months, skilled nursing facilities and other types of long term care facilities have been contacted by one or more of the PROs who assert the facility is violating U.S. copyright laws by playing music in a public space. These letters or telephone contacts are persistent, and they request that the facility, or multi-facility company, enter into and pay for a license to play music in their communities or face legal actions. Since most in-house counsel and outside counsel are not experts in music licensing, it is important to understand the basic foundation of music rights, the basic function of PROs, how to determine whether a long term care facility is required to obtain a license from the PROs, and whether any statutory exemptions to music licensing might apply.

The Basic Foundation of Music Rights and the PRO Function

The owner of the copyright in musical compositions (usually songwriters or music publishing companies) has an exclusive right under the Copyright Act "to perform the copyrighted work publicly."[2] To perform a copyrighted work "publicly" means "to perform or display it at 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."[3] Generally, if any business wishes to perform a musical composition *publicly*, it must obtain a license from the copyright owner.

A PRO helps songwriters and music publishers receive compensation for the usage of their music by collecting one of the most important forms of publishing revenue: performance royalties. The PROs offer blanket licenses[4] to businesses that wish to perform musical compositions publicly. A songwriter (or the composer or music publisher, as applicable) is owed what is called a "performance royalty" any time her music is "performed." This includes broadcast on radio stations (terrestrial, satellite, and internet), use on TV shows or commercials, or live performance in venues.

To avoid the impossible task of collecting that money herself, a songwriter will enter into an agreement with a PRO for the PRO to act as the songwriter's exclusive agent to license her copyrighted songs for public performances, typically to television and radio stations and restaurants, bars, and nightclubs (but also to many other types of businesses, including those in the health care industry, such as hospitals and long term or skilled nursing facilities), in exchange for the collection of license fees and eventual royalty payments to the songwriter.[5]

PROs then enforce their exclusive right to license musical compositions for public performances. As many long term care facilities have recently discovered, the PROs perform this function through sales agents. These agents identify businesses (including long term care facilities) that are unlicensed and potentially are infringing on copyrights in the PRO's applicable music catalog. Usually the issue of music licensing comes up when a long term care facility is contacted by a PRO's representative. These representatives send letters or make calls notifying the businesses of their potential infringement, advising of the potential damages if the business is found to be violating U.S. copyright law, and demanding the business sign and pay for an applicable licensing agreement.

The existence of multiple PROs makes it more complicated for long term care facilities in some ways. As noted above, PROs acquire their rights from the songwriters (or their publishing companies) who own those rights. Each PRO has a certain list of musical compositions in its catalog, but given the vast amount of music in the marketplace, it would be virtually impossible to avoid performing some songs controlled by a particular PRO. The PRO agents will state that they do not "coordinate" with other PROs, so just because one PRO has asked you for a music licensing agreement does not necessarily mean the others will as well. That being said, licensing with only one PRO may not be sufficient to avoid a copyright violation.

Each of the major PROs have sophisticated websites. Pricing for music licenses varies greatly based on a number of factors, including the type of business being licensed. For example, license fees for long term care facilities are typically based on the number of licensed beds per facility (e.g., $X per licensed bed). While lawsuits are uncommon, PROs have sued, and do sue, businesses over copyright violations. Damages under the Copyright Act include statutory damages and attorney's fees.[6]

Is a Public Performance Music License Required?

The most common types of music uses by long term care facilities that are generally licensable include live band/artist or DJ performances; CDs, digital music/video files, and/or streaming services via iPhone, iPod, or other comparable devices; background music (such as elevator music or music on hold over telephones);[7] broadcast radio music over loudspeakers; therapy sessions or aerobic/dance/fitness classes; and large screen or multiple televisions with the sound on (where the music used in commercials or television shows is licensable). There is no question that each of the above music uses constitutes a "performance" under U.S. copyright law.[8]

For such performance to be considered *public*, and trigger an exclusive right under the Copyright Act, however, it must satisfy the Section 101 requirement highlighted above of occurring at either 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."[9] When applied to a long term care facility, the "open to the public" test is likely a close and fact-dependent question. An independent living or assisted living facility could likely argue that because the facility is, in fact, the "home" of the residents, the overall space in the facility is not "open to the public." That argument might be more difficult to make for a skilled nursing facility, which is generally more open and accessible to members of the public.[10] In addition, taking the position that a facility is not "open to the public" would still leave the second prong of the test to be overcome. It is much more difficult to establish what is considered a "substantial number of persons" and what is "outside of a normal circle of a family and its social acquaintances" for an area to qualify as truly private for purposes of copyright law.[11] The assessment turns not on the *actual* number of persons in a location at any given time, but rather the *capacity* for such persons.

In applying the above analysis to various areas within long term care facilities, a resident's room is usually not sufficiently large to hold a "substantial number of persons," and typically only a resident's small circle of close family members and friends gather there at any given time. Therefore, it is well-founded that if music is performed in a resident's room, it would be done so privately and escape the licensing requirements under the Copyright Act.[12] The same analysis would hold for an individual resident's private

viewing of a television program—in her room on her own television. However, most facilities (particularly nursing facilities) offer social service events organized as part of resident activities. Many, if not most, involve the playing of recorded music (or often live music performances). Most are held in "common areas" within the facility such as dining areas, conference rooms, or activity halls. Most such events likely involve what would be deemed a "substantial" number of people, and could include individuals "outside of a normal circle of family and its social acquaintances" of a particular resident. In those cases, when music is performed or played, there is a good argument that it would occur in such a way as to be a "public performance" under the Copyright Act. Social activities of long term care facilities are often the areas scrutinized by music licensing agents and ones that trigger licensing requirements.

The Limited "Business" Exemption to Music Licensing

If a business publicly performs licensed musical works, there are some limited exceptions to the requirement to obtain a license. The statutory exemption applicable to the public performance of broadcast radio and television music and most commonly used by businesses is called the "business" exemption (or, officially, the Fairness in Music Licensing Act of 1998).[13] When passed in 1998, the legislation was somewhat controversial among copyright owners because it expanded the number of "establishments" that could take advantage of performing copyrighted musical compositions without the need to secure a license. The Copyright Act defines an "establishment" as "a store, shop, or any similar place of business open to the general public for the primary purpose of selling goods or services in which the majority of the gross square feet of space that is nonresidential is used for that purpose, and in which nondramatic musical works are performed publicly."[14]

Long term care facilities may be able to argue they are "establishments" under the Copyright Act. First, as discussed above, many long term care facilities are usually open to the general public. Second, the primary purpose of a long term care facility (and especially a skilled nursing facility) is to provide health care "services" to residents, and therefore sell its services. Third, the majority of the nonresidential space is arguably used to provide such health care services.[15] Fourth, nondramatic musical works are often publicly performed in a long term care facility (whether over loudspeakers, televisions, etc.).[16]

It is important to note, however, that a long term care facility meeting the test as an "establishment" only triggers the *applicability* of the "business" exemption; it does not affect public performance licensing requirements in the event the exemption does not apply. Additionally, the exemption has limited application in the real world because of additional requirements that must be met.

Once a business meets the definition of an "establishment," the next exemption requirement relates to the size of the establishment—more specifically, whether it is smaller than 2,000 gross square feet (excluding space used only for customer parking). A facility smaller than 2,000 gross square feet that meets the three additional non-controversial requirements discussed below fits within this exemption from obtaining a music license. Most facilities are larger than 2,000 gross square feet and therefore must limit any public performance based on the restrictions on the number and types of sources discussed immediately below to fit within this exemption from licensing. Those facilities must meet additional factors to qualify for the exemption, including:

- If the facility engages in a public performance of broadcast radio music by audio means only (i.e., via loudspeakers), the facility must not have more than six loudspeakers in the entire facility, of which not more than four loudspeakers are located in any one room or adjoining outdoor space.[17]
- If the facility engages in a public performance of music transmitted audiovisually by a cable system or satellite carrier (i.e., via televisions), the facility must not have more than four televisions in the entire facility, no more than one television located in any one room or adjoining outdoor space, and no television with a diagonal screen size greater than 55 inches.[18]

A facility that clears the size and number of device hurdles outlined above must still meet three remaining statutory requirements before it can claim the licensing exemption, which are:

- the business may not make a direct charge to a customer to see or hear the music;
- the music cannot be further transmitted beyond the facility where it is received (i.e., teleconferencing through Skype or other methods where the individuals on the receiving end could see or hear the music); and
- the transmission of music (i.e., the radio or cable television broadcast itself) must be licensed by the copyright owner.[19]

Long term care facilities usually meet these requirements rather easily, and the requirements are not typically the subject of much critical scrutiny. Long term care facilities usually do not charge residents, family members, or other individuals at the facility to listen to music in common areas. Facilities generally do not retransmit music outside of their facility. Lastly, whatever radio station or cable station broadcasts the music at issue almost always obtains the proper license from the applicable PROs.

Finally, the exemption contains a key limitation. The "business" exemption is limited to broadcast radio or television performances, and it does not cover public performances of *live music* or playing music from any other source (including transmission through digital service providers such as Spotify, Apple Music, Pandora, and the like). Allowing publically performed live music would still subject a long term care facility to music licensing requirements.

Conclusion

Whether a long term care facility (or a chain of facilities) must obtain a public performance music license from one of the PROs depends on the specific circumstances within that community. When a facility applies the standards explained above, often it determines that either a license is required based on its music risks, or that the risks of challenging the requirement outweigh the burdens of obtaining the license. However, the points explained in this article will hopefully provide a path through which in-house counsel for a long term care facility and its outside lawyers can determine if the facility does indeed need a music license or has a valid response to a PRO demand.

---

1 A fourth and relatively new PRO, Global Music Rights (GMR), is small but gaining increasing market share in the industry.

2 17 U.S.C. § 106(4). Musical compositions consist of the written music and lyrics to a song. Sound recordings have a separate copyright and include musical compositions, but they also include instrumentation, arrangement, etc. Think of a composition as the sheet music, and the sound recording as the recorded version of the sheet music. The PROs do not represent the owners of the copyright in a sound recording. Unlike most industrialized countries, the United States currently does not have a broadcast radio public performance right for sound recordings. For now, sound recording copyright owners only have an exclusive right to perform their work publicly by means of a digital audio transmission (e.g., Pandora, Apple Music, Spotify, etc.). 17 U.S.C. § 106(6). This performance right is licensed through a third-party company called SoundExchange. Unless a health care facility streams music digitally to the public, it does not need to worry about acquiring a SoundExchange license.

3 17 U.S.C. § 101. In developing the definition of publicly under the Copyright Act, Congress intended for it to include "semipublic" places, such as clubs, lodges, factories, summer camps, and schools.

4 The term "blanket license" simply means that the license is not for one particular song, but rather for all songs in the PRO's catalog.

5 A songwriter can only affiliate with one PRO at any given time. As such, each PRO represents a different collection of songwriters.

6 17 U.S.C. §§ 504(c), 505.

7 Background music is commonly licensed through third-party companies such as Muzak or DMX. Such licenses generally cover public performance rights.

8 *See* 17 U.S.C. § 101. To "perform" a song means, in part, to play it either directly or by means of any device or process (or in the case of an audiovisual work, to make the sounds accompanying the images audible).

9 17 U.S.C. § 101. This helps to explain why a music user at one's private residence normally does not trigger licensing requirements because a private performance is not an exclusive right of the copyright holder.

10 CMS' regulations specifically infer that a facility is accessible to the "public" by requiring that certain notices be posted in areas that are "accessible to the public." 42 C.F.R. § 483.10(g)(11).

11 In fact, there is an entire law review article devoted to these questions. *See* Daniel Cantor, *How Many Guests May Attend a Wedding Reception Before ASCAP Shows Up? Or, What are the Limits of the Definition of Perform "Publicly" Under 17 U.S.C. § 101?,* 27 Colum. J.L. & Arts 79, 120 (2003).

12 No reported cases appear to analyze whether resident rooms in a health care facility are private space for purposes of music licensing requirements under the Copyright Act. The closest analogy the courts have discussed is hotel rooms. "While the hotel may indeed be 'open to the public,' a guest's hotel room, once rented, is not." *Columbia Pictures Indust. Inc. v. Prof. Real Estate Investors*, 866 F.2d 278, 281 (9th Cir. 1989). There, the court noted that "guests do not view the videodiscs in hotel meeting rooms used for large gatherings," and rather, "[t]he movies are viewed exclusively in guest rooms, places where individuals enjoy a substantial degree of privacy, not unlike their own homes." *Id.*

13 *See* 17 U.S.C. § 110(5)(B).

14 17 U.S.C. § 101.

15 This depends largely on how "nonresidential" (undefined under the Copyright Act) is defined and whether the majority of such space consists of common areas (e.g., waiting rooms, hallways, lobbies, cafeterias, gift shops, restrooms, etc.), which are not used directly to sell health care services to patients.

16 At least one author, however, questions whether a long term care facility would be an "establishment" under the Copyright Act. *See* Nancy Reynolds, *Playing a Radio or TV In The Facility: Copyright Infringement?*, Long Term Care Counsel (May 17, 2016), https://ltccounsel.com/playing-a-radio-or-television-in-the-facility-copyright-infringement ("Whether [long term care] facilities are 'establishments' is unknown, but we do know that they are generally not considered to be open to the public and their common space is not usually used for the sale of goods or services.").

17 17 U.S.C. § 110(5)(B)(i)(I).

18 17 U.S.C. § 110(5)(B)(i)(II).

19 17 U.S.C. § 110(5)(B)(iii)(v).