Copyright Infringement: What’s Covering

the Cover Band?

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This paper will address the topic of copyright law and how that subset of law relates and affects cover bands. The paper begins with the history of copyright and how copyright law came into existence. The paper then discusses the basics of copyright. Such as the definition of copyright, exclusive rights to copyright, limitations on exclusive rights, and licensing rights to copyrights through non-exclusive and exclusive licenses. Performing rights organizations which obtain licenses and distribute licenses to users are explained next. Copyright infringement is also explained including elements to a cause of action for copyright infringement, and ways of proving secondary liability for infringement of third parties. Various bands and venues were contacted in researching this paper. The opinions of those bands and venues are examined and used in analyzing whether cover bands and venues commit copyright infringement. Lastly, this paper explains what shields cover bands from liability for infringement.

INTRODUCTION TO COPYRIGHT

In 2008, Randolph White, owner of Randzz Restaurant & Pub in Suffolk Virginia, found himself defending against a claim of copyright infringement.1 Beginning in 2006, ASCAP, the American Society of Composers, Authors, and Publishers, notified White he would need permission or a license if copyrighted music was played in his restaurant.2 White however, ignored the warnings and continued to allow cover bands to perform copyrighted music in his bar.3 ASCAP then had an independent investigator visit White’s establishment to determine whether ASCAP members’ songs were being performed publicly.4 ASCAP’s investigator

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3 Id.
4 Id.
recognized at least three songs played in White’s restaurant without a license or permission.\(^5\) ASCAP subsequently filed suit against White. White thought if he ignored the suit, it would go away.\(^6\) Unfortunately, White was wrong, and default judgment was entered against him in favor of ASCAP. The court enjoined White and his employees from performing or causing any of ASCAP’s repertory music from being performed without proper authorization.\(^7\) The court also ordered White to pay statutory damages in the amount of $10,500, $2,875 in attorney’s fees, and $417 in costs.\(^8\)

Many bar and restaurant owners find themselves in the same position as Mr. White. Either they can pay the license fees as mandated by these performing rights organizations, or they can take the risk that they will be the subject of a copyright infringement action. It begs the question, however, why is it the venue the organizations go after and not the actual band that performs the copyrighted material? In situations where venues have not paid a fee or obtained a license to be able to perform copyrighted music, it is both the band and the venue that are liable for copyright infringement. Other factors may come into play to relieve the band from liability, such the license obtained by the venue covering the band also. Absent any intervening circumstances, however, both the venue and the band are liable for copyright infringement when each publicly performs or allows copyrighted music to be publicly performed without proper authorization.

\(^6\) Epichoney
\(^7\) *White*, 618 F.Supp.2d at 501-503.
\(^8\) *Id*
HISTORY OF COPYRIGHT

Copyright as a legal concept found its beginnings in Britain at the beginning of the 18th century. British Parliament passed the Licensing of the Press Act 1662 to try to curb the unregulated copying of books by printing presses. The Act established a register of licensed books and required a copy to be registered. In 1709, the Statute of Anne was passed by the British Parliament and provided for governmental regulation of copyright. The Statute was concerned with the individual rights of the artists and the unauthorized copying of the artists’ workers by printers, often to the detriment of the artists.

Ideas of copyright regulation were introduced into the United States during the Constitutional Convention of 1787. Proposals made by James Madison and Thomas Pinckney were made to secure the authors’ exclusive rights for a limited time, and to encourage the advancement of useful knowledge and discoveries. These proposals were submitted to the Committee Detail which accepted the language of the current clause. Article I, Section 8, Clause 8 of the United States Constitution, otherwise known as the Copyright Clause, empowers the United States Congress “to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries”. The Clause, which authorizes the Congress to secure the rights of authors in their

10 Id.
11 Id.
12 Id at Statute of Anne
13 Id at Copyright
14 Id at Copyright Clause
15 Id.
16 Id.
works for a limited time, is the basis for U.S. Copyright Law. This law culminated in the Federal Copyright Act.

COPYRIGHT BASICS

Definition of Copyright

Copyrights protect original works of authorship fixed in any tangible medium of expression from which the works can be perceived or communicated. Original works of authorship include: literary works, musical works, dramatic works, choreographic and pantomime works, pictorial, graphic or sculptural works, motion picture and other audiovisual works, sound records, and architectural works. Copyright, however, does not protect any idea, procedure, process, system, method of operation, concept, principle, or discovery.

Exclusive Rights to Copyrights

The owner of the copyright has exclusive rights to do or authorize certain actions pertaining to that copyright. Such rights allow the copyright owner to reproduce the work in

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18 17 USC § 102(a) (2002)(the statute provides “Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:
(1) literary works;
(2) musical works, including any accompanying words;
(3) dramatic works, including any accompanying music;
(4) pantomimes and choreographic works;
(5) pictorial, graphic, and sculptural works;
(6) motion pictures and other audiovisual works;
(7) sound recordings; and
(8) architectural works.”).
19 Id.
20 17 USC § 102(b)(2002)(the statute provides, “In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”).
copies or phonorecords, prepare derivative works based on the original, distribute copies of the work to the public through sale or other transfer of ownership, to perform or display the copyrighted work publicly, and in the case of sound recordings, to perform the work publicly through digital audio transmission.\(^2\) To perform publicly means to perform or display the work at a place open to the public, or any place where a substantial amount of people outside the normal circle of the person’s family or social acquaintances, or to transmit or communicate a performance.\(^2\) Thus, it is not a public performance subject to applicable copyright law, when a band plays copyrighted songs in a member’s garage for a small number of close contacts, such as family and friends.\(^2\)

**Limitations on Exclusive Rights**

There are limitations on a copyright owner’s exclusive rights, however. Section 110 of the Federal Copyright Act exempts certain conduct from constituting copyright infringement.\(^2\) It is not considered copyright infringement for an instructor to perform or publicly display a work in the course of face-to-face teaching activities, or for a work to be performed publicly in the

\(^2\) 17 USC § 106(1)-(6)(2002)(the statute provides, “Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

1. to reproduce the copyrighted work in copies or phonorecords;
2. to prepare derivative works based upon the copyrighted work;
3. to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
4. in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
5. in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
6. in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.”).

\(^2\) See In re Application of Cellco Partnership v. American Society of Composers, Authors, and Publishers, 663 F.Supp.2d 363, 370 (2009) (question arose whether Verizon Wireless was required to obtain a license for the use of protected songs as ringtones on Verizon’s customers’ phones, and whether this constituted a public performance).

\(^2\) See id.

course of services at a place of worship or religious assembly.\textsuperscript{27} In addition, other exemptions include situations in which the use of the copyrighted material is fair use, or the public performance of a work without direct financial gain or interest.\textsuperscript{28}

\textit{Fair Use}

One limitation on copyright exclusive rights is fair use.\textsuperscript{29} It is considered fair use of a copyrighted work when the work is used for criticism, comment, news reporting, teaching, scholarship, or research.\textsuperscript{30} In determining whether use of a protected work is fair use, certain factors should be considered.\textsuperscript{31} The factors include: the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and the effect of the use on the potential market for or value of the copyrighted work.\textsuperscript{32} As to the purpose or character of the use, non-commercial or not-for-profit uses of a work are presumptively fair.\textsuperscript{33} In addition, if the character of the use differs from the character of the original, the use may be fair.\textsuperscript{34} Another factor often considered is the nature of the copyrighted work.\textsuperscript{35} Where the nature of the copyrighted work is creative, for example, fiction, songs, or lyrics, the scope of fair use is smaller than if the copyrighted work is an

\begin{itemize}
\item \textsuperscript{27} 17 USC § 110 (2005).
\item \textsuperscript{28} \textit{Id} at §§ 110, 107.
\item \textsuperscript{29} 17 USC §107 (the statute provides: “Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include--
(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
(2) the nature of the copyrighted work;
(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(4) the effect of the use upon the potential market for or value of the copyrighted work.”).
\item \textsuperscript{30} \textit{Id}
\item \textsuperscript{31} \textit{Id}
\item \textsuperscript{32} 17 USC §107(1)-(4).
\item \textsuperscript{33} \textit{Righthaven v. Hoehn}, 792 F.Supp.2d 1138, 1149 (2011).
\item \textsuperscript{34} \textit{Id}.
\item \textsuperscript{35} \textit{See id}.
\end{itemize}
informational work. As to the amount of the original work used, when the entire original work is copied, this instructs against fair use. \(^{36}\) Lastly, a copy may have an adverse effect on the potential market for the original when the copy of the original work becomes widespread. \(^{37}\) For example, a performance of a copyrighted work may become so popular that listeners or fans of the work will begin to favor the copy instead of the original. If the copy of the original work becomes widespread such as in this example, it may have an adverse effect on the market for the original and will undermine fair use. \(^{38}\)

Illustrative of the doctrine of fair use is *Righthaven v. Hoehn*. \(^{39}\) In *Righthaven*, the defendant used a work entitled, “Public Employee Pensions. We Can't Afford Them”, as content on a website he was a contributor to. \(^{40}\) The plaintiff brought suit against the defendant seeking permanent injunction prohibiting the defendant from posting the work and damages. \(^{41}\) As to the first factor determining fair use, the court found the defendant did not stand to profit from the posting of the protected work because he posted the work to foster discussion on the website. \(^{42}\) Second, the court found the work was part informational with some creative elements because it was published in the Las Vegas Review Journal, and while it contained some creative opinions of the author, it also included purely factual data. \(^{43}\) Thus, the court found the scope of fair use for the work in question was larger because of its informational nature. \(^{44}\) While the defendant did copy the entire original work and this militates against finding fair use, the court stated this must

\(^{37}\) *Id.*
\(^{38}\) *Id.*
\(^{39}\) See *id*.
\(^{40}\) *Id* at 1141.
\(^{41}\) *Id* at 1143.
\(^{42}\) *Id* at 1149.
\(^{43}\) *Id* at 1149.
\(^{44}\) *Id* at 1149-1150.
ultimately be weighed against the other three factors. Lastly, the plaintiff argued the defendant’s infringement impacted the market for the original work because readers could access the article on the defendant’s website and thus had no reason to visit the original source. However, the court held the plaintiff presented no evidence of negative impact on the market of the original between the dates the work was posted on defendant’s website and found against the plaintiff for this factor. The court ultimately held the defendant’s use of the protected work constituted fair use in light of the four factors.

Public Performance

Most important to the purposes of this paper, it does not constitute infringement to perform a protected work publicly without any purpose of direct or indirect commercial advantage. However, this public performance only remains exempt from infringement when no fee or compensation for the performance is paid to the performers, and there is no direct or indirect admission charge, or the proceeds, after deducting the reasonable costs for performance, are used exclusively for religious, education, or charitable purposes. The copyright owner can object to the public performance of his work in this fashion by serving notice, in writing, at least seven days prior to the performance to a person responsible for the performance. The notice must set forth the reasons for the owner’s objection, and comply with any requirements of the Register of Copyrights. While copyright law at the outset seems stringent and that it forbids

46 Id.
47 Id at 1150-1151.
48 Id.
50 Id at § 110(4)(A)-(B).
51 17 USC § 110(4)(B)(i)-(ii).
52 Id at § 110(4)(B)(ii)-(iii).
public performance or display of any protected work, there are exemptions for those using or performing the work without any financial motive.

**Licensing Rights to Copyrights**

**Exclusive and Non-Exclusive Licenses**

The owner of a copyright may grant such ownership to another person. A grant of ownership is only valid if it is in writing and signed by the owner of the rights conveyed or the owner’s authorized agent. Each of the exclusive rights in a copyright can be conveyed separately. Copyright ownership follows the same general principles as property law, thus the author of a work protected under the Copyright Act possesses a power of sale the same as the owner of any other personal property. Copyright owners may also license their rights in the copyright to others. There are two types of licenses: non-exclusive and exclusive licenses. A non-exclusive license permits each licensee to use the material and may be granted to multiple licensees. An exclusive license on the other hand, grants the licensee exclusive superior rights to use the work in the manner specified by the agreement between the copyright owner and the licensee. An exclusive licensee may have rights to the work superior to the copyright owner thereby excluding the copyright owner’s use of the work, however, this depends on the agreement between the copyright owner and the licensee. Thus, people other than the copyright

53 See 17 USC § 204
54 Id at § 204(a)
57 Id.
58 Id at 99.
59 Id
61 Id.
owner may perform the work or use the work, escaping infringement liability, if they have a license from the copyright owner allowing them to do so.62

**Performing Rights Organizations**

ASCAP is a performing rights organization that protects copyright owners’ rights against infringement.63 Composers, songwriters, lyricists, and music publishers become members of ASCAP, who then protects members’ rights by licensing and distributing royalties for the public performance of artists’ copyrighted works.64 Members of ASCAP grant licenses to ASCAP to authorize public performances of the members’ copyrighted songs. ASCAP then licenses the right to perform the copyrighted songs publicly to various music users, including television networks, radio networks, restaurants, nightclubs, hotels, malls, concert halls, and many more.65 The music mediums pay ASCAP licensing fees to be able to perform ASCAP’s members’ songs publicly.66 ASCAP then distributes royalties to the copyright owners for their songs that are played. Payment for performance of copyrighted songs by ASCAP to the copyright owners is determined by the amount collected in one medium, the type of performance, and the economic significance of the licensee.67 ASCAP employs investigators to visit the various establishments to determine whether copyrighted music is being played without authorization.

BMI, Broadcast Music Inc., is another performing rights organization much like ASCAP. BMI performs the same services as ASCAP for its members, however, BMI is owned by the broadcasting industry while ASCAP is owned by its members. Song authors or copyright owners

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64 Id.
65 Id.
66 Id.
cannot be members of both organizations. On the other hand, song authors or copyright owners are not obliged to be a member of either organization. If it is found that protected music is being performed without authorization, owners of the establishments may find themselves in the same position as Mr. White.

COPYRIGHT INFRINGEMENT

Infringement occurs when an exclusive right of the copyright owner is infringed. The owner of the copyright is then entitled to institute an action for the infringement. The power of a copyright owner to institute an action is subject to the requirements of section 411 of the Copyright Act. Section 411 specifies that an action for copyright infringement cannot be instituted until the copyright has been registered or preregistered with the US Copyright Office. While registration of the copyright is not required to entitle the owner to the exclusive rights of that copyright, it is required to bring a civil action for infringement.

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69 17 USC § 501 (2002)(the statute provides in relevant part, “(a) Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 122 or of the author as provided in section 106A(a), or who imports copies or phonorecords into the United States in violation of section 602, is an infringer of the copyright or right of the author, as the case may be. For purposes of this chapter (other than section 506), any reference to copyright shall be deemed to include the rights conferred by section 106A(a). As used in this subsection, the term “anyone” includes any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity. Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this title in the same manner and to the same extent as any nongovernmental entity.”).
70 Id at § 501(b)(the statute provides in relevant part, “The legal or beneficial owner of an exclusive right under a copyright is entitled, subject to the requirements of section 411, to institute an action for any infringement of that particular right committed while he or she is the owner of it.”).
71 Id.
72 17 USC § 411 (2008)(the state provides in relevant part: “Except for an action brought for a violation of the rights of the author under section 106A(a), and subject to the provisions of subsection (b), no civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title.”).
73 See id.
Elements to Cause of Action for Infringement

In an action for copyright infringement, the plaintiff must first have a valid copyright.\(^74\) In addition, the plaintiff must also show the defendant copied the original work.\(^75\) Courts use the doctrine of substantial similarity to determine whether the copying was illegal.\(^76\) In assessing similarity between the works, courts look to similarity in total concept, theme, characters, plot, sequence, pace, and setting, among others.\(^77\)

*Range Road Music, Inc. v. East Coast Foods, Inc.*\(^78\) is illustrative of an action for copyright infringement.\(^79\) In that case, the plaintiffs, various music companies, owned the copyrights to songs at issue in the case and were members of ASCAP.\(^80\) The defendant owned the restaurant Roscoe’s House of Chicken and Waffles.\(^81\) Attached to the restaurant was the Sea Bird Jazz Lounge, where the defendant contracted live bands play and played music through a jukebox.\(^82\) After the restaurant opened, ASCAP contacted the defendant to offer the restaurant and lounge a license to perform music by ASCAP members, however, the defendant refused to obtain a license.\(^83\) ASCAP then hired an independent investigator to visit the defendant’s establishment.\(^84\) During the investigator’s visit, he recorded the names of songs performed both by a live band and on a jukebox.\(^85\) ASCAP confirmed the plaintiffs owned valid copyrights to


\(^{75}\) Id.

\(^{76}\) Id.


\(^{79}\) See id (district entered summary judgment in favor of plaintiffs and awarded plaintiffs $4,500 in damages and $162,728.22 in attorney’s fees).

\(^{80}\) Id at 1151.

\(^{81}\) Id.

\(^{82}\) Id.

\(^{83}\) Id at 1154.

\(^{84}\) Id.

\(^{85}\) Id.
the songs performed at the defendant’s restaurant and lounge on the night in question. The plaintiffs thereafter brought suit against the defendant for copyright infringement. The court found a prima facie case for copyright infringement requires the plaintiff demonstrate ownership of a valid copyright, and copying of original elements of a work. The court noted establishing substantial similarity between works is not necessary in cases where the copying occurs in toto. Thus, in cases such as the one at hand, the plaintiff need not prove substantial similarity between the works because the defendant directly copied the original work. The court held no material issue existed as to whether copyright infringement occurred and granted summary judgment for the plaintiffs.

Infringement Based on Public Performance

A claim for infringement based on a public performance, however, requires more than just showing a valid copyright and the defendant copied the original work. A plaintiff bringing a suit for infringement based on a live performance must show: (1) Originality and authorship of the work, (2) compliance with the Copyright Act, (3) plaintiff’s ownership of the copyright, (4) defendant performed the work in public for profit, and lastly (5) that the defendant failed to obtain permission from the copyright owner.

*Gnat Booty Music v. Creative Catering of Wadhams* involves a claim for infringement based on a live performance. In this case, the plaintiffs were members of ASCAP to whom the

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87 *Id.*
88 *Id.* at 1153.
89 *Id.* at 1154.
90 *See id.*
91 *Id.*
93 *Id.* (see also *Gnat Booty Music v. Creative Catering of Wadhams*, 761 F.Supp.2d 604 (2011)).
plaintiffs granted non-exclusive rights to license public performances of the plaintiffs’ copyrighted material. The defendant owned a nightclub in which the plaintiffs claimed the defendant hired a disc jockey to play plaintiffs’ copyrighted material without authorization. ASCAP contacted the defendant many times attempting to license the defendant, however, the defendant refused to obtain a license. After defendant’s refusals to obtain a license, ASCAP sent one of its investigators to visit the nightclub and confirm whether or not the defendant was publicly performing copyrighted songs without a license. ASCAP’s investigator confirmed that the defendant was allowing copyrighted material to be performed in its establishment without authorization. The court held the plaintiffs established a successful claim for copyright infringement based on a public performance. The plaintiffs’ certificate of registration from the Copyright Office satisfied the first three elements of this cause of action, the originality and authorship of the material, compliance with the Copyright Act, and ownership of a copyright. The fourth element was satisfied by the investigator’s report affirming the infringing conduct of the defendant. Lastly, the fifth element was satisfied by the defendant’s admission it did not have a license to perform the songs. In sum, the court found the defendant engaged in copyright infringement and entered judgment for the plaintiffs.

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96 Id at 607
97 Id.
98 Id.
99 Id.
100 Id at 608.
101 Id.
102 Id.
103 Id.
104 Id.
Secondary Liability

Copyright infringement is a tort and thus all parties who participate are jointly and severally liable. A party may be found secondarily liable for the infringing conduct of another because they induced the direct infringement of a third party or the party contributorily or vicariously caused the infringement.

Inducement Theory

One theory of secondary liability, adopted by the United States Supreme Court in Metro-Goldwyn, Inc. et al v. Grokster, Ltd. et al, is the inducement theory. Under that theory, liability arises when a person induces the commission of infringement by another party, or entices or persuades a third party to commit infringement. The inducement rule states a party is liable for the resulting acts of third parties when an intent to promote infringement is shown by a clear expression or affirmative steps taken to foster the infringement.

In Grokster, the plaintiffs, a group of copyright holders, sued Grokster and StreamCast for their users’ copyright infringement. Grokster and StreamCast were companies that distributed free computer software which allowed computer users to share electronic files through peer-to-peer networks, namely song recordings. The plaintiffs alleged the defendants intentionally and knowingly distributed their software to allow users to reproduce and distribute

107 Id.
108 Id.
109 Id.
110 Id.
111 Id at 920.
112 Id.
the copyrighted works.\textsuperscript{113} Both defendants created their software around the time Napster was sued for the infringing conduct of its users and hoped to attract Napster’s former users.\textsuperscript{114} The court, using the inducement rule, found direct evidence the defendants distributed their software with the intent to encourage or induce infringement by the defendants’ users.\textsuperscript{115} First, the court found each company aimed to satisfy a known source for copyright infringement, former Napster users.\textsuperscript{116} Second, plaintiffs presented evidence showing neither company, knowing of the infringement, produced tools or mechanisms to filter or diminish the infringing activity of their software.\textsuperscript{117} Lastly, the court found the defendants profited from the infringing conduct because defendants made money by selling advertising space on their software.\textsuperscript{118} Thus, the more software used to commit copyright infringement, the more advertising was sold creating larger profits for the defendants.\textsuperscript{119} In addition to showing the defendants encouraged or induced infringement, the court held actual infringement must also be shown.\textsuperscript{120} The court found this was satisfied by the plaintiffs study proving infringement occurred through defendants’ software on a “gigantic scale”.\textsuperscript{121} In sum, the court found enough evidence was presented to support a finding of liability based on inducement.\textsuperscript{122}


\textsuperscript{114} Id at 924.

\textsuperscript{115} See id at 938.

\textsuperscript{116} Id at 939.

\textsuperscript{117} Id.

\textsuperscript{118} Id at 940.

\textsuperscript{119} Id.

\textsuperscript{120} Id.

\textsuperscript{121} Id.

\textsuperscript{122} Id.
**Contributory and Vicarious Infringement**

A plaintiff may also prove secondary liability for infringement of third parties by establishing the defendant either contributorily or vicariously committed the infringement.\(^{123}\) Contributory infringement occurs when a person with knowledge of the infringing activity, induces, causes, or materially contributes to the infringing of another.\(^{124}\) On the other hand, vicarious liability occurs when a person has the right to supervise the infringing conduct, has an obvious and direct financial interest in the infringement, and declines to exercise the right to stop the infringement.\(^{125}\) Unlike contributory liability, knowledge of the infringing conduct is not required to find vicarious liability.\(^{126}\)

In *ABKCO v. Washington*,\(^{127}\) the plaintiffs were various music publishers and producers who owned the copyrights to songs written by and performed by the artist, Sam Cooke.\(^{128}\) The defendant Washington wanted to create a production about the life of Sam Cooke.\(^{129}\) The defendant contacted the plaintiffs’ counsel to inform him of the future production and ensure the defendant did not infringe on any copyrights owned by the plaintiffs.\(^{130}\) Plaintiffs’ counsel informed the defendant he could not use the songs in his production.\(^{131}\) The defendant created the production against the advice of plaintiffs’ counsel.\(^{132}\) The defendant launched five performances of the production which included a medley of musical compositions written by


\(^{124}\) *Id.*

\(^{125}\) *Id.* (see also Cellco Partnership v. American Society of Composers, Authors, and Publishers, 663 F.Supp.2d 363 (2009)).

\(^{126}\) *Id.* at 9.

\(^{127}\) *Id.*

\(^{128}\) *Id.*

\(^{129}\) *Id.*

\(^{130}\) *Id.*

\(^{131}\) *Id.*

\(^{132}\) *Id.*
Sam Cooke.\textsuperscript{133} To promote the production, the defendant used Detroit Media Broadcast ("DMB") to create a promotional video, subsequently uploaded to YouTube.com.\textsuperscript{134} The promotional video used numerous copyrighted songs and sound recordings owned by the plaintiffs.\textsuperscript{135} The plaintiffs thereafter brought suit against the defendant for copyright infringement alleging the defendant was contributorily or vicariously liable for the use of the copyrighted songs in DMB’s promotional video and both parties moved for summary judgment.\textsuperscript{136}

The court found the plaintiffs presented evidence sufficient to establish the defendant’s contributory liability.\textsuperscript{137} The court held the defendant did not infringe on the copyrighted material because they did not directly produce the video, however, the court found the defendant was both contributorily and vicariously liable for infringement.\textsuperscript{138} Because the defendants most logically were the ones who granted authority to DMB to make the video, defendant materially contributed to the infringement.\textsuperscript{139} Alternatively, the plaintiffs claim the defendant was vicariously liable for copyright infringement.\textsuperscript{140} As to the claim for contributory liability, the court found because the defendant contracted with DMB to create the promotional video, he should have known about the infringement of DMB.\textsuperscript{141} Just because the defendant failed to watch the video did not relieve him of liability.\textsuperscript{142} The defendant had the opportunity to watch the video and consequently should have known about the infringement.\textsuperscript{143}

\textsuperscript{134} Id.
\textsuperscript{135} Id.
\textsuperscript{136} Id.
\textsuperscript{137} Id.
\textsuperscript{138} Id.
\textsuperscript{139} Id.
\textsuperscript{140} Id.
\textsuperscript{141} Id.
\textsuperscript{142} Id.
\textsuperscript{143} Id.
contributory liability, the court also found the defendant vicariously liable.\textsuperscript{144} The court stated it was undisputed that the defendant had a direct financial interest in the creation of the video as a means of promoting his production.\textsuperscript{145} As to the other element of vicarious liability, the court found the plaintiffs produced evidence of the defendant’s ability to supervise the creation of the promotional video.\textsuperscript{146} The plaintiffs produced a letter from the defendant to the plaintiff’s counsel stating he had hired the firm, DMB, to create the video.\textsuperscript{147} Further, the court held the defendant’s relationship with DMB plus his financial interest in the promotion of his production render the defendant liable for infringement.\textsuperscript{148}

**BAND AND VENUE OPINIONS**

Multiple bands and venues were contacted in research for this paper. Bands contacted include Painkiller Hotel, Modern Day Romeos, and an individual musician. All three are artists who cover copyrighted material.\textsuperscript{149} The individual musician said he does not worry about copyright infringement, and actually has not concerned himself with the issue. Painkiller Hotel said neither the band nor the venue has to pay a fee to perform the copyright material, unless the venue is playing songs through a jukebox. Modern Day Romeos said it was up to the venue to pay the licensing fees. As we will see, both the viewpoints of Painkiller Hotel and Modern Day Romeos are mistaken.

Although many venues were contacted, only Total Sports of Naperville and JJ’s Bar and Grill responded. The representative of Total Sports of Naperville venue said it complies with all


\textsuperscript{145} \textit{Id.}

\textsuperscript{146} \textit{Id.}

\textsuperscript{147} \textit{Id.}

\textsuperscript{148} \textit{Id.}

applicable law and pays licensing fees to ASCAP and BMI to allow the public performance of copyrighted material in its bar. A representative at JJ’s Bar and Grill said the venue does not obtain any licenses from any performing rights organizations. This may be because the venue does not charge cover for entrance.

In addition to contacting venues and bands, a manager of cover bands was also contacted. He said the venue is responsible for obtaining licenses from the performing rights organizations and that this license covers the band.

COPYRIGHT APPLICATION TO THE BANDS

Based on the opinions obtained by the bands talked to for this paper, a band may infringe every time it plays a song protected by a valid copyright. The bands talked to for this paper all said copyright infringement was not a concern of theirs and no musician or band obtained permission from the copyright owner or paid any fee to a performing rights organization in order to play a copyrighted song. A band performing a copyrighted song may thus be liable for infringement based on its public performance. If a song performed by a band in a public place is protected by a valid copyright, the first three elements of infringement based on a public performance are satisfied by proof of the copyright.\textsuperscript{150} Element four, which requires the defendant perform in public for a profit, is satisfied because the band is playing at a public venue.\textsuperscript{151} The profit made by the band must be used for private financial gain, however, and not educational, religious, or charitable purposes.\textsuperscript{152} As we have learned, the bands or musicians covering protected songs do not obtain permission from the copyright owner or the owner of the exclusive right to perform the work publicly. Thus, element five requiring the plaintiff show the

\textsuperscript{151} Id.
\textsuperscript{152} Id.
defendant failed to obtain permission to perform the song is satisfied. Accordingly, when a plaintiff in a cause of action for infringement can show the band played a protected song for private financial gain, cover bands or musicians covering copyright songs directly infringe on copyright owners’ rights when they play in public.

If a band is infringing on a copyright, it is possible the band’s performance can be deemed fair use, although unlikely. The cover band’s purpose of the use is almost always for profit. Even if the band is not paid directly to perform at a venue, the band may be playing to advertise its musical talent in the hopes this leads to monetary value. Second, the nature of the protected work performed by the cover band is creative, and thus the margin for fair use is inherently smaller. Typically, the band plays its version substantially similar to the original work. The band may sound a little different or alter some parts of the work, but for the most part the original and the version performed by the band are the same. The only factor that may weigh in favor of the band for fair use is the effect of the copy on the potential market of the original. It does not seem likely the version performed by the band will have an adverse effect on the potential market for the original. Copies of original works have a greater risk of creating an adverse effect on the market of the original where the purpose of the copy is commercial in nature. When a cover is a complete duplication of the original, it may supersede the original and become a market replacement. If the copy does become a market replacement and is used for commercial gain, harm may result to the market of the original. There are many instances in music history where covers of original songs become more popular in the market than the

154 Id.
157 Id
originals.\textsuperscript{158} Although adverse effect can be shown in some instances, harm to the market of the original assumes the cover or duplicate of the original is placed in the market. Where the use of the copyrighted material is noncommercial, the likelihood the harm to original must be demonstrated.\textsuperscript{159} If a cover band does not produce a recording of its performance of the original and place it on the market, there is nothing for listeners to purchase. If fans of the song want to listen to the song, they would have to purchase the original. Ultimately, a finding of fair use takes each factor into consideration. Even if a band may win on the adverse effect factor, it is still unlikely given the other factors the band’s performance will be fair use.

Not only can cover bands be liable for copyright infringement, but the venues at which the bands play may also be liable. Arguably, the venues can be both contributorily and vicariously liable. Where the venue knows the band has not obtained permission to play a copyrighted song and either induces or contributes to the infringement, the venue is contributorily liable.\textsuperscript{160} The venue can materially contribute to the infringing conduct of the band by providing the place to play, or any equipment the band may need. Additionally, the venue may be vicariously liable where the band plays a copyrighted song or a series of copyrighted songs, even if the venue has no knowledge of the infringing conduct, and the venue has a direct financial interest. A plaintiff need not prove the venue knew whether the band obtained a license to cover copyrighted material or not to impose liability.\textsuperscript{161} Live entertainment, such as bands or cover bands, can attract business to a venue, or people may stay at the venue longer and spend more money on drinks or food to listen to the band. Thus, the venue directly profits and has a financial interest in the infringing conduct of the band.

\textsuperscript{158} Top 5 Chart-Crossing Cover Songs, http://voices.yahoo.com. (April 12, 2010).
\textsuperscript{161} Id.
A venue may also be liable pursuant to the inducement theory. A venue arguably induces the infringement of bands my enticing or persuading a band to play at that venue by offering the band compensation. A venue might also persuade a band to play at a public venue because it is an opportunity for the band to put their music out there and get it recognized. Like *Grokster*, compensating a band or inducing infringement by providing a stage for the band may be affirmative steps taken by the venue to foster the infringing conduct of the band. To succeed on the inducement theory, however, actual infringement must be proven.\(^ \text{162} \) A plaintiff trying to impose secondary liability through the inducement theory must also prove the band committed infringement.\(^ \text{163} \)

### RELIEVING BAND LIABILITY

If the bands are not held liable for infringing conduct, there must be some explanation for the lack of liability placed on bands. The best explanation is, where the venue does comply with licensing requirements, the license obtained by the venue includes the band.

**License Granted to Venues May Cover the Band**

The license granted to the venues or other mediums by ASCAP may cover any live performance and preclude liability for infringement of the songs publicly performed in that venue. Attached is a general license agreement granted by ASCAP to restaurants, bars, nightclubs, and other similar establishments. The agreement grants to the venue the right to publicly perform the musical compositions in ASCAPs repertory. The agreement also allows the licensee to assign its rights with the prior written approval of ASCAP. When ASCAP obtains a license from the copyright owner as to the rights to that work, this allows ASCAP to then grant


\(^{163}\) *Id.*
such a license to other parties. Per the attached agreement, a venue who obtains a license from ASCAP can then sub-license its right to perform the work to bands performing at the venue. As long as the venue the band plays at obtains a license from ASCAP, BMI, or any applicable performing rights organization, the band is covered for any infringing conduct at that venue. However, some venues do not believe there is a need to obtain a license. Consequently, not only will the venue be liable, but so will the band.

CONCLUSION

Copyright infringement probably happens more often than one realizes. Bands are covered and shielded from liability where the venue the band plays at obtains a license from a performing rights organization to allow the public performance of copyrighted material for a profit, however, it seems doubtful a band makes sure the venue has obtained a license before it performs at the venue. Where a venue has not obtained a license and a performing rights organization sends an investigator to the venue to determine whether or not infringing conduct is occurring at the venue, the venue will also be liable for infringement along with the band. Because copyright law follows tort law, parties can be contributorily and vicariously liable for the infringing conduct of another. It seems the venues are more privy to the licensing requirements than the bands that cover copyright material in those venues, however, this does not lead to the conclusion the venues comply with such requirements. Venues that do not obtain licenses take a risk every time the venue allows public performances of copyrighted material and the venue stands in a position to gain financially. In addition, bands that play at unlicensed venues also take a risk where they make a profit. That size of that risk all depends on the investigatory and enforcement resources of the performing rights organizations and how much time the organization can put into catching these bands in the act.
GENERAL LICENSE AGREEMENT - RESTAURANTS, BARS, NIGHTCLUBS, AND SIMILAR ESTABLISHMENTS

Agreement between American Society of Composers, Authors and Publishers ("ASCAP"), located at 2 Music Square West, Nashville, TN 37203 and

LICENSEE Legal Name: ________________________________

LICENSEE Business Name: ________________________________

Address: __________________________________________

Tel: ______________________ Fax: ______________________ Email: _______________________

(Check one) □ Individual Owner □ Corporation □ Partnership □ LLC □ Other ___________________

as follows:

1. Grant; Term of License

(a) ASCAP grants, and LICENSEE accepts, for a term of one (1) year, commencing and continuing thereafter for additional terms of one (1) year each unless terminated by either party as hereinafter provided, a license to perform publicly at the premises located at (check one)

☐ same legal address as above ☐ same mailing address as above ☐ (other address; please complete) ________________________________

(the “Premises”), and not elsewhere, non-dramatic renditions of the separate musical compositions now or hereafter during the term hereof in the ASCAP Repertory (see definitions below).

(b) This Agreement shall operate to the benefit of, and shall be binding upon, the parties hereto and their respective successors and assigns. Any assignment of this Agreement shall require ASCAP’s prior written approval. No assignment shall relieve the parties hereto of their respective obligations hereunder as to performances rendered, acts done and obligations incurred prior to the effective date of the assignment, provided, however, that assignee may accept the obligations of assignor upon written notice to ASCAP.

(c) Either party may, on or before thirty (30) days prior to the end of the initial term or any renewal term, give notice of termination to the other. If such notice is given, the Agreement shall terminate on the last day of such initial or renewal term.

(d) Upon a change in the Premises address, LICENSEE shall notify ASCAP immediately of such new address, which shall be incorporated herein.

2. Limitations on License

(a) This license does not authorize the broadcasting, telecasting or transmission by wire or otherwise, of renditions of musical compositions in the ASCAP Repertory to persons outside of the Premises, other than by means of a music-on-hold telephone system operated by LICENSEE at the Premises.

(b) This license does not authorize live concert performances at the Premises when tickets for such live concert performances can be purchased from or through Outside Ticket Services (see definitions below).

(c) This license is limited to non-dramatic performances, and does not authorize any dramatic performances. For purposes of this Agreement, a dramatic performance shall include, but not be limited to, the following: (i) performance of a Dramatico-Musical Work (see definitions below) in its entirety; (ii) performance of one or more musical compositions from a Dramatico-Musical Work accompanied by dialogue, pantomime, dance, stage action, or visual representation; or (iv) performance of a concert version of a Dramatico-Musical Work.

3. License Fees and Payments

(a) In consideration of the license granted herein, LICENSEE agrees to pay ASCAP the applicable license fee set forth in the Rate Schedule and Statement of Operating Policy annexed hereto and made a part hereof. LICENSEE represents and warrants that the Statement of Operating Policy is true and correct as of the date hereof.

(b) License fees due under this Agreement shall be paid pursuant to either subparagraph 3(b)(i) or 3(b)(ii).

(i) Full Payment. LICENSEE shall pay the annual license fee for the initial license term upon execution of this Agreement and for subsequent license terms no later than thirty (30) days after the anniversary date of this Agreement.

(ii) Installment Payments. LICENSEE shall pay the annual license fee in quarterly installments of one-quarter (¼) the annual license fee upon execution of this Agreement and thereafter no later than thirty (30) days after the close of each quarterly period. Notwithstanding the above, if any license fees from any year remain due and owing for a period of more than ninety (90) days, any unpaid portion of LICENSEE’s license fees for such year(s) will be immediately due and payable.

(c) If LICENSEE pays the annual license fee in full in accordance with subparagraph 3(b)(i), LICENSEE shall be entitled to a discount to the applicable license fee for such year as set forth on the Rate Schedule, provided that no license fees remain due and owing under this or any other prior ASCAP license. LICENSEE will not be eligible for any discount if LICENSEE pays its license fee in installments or pays fees for seasonal or occasional performances.

(d) LICENSEE agrees to pay ASCAP any applicable charge levied by banks or other financial institutions for each unpaid check, draft or other form of monetary instrument submitted by LICENSEE to ASCAP, but in no event less than $35.

(e) In the event LICENSEE shall be delinquent in payment of license fees due hereunder by thirty (30) days or more, LICENSEE agrees to pay a finance charge on the license fees due of 1½% per month, or the maximum rate permitted by the law of the state in which the Premises licensed hereunder are located, whichever is less, from the date such license fees became due.

(f) Governmental Entities (see definitions below) may impose special taxes or levies on ASCAP related to the licensing of
public performances. Accordingly, in the event that LICENSEE's payment of fees under this Agreement causes ASCAP to incur a liability to pay a gross receipts, sales, use, business use, or other tax which is based on the amount of ASCAP's receipts from LICENSEE, the number of licensees of ASCAP, or any similar measure of ASCAP's activities, then LICENSEE agrees to pay to ASCAP the full amount of such tax, provided that (i) ASCAP has taken reasonable steps to be exempted or excused from paying such tax; and (ii) ASCAP is permitted by law to pass through such tax to its licensees.

4. Changes in LICENSEE's Operating Policy

(a) LICENSEE agrees to give ASCAP notice of any change in LICENSEE's Operating Policy (see definitions below) and shall, at such time, furnish to ASCAP a current Rate Schedule and Statement of Operating Policy and shall certify that it is true and correct. For purposes of this Agreement, a change in LICENSEE's Operating Policy shall be one in effect for at least thirty (30) days.

(b) Upon any change in LICENSEE's Operating Policy resulting in an increase in the applicable license fee, LICENSEE agrees to pay ASCAP the increased license fee, effective as of the initial date of such change, whether or not written notice of such change has been given pursuant to subparagraph 4(a) hereof.

(c) Upon any change in LICENSEE's Operating Policy resulting in a reduction in the applicable license fee, LICENSEE shall be entitled to the reduction, effective as of the initial date of such change, and to a pro rata credit for any unearned license fees paid in advance, provided LICENSEE has given ASCAP written notice of such change. If LICENSEE fails to give ASCAP such written notice within thirty (30) days of such change, any reduction and credit shall be effective thirty (30) days after LICENSEE gives ASCAP written notice of the change. ASCAP reserves the right to verify the basis for any reduction and/or credit and may reject or reverse any such reduction and/or credit if no basis for such reduction and/or credit exists.

(d) If LICENSEE discontinues the performance of music at the Premises, LICENSEE or ASCAP may terminate this Agreement upon thirty (30) days notice, the termination to be effective at the end of the thirty (30) day period. In the event of such termination, ASCAP shall refund to LICENSEE a pro rata share of any unearned license fees paid in advance. For purposes of this Agreement, a discontinuance of music shall be one in effect for at least thirty (30) days.

5. Breach or Default

Upon any breach or default by LICENSEE of any term or condition herein contained, ASCAP may terminate this license by giving LICENSEE thirty (30) days notice to cure the breach or default, and in the event that it has not been cured within the thirty (30) day period, this license shall terminate on the expiration of that period without further notice from ASCAP to LICENSEE.

6. Interference in ASCAP's Operations

Governmental Entities from time to time may enact laws that create obstacles to ASCAP’s licensing of public performances. Accordingly, in the event of either (a) any major interference with the operations of ASCAP in the Governmental Entity in which LICENSEE is located, by reason of any law of such Governmental Entity; or (b) any substantial increase in the cost to ASCAP of operating in such Governmental Entity, by reason of any law of such Governmental Entity, which is applicable to the licensing of performing rights, ASCAP shall have the right to terminate this Agreement immediately and shall refund to LICENSEE any unearned license fees paid in advance.

7. Notices

Notices of termination under this Agreement shall be given only if mailed to the other party by registered or certified U.S. Mail or sent by generally recognized same-day or overnight delivery service. Unless stated otherwise, all other notices required or permitted to be given by either party to the other hereunder shall, in addition to the methods set forth above, also be given if sent by first class U.S. Mail, facsimile or electronic mail (e-mail) transmission. Notices to ASCAP shall be sent to the attention of VP of General Licensing as follows: (a) if by U.S. Mail, to the ASCAP address set out above; (b) if by facsimile, to 615-691-7795; and (c) if by electronic mail, to glcs@ascap.com. Notices to LICENSEE shall be sent to the mailing address, facsimile number or electronic mail address set out above. Each party agrees to inform the other of any change of address and/or contact information.

8. Definitions

(a) “ASCAP Repertory” shall mean musical works for which ASCAP has the right to license public performances now or hereafter during the term of this Agreement. All compositions written and copyrighted by ASCAP members and in the repertory on the date this Agreement is executed are included for the full term of this Agreement. Compositions written or copyrighted by ASCAP members during the license term are included for the full balance of the term.

(b) “Dramatico-Musical Work” shall mean a work such as, but not limited to, a musical comedy, opera, play with music, revue, or ballet.

(c) “Governmental Entities” shall mean states, territories, dependencies, possessions or political subdivisions.

(d) “Operating Policy” shall mean all of the factors that determine the total license fee applicable to the Premises under the Rate Schedule.

(e) “Outside Ticket Services” shall mean third-party services distributing tickets to the public for events at the Premises, such as, but not limited to, Ticketmaster, Ticketweb and Ticketron.

IN WITNESS WHEREOF, this Agreement has been duly executed by ASCAP and LICENSEE, this ___ day of ____________, 20__.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

By: _______________________________   By: _______________________________

NAME: _______________________________   NAME: _______________________________

TITLE: _______________________________   TITLE: _______________________________

(For ‘Title’, fill in capacity in which signed: (a) If corporation, state corporate office held; (b) If partnership, write word "partner"; (c) If individual owner, write "individual owner."
RESTAURANTS, BARS, NIGHTCLUBS, AND SIMILAR ESTABLISHMENTS
Rate Schedule & Statement of Operating Policy for Calendar Year 2012

Instructions: Enter the corresponding Rate Per Occupant according to the use of music in your business

<table>
<thead>
<tr>
<th>Music Type</th>
<th>Rate Per Occupant</th>
<th>Fee</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Live Music (check no more than one box if applicable)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Frequency Per Week</td>
<td></td>
<td></td>
</tr>
<tr>
<td>4 - 7 nights</td>
<td>$5.59</td>
<td></td>
</tr>
<tr>
<td>3 nights or less</td>
<td>$4.67</td>
<td></td>
</tr>
<tr>
<td>Enter the rate checked above here:</td>
<td>_______</td>
<td>$</td>
</tr>
<tr>
<td>2. Recorded Music* (check no more than one box if applicable)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>If Live Music is not used</td>
<td>$3.26</td>
<td></td>
</tr>
<tr>
<td>If Live Music is also used (must also check a box in Section 1).</td>
<td>$2.16</td>
<td></td>
</tr>
<tr>
<td>Enter the rate checked above here:</td>
<td>_______</td>
<td>$</td>
</tr>
<tr>
<td>3. Enhancements to Recorded Music* (check box if applicable, must also check a box in Section 2)</td>
<td>$1.89</td>
<td></td>
</tr>
<tr>
<td>Enter the rate checked above here:</td>
<td>_______</td>
<td>$</td>
</tr>
<tr>
<td>4. Admission or Cover Charge* (check box if applicable)</td>
<td>$1.89</td>
<td></td>
</tr>
<tr>
<td>Enter the rate checked above here:</td>
<td>_______</td>
<td>$</td>
</tr>
<tr>
<td>5. Television and/or Radio* (check box if applicable, Skip this Section if you checked a box on line 1 or 2).</td>
<td>$1.24</td>
<td></td>
</tr>
<tr>
<td>Enter the rate checked above here:</td>
<td>_______</td>
<td>$</td>
</tr>
<tr>
<td>6. Total Rate Per Occupant (Add lines 1 - 5)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Enter 1,000 if Occupancy is greater than 1,000</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

7. Total Premises Occupancy Enter 1,000 if Occupancy is greater than 1,000
(If premises occupancy is not established by the local fire or similar authority, use the following formula:
Total Square footage of entire premise __________________________/20 = Occupancy).

8. Occupancy Fee
   A. Multiply line 7 by line 6. 8a $_________
   B. Enter the amount from line 8a, or $348, whichever is higher.
   (if no boxes are checked in Sections 1 - 5, enter $0) 8b $_________

9. Jukebox Fee* (skip this Section if our jukebox is currently licensed separately) $163.00 $_________

10. Annual License Fee (Add the amounts from Boxes 8b and 9) $_________

*See notes on Page 2 for explanation

I certify that the information contained herein is true and correct. (complete only upon change in Operating Policy)

Signature: ___________________________ Date: ______________________
Name: ________________________________

ASCAP, PO Box 331608-7515, Nashville, TN 37203-9998 1-800-505-4052 Fax: 615-691-7795
Epayment Websites: http://www.ascap.com/mylicense or http://www.ascap.com
NOTES TO RATE SCHEDULE

Recorded Music (Line 2). This fee applies for the performance of music by mechanical or electronic devices, including, but not limited to, tapes, records, compact discs and other digital audio formats (e.g. MP3), videocassette, DVD and other digital audiovisual formats. This fee applies for performances by jukeboxes that do not meet the definition of “Coin-Operated Phonorecord Player” as defined below.

Enhancements to Recorded Music (Line 3). This fee applies for the use of added features to recorded music such as, but not limited to, karaoke, DJs, emcees, dancing, shows, acts or games.

Admission or Cover Charge (Line 4). This fee applies if an admission, cover, or similar charge exists at any time for a part or the entire premises.

Television and/or Radio (Line 5). The use of televisions and/or radios that are utilized for the reception of broadcast, satellite or cable programming when no live music (Line 1) or recorded music (Line 2) is performed and paid for under this license, and when such television and/or radio performances do not meet the exemption provided for in 17 U.S.C. Section 110(5).

Jukebox Fee (Line 9). This fee applies for performances by means of devices, commonly called "jukeboxes," that meet the definition of "Coin-Operated Phonorecord Player" as set forth in the U.S. Copyright Law and that are not otherwise licensed through a compulsory license, a license from the Jukebox License Office, or an ASCAP license other than this license. The U.S. Copyright Law currently defines a Coin-Operated Phonorecord Player as a machine or device that (1) is employed solely for the performance of non-dramatic musical works by means of phonorecords [compact discs, for example] upon being activated by the insertion of coins, currency, tokens, or other monetary units or their equivalent; (2) is located in an establishment making no direct or indirect charge for admission; (3) is accompanied by a list comprised of the titles of all the musical works available for performance on it, and is affixed to the machine or device or posted in the establishment in a prominent position where it can be readily examined by the public; and (4) affords a choice of works available for performance and permits the choice to be made by the patrons of the establishment in which it is located [as distinguished from the establishment's employees or performers].

ADJUSTMENTS TO ANNUAL FEES

FEES FOR SEASONAL PERFORMANCES
If the Premises is only open seasonally, the fees due for periods up to four (4) months of operation are one-half (1/2) the annual license fees (Line 10). For each additional month or partial month the fee is increased by one twelfth (1/12) the annual license fees (Line 10). In no event shall the seasonal performances be more than the annual license fee (Line 10) or less than $348.00, if any boxes in Sections 1-5 are checked, or less than $163.00, if only the box in Section 9 is checked.

FEES FOR OCCASIONAL PERFORMANCES
For policies in effect for any three (3) or fewer days/nights per month, the annual fee is the applicable annual fee for the policy as if such highest policy were in effect for three (3) or less days/nights per week. For policies in effect for any six (6) or fewer days/nights per calendar year, the fee is one-third (1/3) the applicable annual fee for the policy as if such policy were in effect for three (3) or less days/nights per week. In no event shall the occasional performances be less than $348.00, if any boxes in Sections 1-5 are checked, or less than $163.00, if only the box in Section 9 is checked.

DISCOUNTS

One Year Payment
Full payment of applicable annual license fees (Line 10) upon the execution of the Agreement, but no later than thirty (30) day of invoice, and for subsequent terms no later than thirty (30) days after the anniversary date of the Agreement entitles Licensee to a 10% discount on such annual license fees.

Two Year Payment
Full payment of applicable annual license fees (Line 10) for two (2) years upon execution of the Agreement, but no later than thirty (30) day of invoice, and for subsequent terms no later than thirty (30) days after the anniversary date of the Agreement entitles LICENSEE to a 15% discount on such aggregated two-year annual license fee payment. For purposes of calculating the two-year payment, fees for the second year shall equal the fees for the first year (Line 10) but shall be subsequently adjusted upon the release of the second-year rates.

LICENSE FEES FOR 2013 SEASON AND THEREAFTER
The license fees for each calendar year commencing 2013 shall be the license fee for the preceding calendar year, adjusted in accordance with the increase in the Consumer Price Index, All Urban Consumers - (CPI-U) between the preceding October and the next preceding October.