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## Payin' the Price to Grab a Slice...of Music! A Guide to Music Licensing for Businesses

Nila Jackson

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**PAYIN’ THE PRICE TO GRAB A SLICE...OF MUSIC!  
A GUIDE TO MUSIC LICENSING FOR BUSINESSES**

By Nila Jackson<sup>1</sup>

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## INTRODUCTION

This paper provides information that may be useful to people seeking to acquire music licenses for their places of business and is primarily focused on licensing for food and drink establishments. However, other business types that use live or recorded music in their establishments may find the information useful as well. The purpose of this paper is to provide a brief history of copyright law, and an overview of music licensing to give business owners a better understanding of copyright as it relates to public performance.

## WHY? – HISTORY

The United States has historically valued intellectual property. This is evidenced in the U.S. Constitution, which states that “Congress shall have the power . . . 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.”<sup>2</sup> In 1897, Congress created the U.S. Copyright Office and the position of Register of Copyrights.<sup>3</sup> The laws governing the licensing of musical works are administered by the U.S. Copyright Office.<sup>4</sup> The Copyright Office also supports Congress by providing policy analysis, legislative support, and litigation support.<sup>5</sup>

The Copyright Act of 1909 outlined the exclusive rights of copyright owners of musical compositions, stating in part that they shall have the exclusive right to perform the copyrighted work publicly for profit.<sup>6</sup> Notably, that Act also created remedies for infringement upon musical works.<sup>7</sup> The act provides that the infringer of copyright “shall be liable to: (a) an injunction restraining such infringement; and (b) to pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which

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<sup>2</sup> U.S. CONST. art. I, § 8, cl. 8. (emphasis added) (language omitted).

<sup>3</sup> *Overview of the Copyright Office*, COPYRIGHT.GOV, <https://copyright.gov/about> (last visited April 27, 2020).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Act of March 4, 1909, 60 Pub. L. No. 349, §1(e), 35 Stat. 1075 (1909) (amended 1976).

<sup>7</sup> Act of March 4, 1909 §25.

the infringer shall have made from such infringement.”<sup>8</sup>The 1909 Act also described fines which would be charged per infringement, stating that, “[D]ramatic or dramatico-musical or choral or orchestral composition, one hundred dollars for the first and fifty dollars for every subsequent infringing performance; in the case of other musical compositions, ten dollars for every infringing performance[.]”<sup>9</sup> The 1909 Act also stated that the duration of a copyright was 28 years from first publication.<sup>10</sup> This means that a work remained protected under copyright laws for twenty-eight years after publication.<sup>11</sup>As will be described in the following paragraphs, copyright laws have gone through many amendments since the 1909 Act.<sup>12</sup> These amendments changed certain aspects of the law including the duration of copyright, exemptions, and fines owed for infringing performances.<sup>13</sup>

Early cases involving copyright law showed that musical works were valued not only as a product that could be sold for profit, but as a product that added value to businesses such as restaurants. In 1917, the Supreme Court decided two cases concurrently: *Herbert, et al. v. The Shanley Company*, and *John Church Company v. Hilliard Hotel Company, et al.*<sup>14</sup> In the words of Justice Holmes, “These two cases present[ed] the same question: whether the performance of a copyrighted musical composition in a restaurant or hotel without charge for admission to hear it infringes the exclusive right of the owner of the copyright to perform the work publicly for profit.”<sup>15</sup> Justice Holmes stated that even though there was no charge for the performances, the

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Act of March 4, 1909 §§ 23, 35.

<sup>11</sup> *Id.*

<sup>12</sup> *See generally*, Copyright Act of 1976, 17 U.S.C. §§ 101-1332 (2012).

<sup>13</sup> Copyright Act of 1976, §§ 110, 302, 504.

<sup>14</sup> *Herbert v. Shanley Co.*, 242 U.S. 591 (1917); *John Church Co. v. Hilliard Hotel Co.*, 221 F. 229 (2nd Cir. 1917) (citing Act of March 4, 60 Pub. L. No. 349, §1(e), 35 Stat. 1075 (1909)).

<sup>15</sup> *Herbert*, 242 U.S. at 593.

music gave “a luxurious pleasure, not to be had from eating a silent meal.”<sup>16</sup> Further, “If music did not pay it would be given up . . . whether it pays or not, the purpose of employing it is profit, and that is enough.”<sup>17</sup> Music increased the profit of the restaurant by making the diner’s surroundings more pleasurable.<sup>18</sup> Therefore, it was decided that a performance of a copyrighted musical composition in a restaurant or hotel without charge for admission to hear it does infringe upon the exclusive right of the copyright owner.<sup>19</sup>

Around the same time that the above two cases were decided, the United States’ first performing rights organization (PRO) was founded.<sup>20</sup> In 1914, Victor Herbert, a party to the above *Herbert v. Shanley, et al.*, helped found the American Society of Composers, Authors, and Publishers (ASCAP).<sup>21</sup> PROs such as ASCAP, are organizations that collect royalties on behalf of their members or associated songwriters and publishers (copyright owners) for public performances of their works.<sup>22</sup> PROs provide non-exclusive licenses to businesses, which allow business owners to perform copyrighted musical material at their establishments.<sup>23</sup>

Although *Shanley and John Church*, above, involved live musical performances, to “perform” as defined by the Copyright Act of 1976 means “to recite, render, play, dance, or act it, *either directly or by means of any device or process.*”<sup>24</sup> Therefore, recorded music played through a business’ speaker system is also a performance, and a license must be obtained for the

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<sup>16</sup> *Id.* at 595.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *ASCAP100*, ASCAP, <https://www.ascap.com/100#1914> (last visited April 27, 2020).

<sup>21</sup> *Id.*

<sup>22</sup> 17 U.S.C. § 101 (definition of “performing rights society”). See ASCAP Licensing Frequently Asked Questions, ASCAP, <https://www.ascap.com/help/ascap-licensing> (last visited April 27, 2020); BMI and Performing Rights, BMI, [https://www.bmi.com/digital\\_licensing/more-information/business\\_using\\_music\\_bmi\\_and\\_performing\\_rights](https://www.bmi.com/digital_licensing/more-information/business_using_music_bmi_and_performing_rights) (last visited April 27, 2020).

<sup>23</sup> 17 U.S.C. § 101 (definition of “performing rights society”).

<sup>24</sup> *Id.* (definition of “perform”) (emphasis added) (language omitted).

performance of any copyrighted works.<sup>25</sup> As described above, the copyright owner has the exclusive right to perform their work publicly.<sup>26</sup> A license gives others wishing to perform the music, such as business owners, the exclusive or non-exclusive right to performance of these copyrighted works for a certain period of time.<sup>27</sup>

Regarding the laws that govern copyright licensing today, the Copyright Act of 1976 (1976 Act) forms the basis of the current statutes.<sup>28</sup> Further Amendments were then made to the 1976 Act, such as the Sonny Bono Copyright Term Extension Act (Sonny Bono Act), enacted in 1998, which increased copyright terms by 20 years.<sup>29</sup> The 1976 Act, as amended by the Sonny Bono Act, states that a copyright shall endure from the date of its creation for the life of the author, and 70 years after the author's death.<sup>30</sup> Additionally, copyrights for anonymous works, pseudonymous works, and works made for hire, endure for 95 years from the date of first publication, or a term of 120 years from the year of its creation, whichever expires first.<sup>31</sup> Further, prior to the 1976 Act and the Sonny Bono Act, Congress authorized several Acts authorizing interim extensions for works whose copyright protection began between 1906 and 1920.<sup>32</sup> Thus, even very early musical works remain under copyright protection, and as such, licensing fees must also be paid for the performance of these protected works.

### **PERFORMING RIGHTS ORGANIZATIONS: WHO TO PAY AND HOW TO PAY LICENSING FEES**

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<sup>25</sup> 17 U.S.C. §§ 106(4), (6).

<sup>26</sup> *Id.*

<sup>27</sup> See sources cited *supra* note 22.

<sup>28</sup> *Copyright Law of the United States*, COPYRIGHT.GOV, <https://www.copyright.gov/title17/> (last visited 4/27/2020).

<sup>29</sup> Sonny Bono Copyright Term Extension Act, sec. 101-102, §§ 302-303, 112 Stat. 2827, 2827-2828 (1998); 17 U.S.C. §§ 302-303; *Duration of Copyright*, COPYRIGHT.GOV, <https://www.copyright.gov/title17/92chap3.html> (footnotes 3–6) (discussing Sonny Bono Copyright Term Extension Act).

<sup>30</sup> See sources cited *supra* note 29.

<sup>31</sup> See sources cited *supra* note 29.

<sup>32</sup> See sources cited *supra* note 29.

Based on the information above, copyright protection for most musical works will likely remain for the lifetime of any business owner alive today. These copyright protected works are most likely registered with a PRO, also called a “performing rights society”, such as ASCAP, SESAC or BMI.<sup>33</sup> As previously stated, a PRO is an organization which collects licensing fees on behalf of copyright owners.<sup>34</sup> Each of these PROs license millions of songs, whose copyrights are owned by hundreds of thousands, if not millions of songwriters and publishers.<sup>35</sup> Therefore, if a business owner wants to be sure that none of the musical performances in its establishment are infringing upon the rights of a copyright owner, it is best to obtain a license from each organization. Each of the three organizations described below provide business owners with a “blanket license.” A single-fee blanket license gives copyright users unlimited access to a repertory and provides reliable protection against infringement.<sup>36</sup> It eliminates the need for copyright users to have individual negotiations with copyright owners for use of their works.<sup>37</sup>

The Association of Songwriters, Composers Authors and Publishers (ASCAP), described earlier, was the first PRO established in the United States.<sup>38</sup> ASCAP is a member owned organization, whose members consist of over 740,000 songwriters, composers and publishers.<sup>39</sup> There are over 11.5 million songs in ASCAP’s catalogue.<sup>40</sup> Although ASCAP states that it strives to identify performances in all the businesses holding a license, it also states that it is not

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<sup>33</sup> 17 U.S.C § 101 (definition of “performing rights society”).

<sup>34</sup> See sources cited *supra* note 22.

<sup>35</sup> *About Us*, ASCAP, <https://www.ascap.com/about-us> (last visited April 28, 2020); *About*, BMI, <https://www.bmi.com/about> (last visited April 28, 2020); *About SESAC*, SESAC, <https://www.sesac.com/#!/our-history> (last visited April 28, 2020).

<sup>36</sup> *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 20-21 (1979); *Common Licensing Terms Defined*, ASCAP, <https://www.ascap.com/help/ascap-licensing/licensing-terms-defined> (last visited April 28, 2020).

<sup>37</sup> *Id.*

<sup>38</sup> *About Us*, ASCAP, <https://www.ascap.com/about-us> (last visited April 28, 2020).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

cost-effective to monitor each establishment.<sup>41</sup> To fill these holes, ASCAP’s songwriter members are also able to self-report performances.<sup>42</sup>

To obtain a blanket license from ASCAP, business owners can visit ASCAP’s website at “ascap.com” and fill-out the webform.<sup>43</sup> The form asks for certain parameters, such as, among other options, whether the business requires a license for a website or mobile app, a restaurant or bar, or a fitness facility.<sup>44</sup> For example, to build a license for restaurants, bars and grills, the form asks whether the establishment features live bands, has a cover charge, and in addition to other factors, asks for the establishment’s total occupancy.<sup>45</sup> After pressing the “submit” button, the total fee for a music license for one year is calculated.<sup>46</sup> ASCAP states that after operating expenses (11.3% of fees), all fees collected are distributed as royalties to members.<sup>47</sup>

The Society of European Stage Authors and Composers (SESAC) is the second oldest PRO in America.<sup>48</sup> When it was founded in 1931, its repertory mostly consisted of works from European firms.<sup>49</sup> SESAC’s website states that it is an invitation only PRO, and does not accept unsolicited submissions from copyright owners.<sup>50</sup> Hence, its catalogue is slightly smaller than ASCAP’s, representing 30,000 songwriters, composers, and music publishers, and more than 1

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<sup>41</sup>ASCAP *Payment System*, ASCAP, <https://www.ascap.com/help/royalties-and-payment/payment/monetaryawards> (last visited April 28, 2020).

<sup>42</sup> *Id.*

<sup>43</sup>ASCAP *Music Licensing*, ASCAP, <https://www.ascap.com/music-users> (last visited April 28, 2020).

<sup>44</sup> *Id.*

<sup>45</sup> *Build My License for Restaurants, Bars & Grills*, ASCAP, <https://licensing.ascap.com/?type=bgt> (last visited April 28, 2020).

<sup>46</sup> *Id.*

<sup>47</sup>ASCAP *Licensing Frequently Asked Questions*, ASCAP, <https://www.ascap.com/help/ascap-licensing> (last visited April 28, 2020) (answering the question, “Where does the money go?”).

<sup>48</sup> *About SESAC*, SESAC, <https://www.sesac.com/#!/our-history> (last visited April 28, 2020).

<sup>49</sup> *Id.*

<sup>50</sup> *Music Creators FAQ*, SESAC, <https://www.sesac.com/#!/music-creators-faq> (last visited April 28, 2020).

million songs.<sup>51</sup> SESAC provides an online form similar to ASCAP's for business licenses. It can be found at SESAC.com under the "Business Owners" tab.<sup>52</sup>

Broadcast Music, Inc. (BMI), is America's third PRO. It was founded in 1939 by a group of radio industry leaders, who were prompted to form the organization due to ASCAP's request to double licensing fees to the radio industry.<sup>53</sup> BMI welcomed all musical genres, and unlike ASCAP, did not require copyright owners to have established successful material.<sup>54</sup> In its early years, BMI provided licensing solely for broadcasting, but by 1946 had expanded to licensing music for bars, grills, restaurants and taverns.<sup>55</sup> BMI represents more than 1 million copyright owners and 15 million musical works.<sup>56</sup> Additionally, BMI represents not only songwriters and composers in the U.S., its repertoire also includes music of composers and songwriters from 90 different countries.<sup>57</sup> 90 cents of every dollar of licensing fees go to these affiliated copyright owners.<sup>58</sup> BMI provides an online license application similar to ASCAP and SESAC.<sup>59</sup> Alternatively, a paper form can be downloaded and returned.<sup>60</sup>

### **JUKEBOX FEES**

If a business owner uses a jukebox ("coin-operated phonorecord player") in their establishment, they are required to obtain a Jukebox Licensing Agreement from a separate entity called the Jukebox License Office (JLO).<sup>61</sup> JLO is a joint venture of ASCAP, BMI, and SESAC, who negotiated a license with the Amusement & Music Operators Association (AMOA) in 1989

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<sup>51</sup> *Supra* note 48.

<sup>52</sup> *Business Owners*, SESAC, <https://www.sesac.com/#!/business-owners/> (last visited April 28, 2020).

<sup>53</sup> *BMI's Timeline Through History*, BMI, <https://www.bmi.com/about/history> (last visited April 28, 2020).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *About*, BMI, <https://www.bmi.com/about> (last visited April 28, 2020).

<sup>57</sup> *Id.*

<sup>58</sup> *Licensing FAQ*, BMI, <https://www.bmi.com/licensing/#faqs> (last visited April 28, 2020) (answering the question, "What happens to the fees that businesses pay and how much profit does BMI make?").

<sup>59</sup> *Music Users Apply for Your BMI Music License*, BMI, <https://www.bmi.com/licensing> (last visited April 28, 2020).

<sup>60</sup> *Id.*

<sup>61</sup> *See supra* note 47 (answering the question, "How do I obtain a license for a Jukebox?").

as a result of the Berne Convention, another amendment to the Copyright Act which will be discussed in future paragraphs.<sup>62</sup> AMOA is the largest trade association representing jukebox operators.<sup>63</sup>

Prior to 1989, licensing fees for jukeboxes were paid to the licensing division of the U.S. Copyright Office.<sup>64</sup> An annual Jukebox Licensing Agreement from JLO gives copyright users access to the repertories of all three PROs.<sup>65</sup> A jukebox qualifies for the Agreement if it is a coin-operated phonorecord player, which is a machine or device that:

(A) is employed solely for the performance of nondramatic musical works by means of phonorecords upon being activated by the insertion of coins, currency, tokens, or other monetary units or their equivalent; (B) is located in an establishment making no direct or indirect charge for admission; (C) is accompanied by a list which is comprised of the titles of all the musical works available for performance on it, and is affixed to the phonorecord player or posted in the establishment in a prominent position where it can be readily examined by the public; and (D) 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.<sup>66</sup>

Current jukebox licensing fee rates can be found at [jukeboxlicense.org](http://jukeboxlicense.org).<sup>67</sup> Their fees are based on the number of jukeboxes in an establishment, with fees per jukebox decreasing as the number of jukeboxes in an establishment increases.<sup>68</sup> Importantly, if a business owner has a Jukebox Licensing Agreement, and also plays music by other means, such as live performances, separate licenses must still be obtained from PROs.<sup>69</sup> A Jukebox Licensing Agreement only

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<sup>62</sup> *History of the Jukebox License Office*, JUKEBOX LICENSE OFFICE, <http://www.jukeboxlicense.org/history.htm> (last visited April 28, 2020).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> 17 U.S.C. §116(d)(1).

<sup>67</sup> *2020 JLO Rates*, JUKEBOX LICENSE OFFICE, <http://www.jukeboxlicense.org/rates.htm> (last visited April 28, 2020).

<sup>68</sup> *2020 Jukebox License Fees*, JUKEBOX LICENSE OFFICE, [http://www.jukeboxlicense.org/2020\\_ratesheet\\_standard.html](http://www.jukeboxlicense.org/2020_ratesheet_standard.html) (last visited April 28, 2020).

<sup>69</sup> *Q&A's*, JUKEBOX LICENSE OFFICE, [http://www.jukeboxlicense.org/Q\\_A.htm#i\\_already](http://www.jukeboxlicense.org/Q_A.htm#i_already) (answering the question, "I already have licenses with ASCAP, BMI, and SESAC, why do I need to pay the JLO too?") (last visited April 29, 2020).

provides authorization for jukebox performances.<sup>70</sup> Notably, JLO states that 95% of the fees collected go back to the PROs, who in turn distribute these fees to their affiliated copyright owners.<sup>71</sup> The remaining 5% of fees cover JLO operating costs.<sup>72</sup>

**DIGITAL MUSIC SERVICE BUSINESS SUBSCRIPTIONS: IS IT THE SAME AS PAYING LICENSING FEES?**

A business owner's rights when using a digital music service such as Spotify, Rhapsody, Apple Music, or Napster, are similar to the rights that one has when purchasing c.d.'s, cassettes, records or mp3s. If one has purchased a subscription to such a service, the service may have a document called "End User License Agreement".<sup>73</sup> For example, Napster's End User License Agreement states, "Napster hereby grants to you a limited, non-exclusive, revocable, non-transferable, license to use the Application solely for your own personal, noncommercial use...not for use in operation of a business . . ."<sup>74</sup> Therefore, a subscription to such a digital service only provides users with license to private listening of the music.<sup>75</sup> Further,

[o]wnership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object.<sup>76</sup>

This means that owning an mP3, CD, cassette, record, etc. does not give the purchaser the right to public performance of the underlying work. As previously stated, the copyright owner has the exclusive right to perform the copyrighted work publicly.<sup>77</sup> Further, to perform a work publicly means to:

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<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *See infra* note 74.

<sup>74</sup> *Napster End User License Agreement*, NAPSTER, <https://us.napster.com/eula> (last updated June 2017).

<sup>75</sup> *Id.*

<sup>76</sup> 17 U.S.C. §202.

<sup>77</sup> *See supra* note 25.

(1) *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; or (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or 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.*<sup>78</sup>

Certain services such as Pandora, or SiriusXM, may advertise subscription options for businesses.<sup>79</sup> These services advertise that licensing fees will be paid through the payment of subscription fees.<sup>80</sup> However, these services may also be limited. A detailed description of such services may be found on “Customer Agreement” or “Terms of Service” documents.<sup>81</sup> For example, SiriusXM’s *Customer Agreement for Music for Business Services* states:

*The Service may only be used as foreground/background music in your business or in on-hold messaging on your business telephone system. More specifically, the Service may only be used as an accompaniment to routine activities at your business, such as work, shopping, conversation, dining and relaxation. The Service is not authorized for use as an accompaniment to dancing, use by a DJ or use in connection with a business that charges an admission fee (such as nightclubs, bowling alleys, fitness centers, skate parks, etc.). You may not make any recordings of, or duplicate, stream, or make available for download, the content of the Service. You shall not amplify, transmit or retransmit the broadcast of the Service so as to be audible outside of the business (beyond ordinary patio or other outdoor speaker usage) or otherwise retransmit the Service beyond your business. You may not charge admission for listening to or distribute play lists of our programming.*<sup>82</sup>

Based on the above language, use of such a service would likely be ideal for a clothing store or traditional retail business, rather than a bar or tavern where an admission fee is likely to be charged and dancing is likely to occur.

## **INTERNATIONAL MUSIC: IS IT SUBJECT TO U.S. COPYRIGHT LAWS?**

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<sup>78</sup> 17 U.S.C. § 101 (emphasis added).

<sup>79</sup> *Pandora for Business*, PANDORA, <https://pandora.moodmedia.com/> (last visited April 29, 2020); *SiriusXM for Business*, SIRIUSXM, <https://www.siriusxm.com/siriusxmforbusiness> (last visited April 29, 2020).

<sup>80</sup> *Id.*

<sup>81</sup> See *infra* note 82.

<sup>82</sup> *Customer Agreement for Music for Business Services*, SIRIUSXM, [https://www.siriusxm.com/pdf/siriusxmbiz\\_customeragreement\\_eng.pdf](https://www.siriusxm.com/pdf/siriusxmbiz_customeragreement_eng.pdf) (last visited October 22, 2020) (emphasis added).

The Berne Convention for the Protection of Literary and Artistic Works is an international treaty of the World Intellectual Property Organization (WIPO) that was adopted on September 9, 1886.<sup>83</sup> This treaty gives copyright owners equal protection of their works in countries other than their country of origin.<sup>84</sup> Many countries are members of the Berne Union, and thus are parties to this treaty.<sup>85</sup> “The Berne Convention entered into force in the United States on March 1, 1989.”<sup>86</sup> It is based on three basic principles, and several minimum standards of protection.<sup>87</sup> According to a summary of the treaty by the World Intellectual Property Organization (WIPO), the basic principles are:

(a) Works originating in one of the Contracting States . . . must be given the same protection in each of the other Contracting States as the latter grants to the works of its own nationals . . . (b) Protection must not be conditional upon compliance with any formality . . . (c) Protection is independent of the existence of protection in the country of origin . . . If however, a Contracting State provides for a longer term of protection than the minimum prescribed by the Convention and the work ceases to be protected in the country of origin, protection may be denied once protection in the country of origin ceases.<sup>88</sup>

Further, the minimum standards of protection, are:

(a) [P]rotection must include "every production in the literary, scientific and artistic domain, whatever the mode or form of its expression" . . . (b) rights that must be recognized as exclusive rights of authorization include (in part): the right to perform in public dramatic, dramatico-musical and musical works; the right to communicate to the public the performance of such works; the right to broadcast . . .[.]<sup>89</sup>

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<sup>83</sup> Berne Convention for the Protection of Literary and Artistic Works, June 20, 1986, 1986 U.S.T. LEXIS 160, S. TREATY DOC. NO. 99-127 [hereinafter *Berne Convention*].

<sup>84</sup> *Id.* at art. 2(6).

<sup>85</sup> *Id.* at art. 1.

<sup>86</sup> BERNE CONVENTION IMPLEMENTATION ACT OF 1988, Pub. L. 100-568, 102 Stat. 2853; 17 U.S.C. App. P at sec. 13.

<sup>87</sup> *Summary of Berne Convention*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, [https://www.wipo.int/treaties/en/ip/berne/summary\\_berne.html](https://www.wipo.int/treaties/en/ip/berne/summary_berne.html) (last visited April 29, 2020).

<sup>88</sup> *Id.* at ¶ 1(a)-(c) (language omitted).

<sup>89</sup> *Id.* at ¶ 2(a)-(b) (quoting BERNE CONVENTION *supra* note 77 at art. 2(1)) (language omitted).

Additionally, regarding duration of protection, “the general rule is that protection must be granted until the expiration of the 50<sup>th</sup> year after the authors death.”<sup>90</sup> As per the above basic principles and minimum standards of protection, international musical works are entitled to similar protections as U.S. musical works, including the exclusive right of the copyright owner to public performance.<sup>91</sup> Thus, permission must be obtained from international copyright owners for public performance of their works.

### EXEMPTIONS

There are certain exemptions to the exclusive public performance rights of copyright owners. These include exemptions for education, religion and charity.<sup>92</sup> Section 110(1) of the Copyright Act states that performance or display of a work by teachers or pupils in face-to-face teaching activities of a non-profit educational institution is not an infringement of copyright.<sup>93</sup> Similarly, section 110(3) states that performance of a work of a religious nature, or in the course of services at a place of worship or other religious assembly is not an infringement of copyright.<sup>94</sup> Additionally, section 110(4) states that performances of works are not infringement if they are not performed to the public, no fee is paid to performers, no admission fee is charged, or if such fee is charged the proceeds go to educational, religious or charitable purposes and not for personal financial gain.<sup>95</sup> Unfortunately, the above exemptions likely do not apply to a traditional small business such as a restaurant or bar, as these are likely for profit, non-religious, non-educational ventures. However, the Fairness in Music Licensing Act, passed in 1998, carved out broad exceptions for certain performances in restaurants and bars.<sup>96</sup>

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<sup>90</sup> *Id.* at ¶ 2(c).

<sup>91</sup> *See supra* note 87; 17 U.S.C. § 106(4), (6).

<sup>92</sup> *See infra* notes 93–94.

<sup>93</sup> 17 U.S.C. § 110(1)

<sup>94</sup> *Id.* at § 110(3).

<sup>95</sup> *Id.* at § 110(4).

<sup>96</sup> FAIRNESS IN MUSIC LICENSING ACT OF 1998, Pub. L. No. 105-298, 112 Stat. 2827, 2830 (codified as amended at 17 U.S.C. § 110(5)(B) (1998)). *See also* 17 U.S.C. § 110 n.43 (describing specific language amendments).

### THE “HOMESTYLE” EXEMPTION

Section 110(5)(A) (the “homestyle” exemption) was originally created to protect small businesses with unsophisticated sound equipment, similar to the type used in a home.<sup>97</sup> The Fairness in Music Licensing Act further expanded what had previously been a narrow exception to copyright infringement that applied to the retransmission of a radio broadcast signal on unsophisticated equipment.<sup>98</sup> Section 110(5)(A) states that “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 commonly used in private homes . . .” is not an infringement of copyright, unless a direct fee is charged to see or hear the transmission, or the transmission received is further transmitted to the public.<sup>99</sup>

The underlying issue giving rise to this section of copyright law is whether the public transmission of a radio broadcast is a performance that infringes upon the exclusive right of the copyright owner.<sup>100</sup> The Court first confronted this issue in the case, *Buck v. Jewell-La Salle Realty Co.* in 1931 and again in *Twentieth Century Music Corp. v. Aiken*, in 1975.<sup>101</sup> In *La Salle*, a hotel owner rebroadcast a radio transmission into public and private rooms of the hotel.<sup>102</sup> The Court held that the hotel owner’s transmission of the broadcast was a performance, under the definition of the Copyright Act of 1909.<sup>103</sup> Further, the Court held that where the hotel owner had (1) installed; (2) supplied electric current to; and (3) operated the radio receiving set and

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<sup>97</sup> Fairness in Music Licensing Act: Statement of Marybeth Peters, The Register of Copyrights on H.R. 789 Before the Subcomm. on Courts and Intellectual Property of the Comm. on the Judiciary, 105th Cong. 1 (1997).

<sup>98</sup> *Id.*

<sup>99</sup> 17 U.S.C. §110(5)(A).

<sup>100</sup> *Buck v. Jewell-La Salle Realty Co.*, 283 U.S. 191, 196 (1931); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 152 (1975); Ralph Carter, *Comment: The Erosion of American Copyright Protection: The Fairness In Music Licensing Act*, 18 J. MARSHALL J. COMPUTER & INFO. L. 791, 798–803 (2000).

<sup>101</sup> *Id.*

<sup>102</sup> *Jewell-La Salle Realty Co.*, 283 U.S. at 195.

<sup>103</sup> *Id.* at 202.

loudspeakers, there was no substantial difference between a live performance by an orchestra, and a performance conveyed through the radio and loudspeakers.<sup>104</sup>

This ruling is distinguished from the Court’s ruling in *Aiken*, where *Aiken*, a restaurant owner, was sued for copyright infringement after playing a radio broadcast in his restaurant.<sup>105</sup> Although the radio station which *Aiken* was transmitting had paid licensing fees to ASCAP for the two songs in question, *Aiken* did not pay licensing fees.<sup>106</sup> *Aiken*’s restaurant was a small take-out establishment, but there were members of the public present.<sup>107</sup> So, was *Aiken* an infringing performer of copyrighted works when he played the radio in his restaurant, or was he an audience to a properly licensed broadcast of copyrighted works? The Court held that *Aiken* did not infringe upon the rights of copyright owners.<sup>108</sup> Importantly, the Court stated that if an unlicensed use of a copyrighted work does not conflict with an “exclusive” right conferred by the statute it is no infringement of the holder’s rights.<sup>109</sup> The Court reasoned that the “performance” occurred when the radio station broadcast the signal, and not when *Aiken* rebroadcast the signal throughout his restaurant.<sup>110</sup> It also reasoned that it would be futile to regulate retransmissions of radio broadcasts if it were decided that they constituted a “performance”.<sup>111</sup>

Interestingly, the Court in *Aiken* and *La Salle* confronted substantially the same issue yet reached opposite results. Both defendants in *Aiken* and *La Salle* connected multiple speakers throughout their establishments to retransmit a radio broadcast for their clientele.<sup>112</sup> In his dissenting opinion in *Aiken*, Justice Burger disagreed that *Aiken* was just a “passive beneficiary”,

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<sup>104</sup> *Id.* at 201.

<sup>105</sup> *Aiken*, 422 U.S. at 152–153.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 164.

<sup>109</sup> *Id.* at 155.

<sup>110</sup> *Id.* at 158.

<sup>111</sup> *Id.* at 159–160, 162.

<sup>112</sup> See *Jewell-La Salle Realty Co.*, 283 U.S. at 195; *Aiken*, 422 U.S. at 152.

noting the fact that Aiken had deliberately installed multiple speakers for commercial entertainment in his restaurant.<sup>113</sup> This music likely added to the ambience of Aiken’s restaurant, and made the experience more pleasurable for his customers, thus increasing the profitability of his business. This scenario harkens back to Justice Holmes opinion in *Shanley* when he stated, “If music did not pay, it would be given up.”<sup>114</sup> Thus, some may argue that in *Aiken*, the restaurant owner’s transmission of a radio broadcast constituted a performance of copyrighted works that infringed upon the exclusive performance rights of the copyright owner.

The difference of opinion between *La Salle* and *Aiken*, and between the deciding opinion and dissenting and concurring opinions in *Aiken*, likely helped to lead to the writing of Section 110(5) of the Copyright Act. Notably, in his dissenting opinion in *Aiken*, Justice Burger stated, “...the issue presented can only be resolved appropriately by the Congress . . .”<sup>115</sup> Similarly, in his concurring opinion, Justice Blackmun stated, “Resolution of these difficult problems and the fashioning of a more modern statute are to be expected from the Congress.”<sup>116</sup> The Court in *Aiken* spoke of a balancing of interests between the copyright holder and the public.<sup>117</sup>

Notably, *Aiken* was decided on June 17, 1975, and The Copyright Act of 1976 was enacted a little over a year later on October 19, 1976.<sup>118</sup> Again, section 110(5)(A), the “homestyle exemption”, states that the following is not infringement of copyright:

*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 commonly used in private homes unless – (A) a direct charge is made to hear*

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<sup>113</sup> *Aiken*, 422 U.S. at 159–160 (Burger, J., dissenting) (quoting *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 399 (1968)).

<sup>114</sup> *Herbert*, 242 U.S. at 591; *John Church Co.*, 242 U.S. at 595.

<sup>115</sup> *Aiken*, 422 U.S. at 168.

<sup>116</sup> *Id.* at 166.

<sup>117</sup> *See id.* at 163–164.

<sup>118</sup> *Aiken*, 422 U.S. 151; THE COPYRIGHT ACT OF 1976, Pub. L. No. 94-553, 90 Stat. 2541.

or see the transmission; or (B) the transmission thus received is further transmitted to the public.<sup>119</sup>

Thus, this language seems to contemplate a radio transmission broadcast in a small establishment such as the restaurant owners in *Aiken*. However, both the restaurant owner in *Aiken*, and the hotel owner in *La Salle* used more than one single receiving apparatus in their establishments.<sup>120</sup> Moreover, after section 110(5) was enacted, Courts were left to interpret the language of the statute.<sup>121</sup> They confronted issues such as: types of apparatus, quality of speakers, number of speakers, modification of speakers, transmission to the public; and size of establishment.<sup>122</sup> Confusion such as this likely led to The Fairness in Music Licensing Act, enacted in 1998, which added additional language to section 110(5).<sup>123</sup>

The Fairness in Music Licensing Act added paragraph (B) to section 110(5), the “business exemption”; this amendment included language clarifying number of speakers, and square footage.<sup>124</sup> Particularly, the amendment states that *if the establishment is not a food service or drinking establishment, and communicates a transmission, the exemption applies if it has less than 2,000 square feet of space; or if it has more than 2,000 square feet of space and (I) if transmission is by audio only, communicated on no more than 6 loudspeakers, only 4 of which can be in the same room or adjoining outdoor space, or*

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<sup>119</sup> 17 U.S.C. §110(5)(A).

<sup>120</sup> See *Jewell-La Salle Realty Co.*, 283 U.S. at 195; *Aiken*, 422 U.S. at 152.

<sup>121</sup> Laura A. McCluggage, *Section 110(5) The Fairness in Music Licensing Act: Will the WTO Decide the UNITED STATES Must Pay to Play?*, 40 IDEA 1, at ¶ II. B, D (2000) (discussing legislative history of 110(5) and Courts’ interpretation of same).

<sup>122</sup> See *id.* at ¶ II. D.

<sup>123</sup> See *id.* at ¶ III. (discussing The Fairness in Music Licensing Act); Fairness in Music Licensing Act of 1998, Pub. L. No. 105-298, 112 Stat. 2827, 2830 (codified as amended at 17 U.S.C. § 110(5)(B) (1998); See also 17 U.S.C. § 110 (describing specific language amendments); Rebecca Ullman, *Enhancing The WTO Tool Kit: The Case for Financial Compensation*, 9 RICH. J. GLOBAL L. & BUS. 167, 170–171 (2010).

<sup>124</sup> Fairness in Music Licensing Act of 1998, Pub. L. No. 105-298, 112 Stat. 2827 (codified as amended at 17 U.S.C. § 110(5)(B) (1998); See also 17 U.S.C. § 110 (describing specific language amendments).

(II) *If the transmission is audiovisual, and communicated by no more than 4 audiovisual devices, of which only 1 audiovisual device can be in any 1 room; and audiovisual device must not have a screen size greater than 55 inches; and any audio portion of the performance must not be by more than 6 loudspeakers, of which not more than 4 speakers are in any one room or adjoining outdoor space.*<sup>125</sup>

The amendment further states that the exemption applies *if the establishment is a food service or drinking establishment that communicates a transmission and is less than 3,750 square feet in space, or if the establishment is more than 3,750 square feet of space, the same conditions of either subparagraphs I or II, above, also apply.*<sup>126</sup>

Further, the exemption only applies if there is no direct charge to see or hear the transmission; the transmission is not further transmitted outside of the establishment; and the transmission is licensed by the copyright owner “so publicly performed or displayed”.<sup>127</sup>

The Fairness in Music Licensing Act was disputed by some in the music industry in America as well as abroad. Some argued that the law, passed to protect small business owners, actually hurt small businesspersons who make their living through songwriting.<sup>128</sup> Billboard magazine stated in a 2016 article that the Act could be costing copyright holders over \$150 million a year.<sup>129</sup> Further, some thought that the Act violated the United States’ obligations to international copyright holders under the Berne Convention, and a lawsuit was filed by the European Communities (EC) on those grounds.<sup>130</sup> Specifically, the dispute was based on

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<sup>125</sup> See 17 U.S.C. 110(5)(B).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> Todd Hagins, *Robbing Peter Gabriel to Pay Paul's Diner: Plunder, the Free Market, and the Fairness in Music Licensing Act*, 7 TEX. REV. LAW & POL. 385, 388 (2003).

<sup>129</sup> Robert Levine, *U.S. Copyright Act's Public Performance Exception Costs Composers More Than \$150 Million: Study*, BILLBOARD (Nov. 8, 2016), <https://www.billboard.com/articles/news/7565926/us-copyright-act-public-performance-exception-composers-europe> (last visited April 30, 2020).

<sup>130</sup> *Id.*

incompatibilities between sections 110(5)(A) and (B) and U.S. obligations under Article 9(1) of the World Trade Organization's (WTO) TRIPS Agreement, which requires members to comply with Articles 1-21 of the Berne Convention.<sup>131</sup> The TRIPS Agreement is the WTO Agreement on Trade-related aspects of Intellectual Property Rights (TRIPS).<sup>132</sup> As a member of the WTO the United States is required to comply with the Agreement. It was also disputed whether the Act complied with U.S. obligations under Article 13 of the TRIPS Agreement.<sup>133</sup> A panel meeting was held by the WTO and it found that section 110(5)(B):

did not meet the requirements of Article 13 of the TRIPS Agreement and was thus inconsistent with Articles 11bis(1)(iii) and 11(1)(ii) of the Berne Convention (1971) as incorporated into the TRIPS Agreement by Article 9.1 of that Agreement. The panel noted, *inter alia*, that a substantial majority of eating and drinking establishments and close to half of retail establishments were covered by the business exemption.<sup>134</sup>

Article 11bis(1)(iii) of the Berne Convention states that “authors of literary and artistic works shall enjoy the exclusive right of authorizing the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds, or images, the broadcast of the work.”<sup>135</sup> Further, Article 11(1)(ii) of the Berne Convention states that authors of literary and artistic works shall enjoy the exclusive right of any communication to the public of the performance of their works.<sup>136</sup> Conversely, the panel found that 110(5)(A) did not violate the

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<sup>131</sup> *World Trade Organization: DS160: UNITED STATES – SECTION 110(5) OF US COPYRIGHT ACT*, WORLD TRADE ORGANIZATION: DISPUTE SETTLEMENT (Feb. 24, 2010), [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds160\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds160_e.htm) (last visited on April 30, 2020).

<sup>132</sup> *See generally* TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter TRIPS Agreement]; *and see Legal Texts: List of Abbreviations*, WORLD TRADE ORGANIZATION, [https://www.wto.org/english/docs\\_e/legal\\_e/abbrev\\_e.htm](https://www.wto.org/english/docs_e/legal_e/abbrev_e.htm) (last visited Feb. 1, 2021) (defining the TRIPS abbreviation).

<sup>133</sup> WORLD TRADE ORGANIZATION, *supra* note 131.

<sup>134</sup> *Id.*

<sup>135</sup> *See supra* note 78 at art.11bis(1)(iii).

<sup>136</sup> *Id.* at art. 11(1)(ii).

United States' obligations under the TRIPS Agreement and was thus consistent with the above articles of the Berne Convention.<sup>137</sup>

As a result of the above proceedings, the United States was ordered to pay into a fund to benefit songwriters.<sup>138</sup> Although copyright holders do not benefit from the Fairness in Music Licensing Act, many small restaurants undoubtedly fall under the business exemption, resulting in a benefit in the form of less operating costs for their businesses.<sup>139</sup> It should be noted that a business owner's broadcast of a digital music service such as Spotify likely does not fall under the section 110(5) exemption because the statute states that the exemption applies to "...nondramatic musical work *intended to be received by the general public.*"<sup>140</sup> Services such as Spotify require account registration and often limit listeners' use of content to "personal, non-commercial use".<sup>141</sup> Therefore, such services are likely not intended to be received by the general public.

### WORKS IN THE PUBLIC DOMAIN

"A work of authorship is in the 'public domain' if it is no longer under copyright protection or if it failed to meet the requirements for copyright protection."<sup>142</sup> "Works in the public domain may be used freely without the permission of the former copyright owner."<sup>143</sup> Works can come into the public domain in several different ways: (1) expiration of copyright; (2) copyright owner failed to file copyright renewal rules; (3) copyright owner deliberately places

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<sup>137</sup> WORLD TRADE ORGANIZATION, *supra* note 131.

<sup>138</sup> Levine, *supra* note 128.

<sup>139</sup> See Hagins, at 414 (regarding the ability of businesses to "play the latest hits for free").

<sup>140</sup> 17 U.S.C. 110(5)(B) (emphasis added).

<sup>141</sup> *Spotify Terms and Conditions of Use*, at ¶ 5 *Using Our Service*, SPOTIFY, <https://www.spotify.com/us/legal/end-user-agreement/#5-using-our-service> (last visited Feb. 1, 2021).

<sup>142</sup> *FAQs: Definitions*, U.S. COPYRIGHT OFFICE, <https://www.copyright.gov/help/faq/faq-definitions.html> (answering the question: "Where is the public domain?") (last visited May 1, 2020).

<sup>143</sup> *Id.*

the work in the public domain; (4) copyright law does not protect the type of work.<sup>144</sup> The fourth method of a work coming into the public domain does not apply to musical works; however it does apply to titles of musical works, which are not protected by copyright laws.<sup>145</sup>

More commonly, a work will fall into public domain through expiration of copyright. As stated by the U.S. Copyright Office, generally, for works created on or after January 1, 1978, the copyright lasts for the life of the author plus seventy years after the author's death.<sup>146</sup> For works made for hire, anonymous and pseudonymous works, copyright lasts the shorter of ninety-five years from publication or 120 years from creation.<sup>147</sup> The duration of copyright for published pre-1978 works is twenty-eight years from the date of publication, with the option of renewal, which would add on an additional sixty-seven years, for a total of ninety-five years of copyright protection.<sup>148</sup> The duration of copyright for un-published pre-1978 works is the same as for those created on or after January 1, 1978, however, the law provides that no copyright for those works would expire before 2002.<sup>149</sup> Additionally, if the work was published on or before 1978, the copyright would not expire before December 31, 2047.<sup>150</sup> Further, requirements for renewal term registrations became optional as of June 26, 1992.<sup>151</sup>

Thus, it may be possible for a food service or drinking establishment to avoid paying licensing fees by creating a playlist composed entirely of music in the public domain. According

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<sup>144</sup> *Copyright & Fair Use: Welcome to the Public Domain*, STANFORD UNIVERSITIES LIBRARIES, <https://fairuse.stanford.edu/overview/public-domain/welcome/> (last visited May 1, 2020).

<sup>145</sup> *FAQs: What Does Copyright Protect?*, U.S. COPYRIGHT OFFICE, <https://www.copyright.gov/help/faq/faq-protect.html#title> (last visited on May 1, 2020) (answering the question: "How do I copyright a name, title, slogan, or logo?"); *See also Circular 1: Copyright Basics*, U.S. COPYRIGHT OFFICE, <https://www.copyright.gov/circs/circ01.pdf> (answering the question, "What is not protected by copyright?").

<sup>146</sup> *Circular 1: Copyright Basics*, U.S. COPYRIGHT OFFICE, <https://www.copyright.gov/circs/circ01.pdf> (answering the question, "How long does copyright last?") (hereinafter CIRCULAR 1).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

to the Library of Congress, last year, “for the first time in twenty years, published creative works entered into the public domain in the United States.”<sup>152</sup> This included works from 1923, and as of 2020, works from 1924 also fell into the public domain.<sup>153</sup> Some of these works include: songs from the hit musical “Lady, Be Good” by George and Ira Gershwin, including “Fascinating Rhythm”, and “Oh, Lady Be Good”.<sup>154</sup> Another musical work in the public domain includes “Jealous Hearted Blues” by Cora “Lovie” Austin.<sup>155</sup> It is important to note that although the underlying compositions (music and lyrics) may have entered into the public domain, more recent sound recordings may have not.<sup>156</sup> Copyright protection extends separately to the underlying musical composition, and the “sound recording”.<sup>157</sup> Per the U.S. Copyright Office, “Sound recordings are works that result from the fixation of a series of musical, spoken, or other sounds.”<sup>158</sup> The Music Modernization Act, enacted in October 2018, brought sound recordings recorded prior to 1972 partially into the federal copyright system.<sup>159</sup> Thus, the original recording of “Jealous Hearted Blues” recorded by Ma Rainey in 1924, will likely not enter the public domain until 2024, 100 years after its publication.<sup>160</sup> Similarly, although the underlying compositions of “Fascinating Rhythm” and “Oh, Lady Be Good” entered into the public domain, later recordings of the songs by such artists as Ella Fitzgerald, Count Basie, and Tony Bennett, are likely still protected by copyright.<sup>161</sup>

## REMEDIES

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<sup>152</sup> Nicole Lamberson, *The Lifecycle of Copyright: 1924 Works Enter the Public Domain*, LIBRARY OF CONGRESS, <https://blogs.loc.gov/copyright/2020/02/the-lifecycle-of-copyright-1924-works-enter-the-public-domain/> (last visited May 1, 2020).

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> CIRCULAR 1, *supra* note 145 (answering the question, “What works are protected?”).

<sup>158</sup> 17 U.S.C. § 101 (definition of “sound recordings”).

<sup>159</sup> Lamberson, *supra* note 152 (describing the recording “Jealous Hearted Blues”); Orrin G. Hatch - Bob Goodlatte Music Modernization Act, Pub. L. No. 115–264, , 132 Stat. 3676 (2018) [hereinafter Music Modernization Act].

<sup>160</sup> Lamberson, *supra* note 152.

<sup>161</sup> 17 U.S.C.S. § 1401(a).

Copyright law provides several remedies for copyright owners whose exclusive rights have been infringed upon. As stated, previously these remedies first appeared in the Copyright Act of 1909 and included: (1) an injunction of such infringement; and (2) damages that the copyright owner may have suffered due to such infringement, as well as all profits the infringer shall have made from such infringements, and in the “case of dramatic or dramatico-musical or a choral or orchestral composition, one hundred dollars for the first, and fifty dollars for every subsequent infringing performance.”<sup>162</sup>

The Copyright Act of 1976 (provides basic framework for current copyright law) states that a copyright owner may elect to recover actual damages and profits; or

statutory damages for all infringements involved in the action, with respect to any one work for which any infringer is liable individually, or for which any two or more infringers are liable jointly and severally, in a sum of not less than \$750 or more than \$30,000 as the court sees just.<sup>163</sup>

That is, infringers may be charged not less than \$750 per infringement, or not more than \$30,000 per infringement.<sup>164</sup> Further, if the court finds that the infringement was committed willfully, it may increase the award of statutory damages to a sum of not more than \$150,000.<sup>165</sup> In the case where the court finds that the infringer was not aware and had no reason to believe that his actions constituted an infringement of copyright, the court may reduce the award to not less than \$200.<sup>166</sup>

Several cases illustrate instances of infringement, and damages awarded for same.

First, the elements required to prove copyright infringement are:

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<sup>162</sup> Act of March 4, 1909, §§ 25, 35.

<sup>163</sup> 17 U.S.C. § 504(c)(1).

<sup>164</sup> *See id.*

<sup>165</sup> *Id.* at § 504(c)(2).

<sup>166</sup> *Id.*

(1) the originality and authorship of the compositions involved; (2) compliance with the formalities to secure a copyright under Title 17, United States Code; (3) plaintiff's ownership of the copyrights of the relevant compositions; (4) defendant's public performance of the compositions; and (5) defendant's failure to obtain permission from the plaintiffs or their representatives of for such performance.<sup>167</sup>

Oftentimes, as described in the following paragraphs, the plaintiff successfully shows the elements of copyright infringement have been met at summary judgment level. This allows the plaintiff to prove their case soon after filing of the complaint, rather than proceeding through lengthy litigation processes.<sup>168</sup> Additionally, in deciding the amount of damages to be awarded, courts contemplate: (1) "the expenses saved and profits reaped by the defendants in connection with the infringements"; (2) "the revenues lost by the plaintiffs as a result of the defendant's conduct"; and (3) "the infringers' state of mind, that is, whether willful, knowing, or merely innocent."<sup>169</sup> *Red Giant, Inc. v. Molzan, Inc.*, is one such case that was decided at the summary judgment level.<sup>170</sup> Plaintiffs moved for summary judgment after filing a complaint for copyright infringement.<sup>171</sup> In that matter, the plaintiffs alleged, and successfully showed that the defendants were liable for two infringing live music performances during 2006.<sup>172</sup> That is, two songs were performed by a band, one performance of a song occurring on September 23, 2006, and another performance of a song on October 22, 2006.<sup>173</sup> Additionally, two other songs were played

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<sup>167</sup> *Almo Music Corp. v. 77 East Adams, Inc.*, 647 F. Supp. 123, 124 (N.D. Ill. 1986) (citing *Van Halen Music v. Palmer*, 626 F. Supp. 1163, 1164-65 (W.D. Ark. 1986); *Broadcast Music, Inc. v. Fox Amusement Co.*, 551 F. Supp. 104, 107 (N.D. Ill. 1982)).

<sup>168</sup> See generally *MOB Music Publ'g v. Zanzibar on the Waterfront, LLC*, 698 F. Supp. 2d 197 (D.D.C. 2010); *Red Giant, Inc. v. Molzan, Inc.*, No. H-07-2657, 2009 U.S. Dist. LEXIS 63990 (S.D. Tex. July 24, 2009); *Golden Torch Music Corp. v. Lichelle's, Inc.*, No. W-86-CA-005, 1987 U.S. Dist. LEXIS 7634 (Jan. 26, 1987).

<sup>169</sup> *Boz Scaggs Music v. KND Corp.*, 491 F. Supp. 908, 914 (D. Conn. 1980).

<sup>170</sup> *Molzan, Inc.*, No. H-07-2657, 2009 U.S. Dist. LEXIS 63990 at \*16.

<sup>171</sup> *Id.* at \*1-2.

<sup>172</sup> *Id.* at \*1-7.

<sup>173</sup> *Id.* at \*22.

from a C.D.<sup>174</sup> The plaintiffs, who were members of ASCAP, alleged that the defendants were contacted repeatedly by ASCAP representatives regarding their need to obtain licenses.<sup>175</sup> The court granted plaintiff's summary judgment, awarding them \$30,000 (\$7,500 per infringement) in statutory damages, and \$35,496.44 in attorney's fees.<sup>176</sup> Defendants were also enjoined from playing further music licensed by ASCAP without paying proper fees.<sup>177</sup>

Similarly, in *Golden Torch Music Corp. v. Lichelle's, Inc.*, the plaintiffs moved for summary judgment and were awarded \$1,250 per infringement, for a total of \$3,750.<sup>178</sup> The defendants were also enjoined from public performance of any music licensed by ASCAP.<sup>179</sup> Notably, defendants would have paid only \$1,443 to ASCAP had they been properly licensed.<sup>180</sup>

In another successful motion for summary judgment, *MOB Music Publ'g v. Zanzibar on the Waterfront, LLC*, the defendants were liable for five infringing performances occurring on November 16, 2007, and one infringing performance occurring after the lawsuit had been filed.<sup>181</sup> The plaintiffs were awarded \$6,000 per infringement for the first five performances, and \$10,000 for the sixth infringement.<sup>182</sup> Thus, statutory damages for all six infringements totaled \$40,000.<sup>183</sup> Additionally,

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<sup>174</sup> *Id.* at \*5.

<sup>175</sup> *Id.* at \*22.

<sup>176</sup> *Id.* at \*34–35.

<sup>177</sup> *Id.* at \*33–35.

<sup>178</sup> *Golden Torch Music Corp. v. Lichelle's, Inc.*, No. W-86-CA-005, 1987 U.S. Dist. LEXIS 7634, at \*13 (Jan. 26, 1987).

<sup>179</sup> *Id.* at \*14.

<sup>180</sup> *Id.* at \*12.

<sup>181</sup> *MOB Music Publ'g*, 698 F. Supp. 2d at 208.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

plaintiffs were awarded attorney's fees and costs in the amount of \$74,712.22.<sup>184</sup> Thus, total damages amounted to \$114,712.22 where licensing fees of \$26,395.15 were avoided had they been properly paid.<sup>185</sup>

In *Broadcast Music, Inc. v. Entertainment Complex, Inc.*, the defendants were liable for \$3,909.09 for all eleven infringing performances.<sup>186</sup> Thus, the total amount of statutory damages awarded to plaintiffs was \$43,000, not including attorney's fees and costs.<sup>187</sup> This award was more than three times the proper license fee, which would have amounted to \$14,361.35.<sup>188</sup>

In *Morley Music Co. v. Cafe Continental, Inc.*, where the defendant was found liable for seven infringing performances, the court awarded damages of \$1,500 per infringement.<sup>189</sup> Thus, defendant owed \$10,500 where they would have paid \$2,582.91 had they been properly licensed.<sup>190</sup>

As demonstrated above, statutory damages and attorney's fees can far exceed the cost of a proper blanket license. Courts have found that "substantial damages, in an amount well in excess of appropriate licensing fees, are appropriate where the defendant repeatedly violates the copyright laws despite actual knowledge of their licensing requirements."<sup>191</sup>

### **ENFORCEMENT TACTICS**

Per the court in *Morley Music Co.*, ASCAP has district offices throughout the country that are responsible for contacting and licensing establishments, such as radio

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<sup>184</sup> *Id.* at 209.

<sup>185</sup> *Id.* at 207, 209.

<sup>186</sup> *Broad. Music, Inc. v. Entm't Complex, Inc.*, 198 F. Supp. 2d 1291, 1297 (N.D. Ala. 2002).

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 1296.

<sup>189</sup> *Morley Music Co. v. Cafe Continental, Inc.*, 777 F. Supp. 1579, 1583 (S.D. Fla. 1991).

<sup>190</sup> *Id.*

<sup>191</sup> *Coleman v. Payne*, 698 F. Supp. 704, 708 (W.D. Mich. 1988).

and television stations, restaurants and others who desire to lawfully perform its members' musical compositions.<sup>192</sup> In that case, ASCAP repeatedly sent correspondence to the defendants and discussed licensing in person.<sup>193</sup> ASCAP also repeatedly sent proposed licensing agreements to defendants.<sup>194</sup> After repeated attempts, ASCAP conducted a “musical inspection” of defendants.<sup>195</sup> This involves visiting an establishment suspected of playing of a song copyrighted by an ASCAP member and collecting information on: (a) the physical arrangement of the business; (b) the music system in use; (c) a description of live performers; and (d) the music performed.<sup>196</sup> In *Morley Music Co.*, an ASCAP representative noted the titles of songs performed, as well as the exact time and date they were performed in the establishment.<sup>197</sup> Sometimes, as was the case in *Zanzibar on the Waterfront, LLC*, and *Molzan, Inc.*, an establishment has a license but fails to renew it, or it alternatively becomes delinquent.<sup>198</sup> In those cases, ASCAP made repeated requests for the defendants to bring their accounts current.<sup>199</sup> With such diligent enforcement and record keeping techniques, it is not hard to see why ASCAP is one of the most successfully litigious PROs.

Similar tactics were used by BMI in *Broadcast Music, Inc.*, above. The court states that BMI learned of infringing performances occurring at the defendant’s establishment.<sup>200</sup> After learning of the performances, BMI sent several correspondences

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<sup>192</sup> *Morley Music Co.*, 777 F. Supp at 1580.

<sup>193</sup> *Id.* at 1581.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> Plaintiffs’ Motion for Summary Judgment at 19, *MOB Music Publ’g v. Zanzibar*, No. 08-1617(EGS), 2009 U.S. Dist. Motions LEXIS 77401 (August 24, 2009); *Red Giant, Inc. v. Molzan, Inc.*, No. H-07-2657, 2009 U.S. Dist. LEXIS 63990, at \*4-5 (S.D. Tex. July 24, 2009).

<sup>199</sup> *Id.*

<sup>200</sup> *Broad. Music, Inc.*, 198 F. Supp. 2d at 1292.

to the defendant informing them of the requirement to obtain a license, and even sent a proposed license agreement and fee schedule.<sup>201</sup> After several correspondences with no response, BMI sent a letter requesting defendant to cease the performances.<sup>202</sup> The court then states that performances of unlicensed songs were noted by a BMI investigator on two dates.<sup>203</sup> Again, using such techniques as these, PROs seem to be able to collect sufficient evidence to prove rock-solid cases against alleged infringers.

### **DEFENSES?**

As evidenced by the cases above, PROs use the information collected through their enforcement techniques to build strong cases against copyright infringers. As stated above, these cases are often won at the summary judgment level.<sup>204</sup> Importantly, the cases above also show that the defendants were provided notice of their unlawful use of copyrighted works yet continued to infringe upon them. This evidence helps to satisfy the fourth and fifth elements needed to prove copyright infringement: public performance of the works, and failure to obtain permission to publicly perform the works.<sup>205</sup>

### **THE BAND IS AN INDEPENDENT CONTRACTOR**

There are several excuses that a person could come up with for the continued infringement of copyrighted works. In one of the early cases, *Dreamland Ballroom v. Shapiro, Bernstein & Co.*, a dancehall orchestra performed musical works without obtaining permission from the copyright holder.<sup>206</sup> The owner of the dancehall argued that he had no control over what the orchestra played, or knowledge that the songs they

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<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> See Plaintiffs' Motion for Summary Judgment at 33, *MOB Music Publ'g v. Zanzibar*, Civil Action No. 08-1617(EGS), 2009 U.S. Dist. Motions LEXIS 77401 (August 24, 2009).

<sup>205</sup> *Almo Music Corp.*, 647 F. Supp. at 124 (citing *Van Halen Music v. Palmer*, 626 F. Supp. 1163, 1164-65 (W.D. Ark. 1986); *Broad. Music, Inc. v. Fox Amusement Co.*, 551 F. Supp. 104, 107 (N.D. Ill. 1982)).

<sup>206</sup> *Dreamland Ball Room, Inc. v. Shapiro, Bernstein & Co.*, 36 F.2d 354, 355 (7th Cir. 1929).

played were copyrighted.<sup>207</sup> He also argued that the orchestra was hired as an independent contractor, and therefore they alone should be held liable for the infringing performances.<sup>208</sup> The Court disagreed and held that,

the owner of a dance hall at whose place copyrighted musical composition are played in violation of the rights of the copyright holder is liable, if the playing be for the profit of the proprietor of the dance hall. And this is so even though the orchestra be employed under a contract that would ordinarily make it an independent contractor.<sup>209</sup>

Further, courts have held that even when a selection of songs played at the infringer's establishment is determined by non-employee, independent contractors who are hired to play music at the club, the defendant is not absolved of liability.<sup>210</sup> Similarly, in *EMI April Music, Inc. v. White*, a restaurant owner asserted to ASCAP that it was the sole responsibility of the performer to obtain permission or a license to perform copyrighted material.<sup>211</sup> The court held that this argument was without merit, reasoning that the restaurant owner had a right to supervise, and a financial interest in such performance.<sup>212</sup> Thus, restaurant and bar owners probably should not depend on independent musicians, cover bands, or D.J.s hired to perform at their establishment to procure their own licensing agreements. As shown above, such an argument is likely not a valid defense to copyright infringement.

#### **INTENT/LACK OF KNOWLEDGE**

Similar to the above defense, a defendant may claim that he did not have knowledge of the infringing performances, or that he did not know that the works were

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<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *MOB Music Publ'g*, 698 F. Supp. 2d at 206.

<sup>211</sup> *EMI April Music, Inc. v. White*, 618 F. Supp. 2d 497, 502 (E.D. Va. 2009).

<sup>212</sup> *Id.* at 507.

protected by copyright. Although it is a factor that courts consider in deciding the amounts of damages to be awarded, “intent to infringe” is not an essential element that must be proven to show infringement.<sup>213</sup> Likewise, per current copyright law, “[a]nyone who violates any of the exclusive rights of the copyright owner . . . is an infringer of the copyright . . . .”<sup>214</sup> Further, as shown in the cases above, PROs diligently collect evidence showing repeated correspondences with defendants regarding the need for licenses. The evidence above shows that in each instance, the defendants refused to obtain proper licensing or to respond to correspondence from PROs. Based on the facts of the cases discussed, “lack of knowledge” or “lack of intent” would likely not be a valid defense to a similar claim of copyright infringement.

#### **ESTABLISHMENT DID NOT PROFIT FROM THE PERFORMANCE**

Another possible defense is that the proprietor did not profit from the musical performance, and therefore did not violate the exclusive right of the copyright holder. This assertion was struck down early on in *Herbert, et al. v. The Shanley Company*, where the Court held that performances of copyrighted works at establishments that did not charge an admission fee, and had not obtained permission for the performances from the copyright holder, infringed upon the copyright owner’s exclusive right to public performance for profit.<sup>215</sup> Although early versions of the Copyright Act state that copyright owners have the exclusive right to public performance for profit, the “for profit” element is no longer listed as an exclusive right of the copyright owner, and

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<sup>213</sup> *Jewell-La Salle Realty Co.*, 283 U.S. at 198 (holding that “Intention to infringe is not essential under the Act”); *see also* *Boz Scaggs Music*, 491 F. Supp. at 914–15 (discussing absence of knowledge of infringement and factors considered in the award of damages).

<sup>214</sup> 17 U.S.C. § 501(a) (language omitted).

<sup>215</sup> *Herbert*, 242 U.S. at 595.

therefore is not required to prove copyright infringement.<sup>216</sup> The Copyright Act of 1976 included an amendment to section 106, which removed the words “for profit” from the exclusive rights held by a copyright owner.<sup>217</sup> Section 106(4), (6), now states that a copyright owner has the exclusive right to perform the copyrighted work publicly.<sup>218</sup> Hence, a copyright owner seeking to make a claim of copyright infringement must show that the infringer performed the work publicly, not publicly *for profit*.<sup>219</sup>

Notably, the “for profit” element of section 106(4) was transferred to section 110(4) of the Copyright Act, which states:

performance of a musical work . . . *without any purpose of direct or indirect commercial advantage, and without payment of any fee or compensation to any of its performers, promoters, or organizers* is not an infringement of copyright if: (A) there is *no direct or indirect admission charge*; or (B) the *proceeds, after deducting the reasonable costs of producing the performance, are used exclusively for educational, religious, or charitable purposes and not for private financial gain* . . .<sup>220</sup>

Additionally, regarding profit, courts look to whether a business is a “profit-making enterprise.”<sup>221</sup> Even if an establishment is not a commercial success, it is still considered to be a for-profit enterprise and as such is not exempted under section 110(4).<sup>222</sup> In *Bourne Co.*, a musical theatre owner argued that his establishment fell under the non-profit exemption of 110(4) because the theatre was never financially lucrative and was often used as a refuge for the homeless.<sup>223</sup> However, the court held that

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<sup>216</sup> Act of March 4, 1909 § 1(e); 17 U.S.C. §§ 106(4), (6).

<sup>217</sup> *La Salle Music Publishers, Inc. v. Highfill*, 622 F. Supp. 168, 169 (W.D. Mo. 1985) (discussing legislative history of “for profit” element of copyright laws).

<sup>218</sup> 17 U.S.C. §§ 106(4), (6).

<sup>219</sup> *Id.*

<sup>220</sup> *Id.* at § 110(4) (emphasis added); *LaSalle Music Publishers, Inc.*, 622 F. Supp at 169.

<sup>221</sup> *U.S. Songs, Inc. v. Downside Lenox, Inc.*, 771 F. Supp. 1220, 1226 (N.D. Ga. 1991) (discussing “No Profit” defense).

<sup>222</sup> *Bourne Co. v. Speeks*, 670 F. Supp. 777, 779 (E.D. Tenn. 1987).

<sup>223</sup> *Id.*

occasional charity was not enough to claim an exemption under 110(4).<sup>224</sup> Further, the court held that performances of musical compositions in a restaurant for the incidental entertainment of diners constituted a copyright infringement, per *Herbert v. Shanley Co.*<sup>225</sup> Thus, a successful defense alleging an exemption under section 110(4), must satisfy each element required for the performance to fall under such exemption, as the courts do not consider financial success or commercial viability to be factors.

### CONCLUSION

As stated above, copyright owners enjoy the exclusive right to perform their works publicly.<sup>226</sup> Congress was empowered to create these exclusive rights in Article 1 section 8 of the Constitution.<sup>227</sup> Importantly, the Court has stated that the Framers intended copyright itself to be the engine of free expression.<sup>228</sup> Further, by establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas.<sup>229</sup> Additionally, in *Aiken*, the court stated “The immediate effect of our copyright law is to secure a fair return for an ‘author’s’ creative labor. But the ultimate aim is, by this incentive, to stimulate [the creation of useful works] for the general public good.”<sup>230</sup> Indeed, the public is likely benefited by the pleasing sounds of background music while slurping merlot and linguini on an awkward first date, or as they ride up ten floors in an otherwise silent elevator, or as they wait patiently on hold for customer service. Further, the public is likely benefited by enjoying a thrilling escape from the workday with a night of live music and beer at the local bar n’ grill. Life in a silent landscape would no doubt be dull, and only good for napping.

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<sup>224</sup> *Id.*

<sup>225</sup> *Id.* (citing *Herbert*, 242 U.S. at 595).

<sup>226</sup> 17 U.S.C. §§ 106(4), (6).

<sup>227</sup> U.S. Const. Art. 1 § 8.

<sup>228</sup> *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 558 (1985).

<sup>229</sup> *Id.*

<sup>230</sup> *Aiken*, 422 U.S. at 156.

As shown in the numerous cases above, the price for performing a copyrighted work without obtaining proper licensing can result in damages awards that far surpass the cost of a proper music license, sometimes tripling in cost.<sup>231</sup> Further, courts are happy to award such damages and usually find that they are just, considering such factors as expenses saved and profits made by the infringing performance, revenue lost by the copyright holder, and the infringer's state of mind.<sup>232</sup> Moreover, PROs such as ASCAP and BMI are diligent in their protection of copyright holders' exclusive rights, and help to build solid lawsuits against businesses who willfully ignore their attempts to protect these rights.<sup>233</sup> Defenses to such an assertion of copyright infringement are difficult to prove, as shown in the cases above.<sup>234</sup> Thus, PROs are usually successful in such lawsuits, procuring thousands of dollars in royalties for their members.<sup>235</sup> Likewise, the implementation of the Berne Convention gives international copyright holders the same rights in the United States that American copyright holders enjoy.<sup>236</sup>

In summary, United States Copyright Law provides an abundance of exclusive rights for copyright holders. These rights benefit copyright holders by providing them incentive to continue creating, knowing that their works will be protected. Likewise, by complying with copyright laws, business owners support songwriters and composers, who in turn provide a valuable service to business. Again, as stated by Justice Wendell Holmes, “[i]f music did not pay it would be given up.”<sup>237</sup>

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<sup>231</sup> See *Molzan, Inc.*, No. H-07-2657, 2009 U.S. Dist. LEXIS 63990 at \*34–35; *Lichelle's, Inc.* No. W-86-CA-005, 1987 U.S. Dist. LEXIS 7634 at \*12–13; *MOB Music Publ'g*, 698 F. Supp. 2d at 207, 209; *Entm't Complex, Inc.*, 198 F. Supp. 2d at 1296–1297; *Cafe Continental, Inc.*, 777 F. Supp. at 1579, 1583.

<sup>232</sup> *Boz Scaggs*, 491 F. Supp. at 914.

<sup>233</sup> See *Morley Music Co.*, 777 F. Supp at 1580–1581; *Molzan, Inc.*, No. H-07-2657, 2009 U.S. Dist. LEXIS 63990 at \*4–5.

<sup>234</sup> See *Shapiro, Bernstein & Co.*, 36 F.2d at 355; *MOB Music Publ'g*, 698 F. Supp. 2d at 206; *White*, 618 F. Supp. 2d at 507.

<sup>235</sup> See cases cited *supra* note 231.

<sup>236</sup> See BERNE CONVENTION at ¶ 1(a)-(c); 17 U.S.C. § 106(4), (6).

<sup>237</sup> *Herbert*, 242 U.S. at 595.

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