

Using Copyrighted Music



ASCAP
www.ascap.com

“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.”

U.S. Constitution Article 1, Section 8

Music Copyright Law Explained in a whole new way. In plain English.

John Philip Sousa and Irving Berlin, among others, founded ASCAP in 1914 to protect the rights of songwriters. Since then the Society has grown to include over 320,000 members. And although the purpose of the performing rights society has not changed, the various technologies and music distribution channels have. As a result, licensing has become much more complex. But our mission to provide compensation for music use remains the same. And this publication attempts to assist you in understanding the various applications of the copyright law, in a language most songwriters would be familiar with...plain English.



Answers to the most commonly asked questions about performing rights in music.

Why Does A Business Need A License To Play Music?

The Constitution authorizes Congress “to Promote the Progress of Science and Useful Arts” by granting exclusive rights to authors. This insures that creators can earn a living from their creations and provides incentive for the creation of more works. The Copyright Law of the United States, Title 17 USC, establishes property rights in musical works and grants creators and owners of copyrighted musical works several specific rights, including the exclusive right to perform or authorize the performance of their works publicly (17 U.S.C. 106(4)). This means that, generally, no one can publicly perform copyrighted works without the permission of the copyright owner, and, as is the case with other property rights, the owner has the right to be paid for the use of his property.

Copyright is not new — in fact it has existed in some form for centuries. The first U.S. copyright law was enacted in 1790 and has been revised periodically to keep pace with society and technology. The current copyright statute became effective in 1978 and has been amended many times since then.

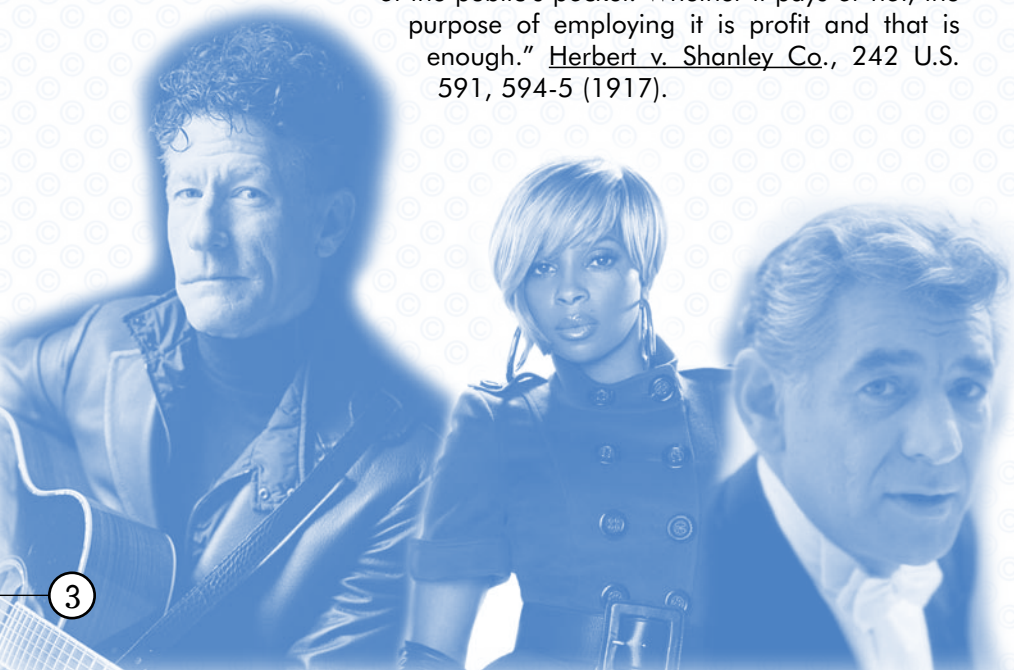


What is a public performance?

The Copyright Law defines a public performance as one “in a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered.” Performances transmitted or otherwise communicated by means of any device or process (for example, via broadcast, telephone wire, the Internet, or other means) to the public are also public performances (17 U.S.C. 101).

The law requires users to obtain authorization not only for performances by live musicians, but also for performances by mechanical means, including videotapes, CDs, tapes, music-on-hold, karaoke, jukeboxes, radio and TV reception, and personal computers.

For decades the courts have recognized that public performances of copyrighted music are an important part of many commercial and non-profit enterprises. In a landmark 1917 Supreme Court decision, Justice Oliver Wendell Holmes, Jr. wrote about music performances at a restaurant: “They [music performances] are part of a total for which the public pays...It is true that the music is not the sole object [of a patron’s visit to a restaurant], but neither is the food which probably could be got cheaper elsewhere. The object is a repast in surroundings that to people having limited powers of conversation or disliking the rival noise give a luxurious pleasure not to be had from eating a silent meal. If music did not pay it would be given up. If it pays, it pays out of the public’s pocket. Whether it pays or not, the purpose of employing it is profit and that is enough.” Herbert v. Shanley Co., 242 U.S. 591, 594-5 (1917).



How do businesses obtain permission to perform music?

It is impossible for copyright owners to know of every conceivable use or performance of their works, and it would also be difficult for users of music to locate all the copyright owners and negotiate licenses for all of the works that might be used. Therefore, writers and publishers of musical works authorize collective licensing organizations to locate and license public performances of their works. ASCAP makes giving and obtaining permission to perform music simple, providing a valuable service to businesses and creators alike. An ASCAP license grants music users the right to perform any or all of the music in ASCAP's repertory as often as they like. The ASCAP license saves businesses the paperwork, trouble and expense of finding and negotiating licenses and helps prevent the user from even inadvertently infringing on the copyrights of ASCAP's members.

Who does ASCAP represent?

ASCAP is the world's largest performing rights licensing organization, representing the performance rights to over 8 million copyrighted musical works. With a membership of over 320,000 composers, songwriters and music publishers, ASCAP is home to the greatest names in American music. ASCAP also licenses the U.S. rights for hundreds of thousands of creators from all over the world. ASCAP's repertory spans the entire musical spectrum, including the best in every musical genre — pop, rock, country, R&B, alternative, rap, hip hop, film and television music, symphonic and concert, musical theater, cabaret, folk, roots, jazz, gospel, Latin, new age and more. It is important to note that ASCAP represents songwriters and not recording artists. Although some writers are also popular performers, most members are writers whose names are not well known, but who create music that the public enjoys, and who derive most of their income from public performances of their works.

What does ASCAP represent?

ASCAP has agreements with foreign performing rights organizations covering more than 100 territories, through which it represents in the United States the bulk of the copyrighted music from all over the world. Representative countries include Great Britain, Canada, France, Germany, Ireland, Italy, Greece, Japan, Korea, China, Brazil, Russia, Mexico, Spain, and Sweden.

Is authorization required when only TV or radios are used?

Section 110(5) of the Copyright Act contains a limited exemption for performances by means of radio-over-speakers or televisions in certain establishments only if (1) no direct charge is made to see or hear the performances; (2) the performances are not further transmitted beyond the establishment where they are received; and (3) the original transmission is licensed by the copyright owners — that is, the radio or television station, cable system or satellite carrier is licensed by the copyright owners or their performing rights organizations.

Two types of music users can be exempt if they only use radio-over-speakers or televisions, under different standards: a food service or drinking establishment (defined as “a restaurant, inn, bar, tavern, or any other similar place of business in which the public or patrons assemble for the primary purpose of being served food or drink, in which the majority of the gross square feet of space that is non-residential is used for that purpose”), and an other establishment (defined as “a store, shop, or any similar place of business open to the general public for the primary purpose of selling goods or services in which the majority of the gross square feet of space that is non-residential is used for that purpose”).

A food service or drinking establishment is eligible for the exemption if it (1) has less than 3,750 gross square feet of space (in measuring the space, the amount of space used for customer parking only is always excludable); or (2) has 3,750 gross square feet of space or more and (a) uses no more than 6 loudspeakers of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space; and (b) if television sets are used, there are no more than 4 televisions, of which not more than 1 is located in any 1 room and none has a diagonal screen size greater than 55 inches.

An other establishment is eligible for the exemption if it (1) has less than 2,000 gross square feet of space; or (2) has 2,000 or more gross square feet of space and satisfies the same loudspeaker and television set requirements as for food service or drinking establishments.

Is a license required for music-on-hold?

Yes. Transmissions of music to the public are “public performances.” When music-on-hold is employed via recorded music, a transmission is made to the callers. And, when a business retransmits radio broadcasts for the entertainment of callers, the law makes it clear that two separate public performances are taking place: the first occurs when the radio station transmits its broadcasts of copyrighted music to the general public; the second performance occurs when the business receives the radio station’s broadcasts and retransmits those broadcasts via its music-on-hold system to callers. In either case, the music-on-hold user is separately “performing” the music and thus requires the permission of the copyright owners whose music is being performed.

License agreements between ASCAP and radio stations specifically exclude from the licenses any further performances of the stations’ broadcasts. This means that no radio station should represent to local businesses that its license agreement with ASCAP authorizes retransmission of the station’s broadcasts by means of a music-on-hold telephone system.

Our license agreements with background music services, (e.g., Muzak, DMX, Music Choice, Playnetwork) include coverage for music-on-hold. If your use of music-on-hold is provided by one of these or another licensed background service, no separate ASCAP license is required.



Shouldn't the band or DJ obtain the license?

Under the law, owners or operators of establishments are responsible for performances on their premises. Technically, everyone who participates in an infringing performance is liable and copyright owners can sue the owner of a club as well as the members of the band or the disc jockey who actually gave the unauthorized performance. In practice, the owners obtain licenses as a cost of doing business.

For more than 70 years courts have consistently held that those who operate facilities or sponsor events at which copyrighted music is performed publicly may not avoid their responsibilities under the United States Copyright Law by attempting to shift those responsibilities to their entertainers.

Courts have held liable as an infringer the owner of a club who had insisted that his entertainers sign agreements stating that they would not perform ASCAP music and posted signs stating that no ASCAP music could be performed at the club. Similarly, the fact that the entertainers alone choose the music to be performed does not absolve the owner of the club or the promoter of a concert from liability – the “independent contractor” defense is no defense to a claim of copyright infringement.

I bought the CD, why do I need an ASCAP license to play it in my establishment?

As is the case with other property, the use of a musical work might take any one of several forms, each of which requires authorization. Rights in intellectual property may be analogized to the various rights in a single piece of land that a landowner might lease. For example, one lessee may obtain mineral rights and another might obtain grazing rights on the same acreage. Certainly, the lessee of the mineral rights would not want to pay for the grazing rights. Similarly, the right to make copies (in sheet music or recorded form) of a copyrighted work and the right to perform music publicly are distinct rights, requiring separate authorization from the copyright owners (17 U.S.C. 106). And, just as the mineral rights lessee does not obtain or pay for grazing rights permission, neither does the record label obtain performing rights.

If the performers perform only “original music” is a license required?

First, as a general matter, very few artists perform only their own music. Even many well-known songs often identified with writer-artists such as Garth Brooks, Whitney Houston, Backstreet Boys, Bonnie Raitt, and Amy Grant were written by other ASCAP members. Additionally, in live performances artists often pay tribute to other writers by performing their works. Without permission from the copyright owners of those works or from ASCAP, those songs won't be available for performance.

Artist engagement agreements also usually detail exactly what services are to be performed by the artist. Obviously, the fee paid to artists covers only the services for which they are engaged—such as personal appearance, press and publicity. Unless there is an express provision in the contract, no implication can be drawn that the engagement includes performance rights in the writer-artist's music. Performance rights in songs are valuable and are generally not given away.

With an ASCAP license you won't be limited to works owned by only a few writers but can expand your music offerings to more than 8 million songs owned and written by our 320,000 members and thousands of foreign writers represented in the U.S. by ASCAP.

Does the ASCAP license cover performances of music in plays or musicals?

No. ASCAP licenses non-dramatic performance rights only. ASCAP does not license “dramatic” rights, sometimes called “grand” rights. ASCAP members who write musical plays, operas or ballet scores deal directly with those who want to perform their works “dramatically.” The ASCAP license does authorize non-dramatic performances of songs from dramatic productions. For example, ASCAP licenses piano bar performances of an individual song from a Broadway show. Because often there is no clear-cut distinction between “dramatic” and “non-dramatic” performances, users may be asked to contact our members directly.

What other rights are not represented by ASCAP?

ASCAP does not license the right to record music either on a CD or tape or as part of an audio-visual work such as a motion picture, video or television program. Those rights, known in the music industry as mechanical and synchronization (or “synch”) rights, are licensed by writers or publishers, or their agents. ASCAP does not license the right to make printed copies of songs, nor does it license the right to make adaptations or arrangements.

ASCAP does not license rights for recording artists, musicians, singers or record labels. However, artists or musicians who are songwriters can become ASCAP members, and ASCAP would license the performing rights for their songs.

Are there any exceptions to the requirement to obtain authorization for public performances?

The law provides a few strictly limited exemptions for performances in the course of worship services and performances in the course of face-to-face teaching activities of a non-profit educational institution. Purely non-profit performances may be exempt if (1) there is no direct or indirect commercial purpose; and (2) there is no payment to the performers, promoters or organizers; and (3) there is no admission charge, or if there is a charge, all proceeds after deduction of costs are used exclusively for educational, religious or charitable purposes.

Are there any other exceptions?

There is also an exemption for performances at a vending establishment open to the public at large without any direct or indirect admission charge where the sole purpose of the performance is to promote the retail sale of copies or phonorecords of the works or of the audio-visual or other devices (like TV sets or stereos) utilized in such performance and the performance is within the immediate area where the sale is occurring. The exemption does not apply if the performance serves more than the sole purpose of promoting record or equipment sales, for example, where music functions as a form of background music which is unrelated to the sale of records or where live music is used to draw patrons to the establishment and to entertain them while they are there.

What types of businesses have licenses?

Hundreds of thousands of United States businesses have ASCAP licenses, including nightclubs, bars, restaurants, hotels, corporations, radio and television stations, and nearly 100 other types of businesses that use music. A few of the many other businesses and entities that hold ASCAP licenses are concert promoters, carnivals, conventions and trade shows, motion picture theatres, roller and ice skating rinks, training and development seminars, colleges and universities, festivals, YMCAs and YWCAs, theme and amusement parks, health clubs, professional speakers, dance schools, department and retail stores, race tracks, sports leagues, zoos, and municipal, county and state government entities.

How much will an ASCAP license cost?

The annual rate depends on the type of business. Generally, rates are based on the manner in which music is performed (live, recorded or audio-visual) and the size of the establishment or potential audience. For example, rates for restaurants, nightclubs, bars and similar establishments depend on whether the music is live or recorded, whether it is audio only or audio-visual, the seating capacity of the bar or restaurant, the number of nights per week music is offered, the number of musicians, whether admission is charged, and several other factors.

Concert rates are based on the seating capacity of the facility and box office receipts. Rates for music used by corporations ("Music In Business") are based upon the number of employees. Hotel rates are based on a percentage of entertainment expenses and an additional charge if recorded music is used.

Because ASCAP has over a hundred different licenses and rate schedules, one will likely fit your needs. ASCAP operates under the principle that similarly situated users should be treated similarly. This assures fairness and consistency in our licensing.

Where do the license fees go?

To ASCAP's writer and publisher members. ASCAP is a membership association owned and controlled by and managed for its composer, writer and publisher members. After deducting expenses (currently less than 12% of all fees collected), ASCAP distributes the remainder to its members and to the members of foreign performing rights organizations whose rights are represented in the U.S. by ASCAP.

How are they distributed?

There are millions of performances of ASCAP music in hundreds of thousands of broadcasts and live venues throughout the country each year. Because the cost of tracking each and every performance would be so high as to leave no money left to distribute, ASCAP relies on surveys of performances. The surveys cover performances on AM, FM, public and college radio; local, network, public and cable television; Internet transmissions; airlines; MUZAK and similar background music services; live performances in symphony and concert halls; colleges and universities; and a wide range of other live venues. Whenever it is economically sensible, we conduct a census survey, or complete count, of performances in a medium. Where a census survey is impractical, we conduct a sample survey designed by outside experts to be a statistically accurate representation of performances in a medium.

ASCAP tracks music use on these and other media and live venues to determine what works are performed and the appropriate writers and publishers to be paid. Changes in the manner in which royalties are distributed to members must be approved by the Board of Directors.

Are there alternatives to the ASCAP license?

You are not required to obtain an ASCAP license, but you are required to obtain permission to perform publicly ASCAP members' music. Since ASCAP's members grant to ASCAP only non-exclusive rights, you may obtain permission directly from each member whose works will be used.

ASCAP operates in conformity with a federal antitrust consent decree, the Second Amended Final Judgment entered in *United States v. ASCAP*, Civ. Action No. 41-1395 (S.D.N.Y. Jun. 11, 2001), which prohibits ASCAP from discriminating in license fees or other license terms and conditions among licensees similarly situated. The same form of license agreement is offered to all users in the same industry.

What if I want to contest or challenge the fee?

You may ask the U.S. District Court for the Southern District of New York to determine a reasonable fee. Small business owners — those who do not own more than six establishments and are not publicly traded — can also have the reasonableness of license fees determined in a proceeding under ASCAP's consent decree conducted under the auspices of that court, either in New York or in one of 11 other cities around the country. While a fee proceeding is pending, the business owner obtains the right to perform ASCAP music and pays an interim fee. The decision as to the reasonableness of the fees is ultimately to be reviewed by the federal judge who administers the ASCAP consent decree, and it applies only to that business owner. An owner is limited to one proceeding per license agreement. Significantly, existing ASCAP music licensing rates for the user's industry are presumed to be reasonable in such a proceeding.

What happens if music is publicly performed without authorization?

All who are involved in the public performance may be held liable for copyright infringement. Damages range from several hundred to tens of thousands of dollars per infringement (or more if willful) and usually exceed what the defendant would have paid in license fees so that those who violate the law do not benefit, and so that those who obey the law are not placed at a competitive disadvantage. Corporate officers and directors, business owners and managers may all be held vicariously liable for infringing performances. A court may also award costs, attorney's fees and injunctive relief. Obviously, it makes more sense to comply with the law than to break it.

Information about specific works and ASCAP members can be obtained in a variety of ways. Separate databases of works in the ASCAP repertory that have been registered with ASCAP since January 1, 1991, or identified in ASCAP's surveys of performed works since January 1, 1978, are available online at the ASCAP Web site, www.ascap.com (click on "ACE Database of Musical Titles"). The ACE Database can also be used to determine whether a particular songwriter or composer is a member of ASCAP. The same data contained in the ACE Database is also available on CD-ROM and can be purchased at a cost of \$5.00 by written request to: ASCAP, One Lincoln Plaza, New York, NY 10023, attn: Director of Repertory. More comprehensive records of the titles, dates of U.S. Copyright registration (if any), writers and current publishers or other copyright owners of all known works in the ASCAP repertory are available for public inspection at ASCAP's offices in New York City during regular business hours. You can also call or write ASCAP for information as to specific works: ASCAP, One Lincoln Plaza, New York, NY 10023, attn: Repertory Dept. - Clearance Section.

If you have further questions or would like more information about licenses for specific industries, please don't hesitate to call our General Licensing Department at 1-800-505-4052. Or write to the ASCAP General Licensing Department at 2675 Paces Ferry Road, SE Suite 350, Atlanta, Georgia 30339. Or visit our website at www.ascap.com.





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