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FEDERAL

BY: ERICH EISELT,
IMLA Assistant General Counsel

Music, Money, and Municipalities

The evolution of a musical work, from creative spark through arrangement and enhancement, to rendering by instrumentalists and singers, to recording and digitization, to enjoyment by the public is complex and mysterious to those outside the industry. So too are the laws that govern how that work is protected and made available. This article is a brief look at the elements involved when local governments make music available for their constituents.

Origins of Music Protection: The protection of intellectual property, a principle brought to this country by our English forbears, has enabled American ingenuity to flourish. That foundational concept was enshrined in our own Constitution, which in Article 1, section 8, empowers Congress "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

Our national legislature would thereafter fulfill its responsibilities. Federal patent law was enacted for the protection of "any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof."[1] More relevant for the scope of this article, authors, artists, composers, designers and other creative sorts would be protected under federal copyright law: Codified at 17 U.S.C. § 100 et seq., the United States Copyright Act (Act) protects "original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." [2] The protected "original works" comprise a breadth of genres: literary, dramatic, choreographic, pictorial, graphic, sculptural, architectural—and include motion pictures and audiovisual works, sound recordings (added to the Act in 1972), as well as compilations and derivative works. [3] And most salient for our purposes, the Act protects musical compositions and lyrics.[4]

Rights of the Copyright Holder: Under the Act, the owner of the copyright is granted exclusive rights for a specified time period to control how, where, and if the original work is used. This includes exclusivity to (or authorize others to) do the following:

- reproduce the copyrighted work in copies or recordings;
- distribute copies or recordings of the copyrighted work to the public via sale or lease;
- produce derivatives based on the copyrighted work;
- display the copyrighted work publicly;
- and, central to this discussion, "in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to **perform the copyrighted work publicly;**" which is effected "in the case of sound recordings . . . by means of a digital audio transmission.[5]

"Public Performance" Defined: As the Act makes explicit, to "perform" a work includes not only an actual live performance, but also transmission of the work; the "public" is anything greater than a personal social circle. A "public performance" means:

> (1) to perform… 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… the work to a place specified by clause (1) or to the public… whether the members of the public… receive it in the same place or in separate places and at the same time or at different times.[6]

Sanctions: The most significant element of the Act in terms of protecting musical creativity (and threatening unauthorized music users) are its sanctions. 17 U.S.C. §504 allows for penalties ranging from $750 to $30,000 *per infringement*, with willful violations increasing to $150,000 (on the other hand, innocent violations may incur a vastly reduced $200 penalty). The Act also allows for the imposition of costs and attorney's fees.[7]

Duration: Unlike patent law, which confers protection for only 20 years after a patent is formally filed with the United States Patent and Trademark Office,[8] the Act protects copyrighted works (which obtain legal legitimacy as soon as they are reduced to any "tangible medium of expression"—often evidenced by publication) for far longer. While the specifics add complexity, it is fair to summarize

that works published from 1924 through 1977 receive copyright protection for 95 years after publication.[9] Thus Jimi Hendrix's "All Along the Watchtower," published in 1968, is protected until 2063. For works published from 1978-on, copyright is based not on publication date but the lifespan of the creator, lasting 70 years after the date of death.[10] The Act will therefore protect "Rehab," the 2006 musical offering by Amy Winehouse, who died in 2011, until 2081.

January 1 is referred to as "public domain day," marking the date that copyrighted works of the statutory age limit lose their protection under the Act.[11] As of New Year's 2021, works published in 1925 became 96 years old, meaning that Fitzgerald's "The Great Gatsby" and Alain Locke's collection "The New Negro" are now in the public domain.[12] So too are musical compositions like "Sweet Georgia Brown" and numerous works by Duke Ellington, Fats Waller and Ma Rainey.[13] (One caveat: it is the words and the specific melodic rendition that is protected; other versions, like George Harrison's much more recent treatment of "Sweet Georgia Brown" retain protection, meaning that, while anyone is free to perform the lyrics or melody, or broadcast the 1925-era version, performance or broadcast of a more recent arrangement or recording may well invoke the Act's proscriptions).

An Aside-"Performance Rights," not Performer Rights: Note that the performance rights guarded by the Act protect the composer and song writer, not the singer. While Gladys Knight's unforgettable vocal talents brought "Midnight Train to Georgia" to life, placing the song at number 15 on the 1973 Billboard 100 (just above Cher's "Half Breed" and three stops behind another railroad rendering, "Love Train" by the O'Jays) and winning Gladys and her Pips a Grammy, the song was actually written by Jim Weatherly, a University of Mississippi quarterback-turned songwriter. Originally titled "Midnight Plane to Houston," he converted the lyric to its more bucolic Peach State sentimentality at the urging of singer Cissy Houston, an Atlanta native and mother of a far more famous musical daughter.

"Midnight Train" now been covered by scores of other singers, from Aretha Franklin to Neil Diamond to Garth Brooks, garnering additional performance royalties to songwriter Weatherly--but none to Gladys Knight. Neither Knight, nor the Pips, nor the thousands of other singers, instrumentalists, sound technicians and the retinue of associated players who bring a musical work to our ears can look to "performance rights" for significant compensation. Surprisingly, the playing of a song on AM/FM radio, whether in Dallas (KSCS for country) or Detroit (WJLB for throwback R&B and Hip-Hop) does not generate a penny of revenue for the voices or musicians we hear. The logic in the formative years of the Act was that radio stations were essentially free advertising, driving "hard copy" sales of the recording, first on shellac, then vinyl, 8-track, CD or other medium.

That rationale may have been valid in the days when listeners rushed to Tower Records or Sam Goody to scoop up "Thriller," generating gold-album income for Michael Jackson. But the arrival of digitization and streaming services drastically reduced the need to purchase music, severely undercutting performers' revenues. Congress set out to rectify the problem via new legislation amending the Act, via the Digital Performance Rights in Sound Recordings Act of 1995 (DPRA),[14] which requires that payments by streaming services go in part to the musicians and vocalists who actually produce the songs and melodies being heard.

Enter the PROs: Clearly, the long-lasting and exclusive performance rights granted under the Act are of immense worth to musical creators. It is equally obvious, however, that in most scenarios, writers and composers have little capacity, acting individually, to generate value from their works. Many sign contracts with publishing houses, who act on behalf of creators to commercialize their lyrics and melodies, licensing titles to performers, negotiating rights to synchronize music to movies and video, and deriving value from various other uses of music. But the musical creators and their publishers then look to another enterprise to collect revenues from the performance of copyrighted works. Enter the Performing Rights Organizations (PROs), who, for a fee from their clients, whether composers, lyricists, or publishers, wield the Act's considerable sanctions to discourage the misappropriation and uncompensated use of music, requiring licenses for the right to perform musical works and remitting royalties among their licensor clients.

From the municipal perspective, four PROs are most likely to play a role. By far the largest share of musical compositions are licensed from two massive and long-standing fixtures, ASCAP and BMI:

ASCAP-The American Society of Composers, Authors, and Publishers (www.ascap.com) originated in 1914. It largely predated musical recordings and was initially engaged in licensing sheet music on behalf of melodists, lyricists, and publishing companies, eventually exercising significant power as the sole PRO. ASCAP instituted the "blanket license," granting the right to perform multiple compositions for a fixed price. Today, it claims to represent nearly 10 million works and 575,000 creators and publishers.

BMI-Broadcast Music Inc. (www.bmi.com) was formed in 1939 by broadcasters, in no small part as a response to the ASCAP megalith. BMI focused on licenses to radio stations, and rapidly attracted its own cohort of composers and publishers. BMI now claims to represent more than 11 million works and over 790,000 copyright holders from 90 countries.

Two other PROs have more recently emerged in the municipal environment, further complicating the licensing picture:

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Federal *cont'd from page 21*

SESAC-The Society of European Stage Authors and Composers (www.sesac.com), founded in 1930, originally sought to support European creators obtain their US royalties, but migrated to representing American clients beginning in the 1960's. It claims to represent 30,000 copyright holders and one million titles. Evidencing the lucrative potential of PROs, SESAC was acquired by major private equity player Blackstone Group in 2017.

GMR-Global Music Rights (www.globalmusicrights.com) is the newcomer to the PRO family, having been formed in 2013 by industry heavyweight Irving Azoff, who previously managed acts including Bon Jovi and the Eagles and served as CEO of MCA Records and Ticketmaster. GMR's footprint is far smaller than the other PROs; its website promotes a curated collection of only 53,000 titles (including 137 Billboard 100 songs) and 95 high-profile song writers.

(There are numerous additional PROs which play a role in American performance licensing, including Soundexchange and Songtrust, but these occupy niches that will not be of direct impact to municipal users).

Antitrust Considerations: The ability to represent collectives of musical creators confers significant market power, which can be wielded against those who produce music and those who use it. Early in its history ASCAP began to exercise that clout for anticompetitive ends.[15] It refused to sign agreements with some creators, depriving them of representation.[16] For those who became clients, it demanded that all their works be licensed to ASCAP. It created barriers to composers who desired to leave ASCAP for other representation. It sought to require music users to take blanket licenses for an entire library of works rather than making a la carte selections. And its obscure financial terms with composers and users alike were riddled with favoritism and inconsistencies. Ironically, BMI was also accused of similar practices. After investigating these allegations, the Department of Justice sued under the Sherman Act, imposing consent decrees first on ASCAP[17], followed by BMI [18] (Consent Decrees). The Consent Decrees required that BMI and ASCAP allow licensing of selected titles rather than requiring blanket licensing of their complete repertoires. They also injected transparency and a level playing field, and subjected the two PROs' pricing to oversight by a "Rate Court" in the Southern District of New York. While these regulations continue to harness ASCAP and BMI, the newcomer PROs are not subject to the Consent Decrees and their restrictions.

In subsequent years, the PROs and radio station groups have increasingly accused one another of anticompetitive behavior. The Radio Music License Committee (RMLC), which represents roughly 10,000 commercial radio stations across America, has been a prominent adversary. It reached settlements reducing its royalties with SESAC in 2014 and BMI in early 2020, but GMR has not been so accommodating. RMLC alleged that GMR, by combining select key artists (Bruce Springsteen, Bruno Mars, and Smokey Robinson among them) in a single take-it-or-leave-it package, is charging rates far above what any single artist could receive on its own—the same argument that led to dramatically lower performance license rates in the SESAC settlement. As a Pennsylvania federal court summarized the case in an order moving *Radio Music License Committee, Inc. v. Global Music Rights, LLC,* no. 16-6076 (E.D. Pa. March 16, 2019) to the Central District of California:

> Defendant Global Music Rights, LLC ("GMR") is a newly founded PRO that grants public performance licenses to the musical works within its repertory. RMLC claims that GMR has leveraged the competitive vacuum created by judicially-monitored consent decrees over the two largest PROs in the industry - the American Society of Composers, Authors and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI") - to poach a strategic group of songwriters and create a repertory that no radio station could succeed without access to. RMLC argues that GMR has created an untenable and illegal situation wherein RMLC's members are forced to either pay overly priced licensee fees to GMR or face copyright infringement claims, which at the tune of $150,000 per infringed work, would quickly bankrupt the infringing member.

Each party's motion to dismiss has been denied and the action is currently moving towards trial in the California court, although significantly delayed due to COVID interruptions.[19]

Implications for Municipalities: The foregoing, from the protections and penalties in the Act, to the Consent Decrees, to the emergence of the new PROs, has implications for municipalities. First, as described earlier, under the terms of the Act it is not legal for a municipality to "perform" copyrighted music without authorization. Governmental entities are specifically included within the Act's proscriptions: "Anyone who violates…the exclusive rights of the copyright owner…is an infringer…. '[A]nyone' includes a State, any instrumentality of a State and any officer or employee…. Any State, and any such instrumentality…shall be subject to the provisions of this title…to the same extent as any nongovernmental entity." [20]

This means that music "performed publicly" on municipal property, whether owned, leased or otherwise controlled, and whether provided by live musicians or singers, or broadcast from recordings, radio, television or via streaming services, is generally subject

to authorization from the copyright holder. Examples include music in public parks, ice skating rinks, pools and exercise facilities. Also covered are marathons and sporting events, on-hold music and classes where yoga instructors or spin leaders bring their own musical selections: if the "performance" to the "public" occurs on municipal territory, the composer, lyricist and/or publisher has rights to be compensated by the municipality unless it has received permission for such use. This is so even if the infringement occurs at the hands of a cover band on a public stage or a well-intentioned modern dance instructor at the local high school—under the Act, the venue is liable. The fact that an individual has purchased a CD or subscribes to iTunes or Pandora for personal use does not confer authority to publicly perform that music. While nominal exceptions in the Act permit fair use (using minor portions of the work, subject to a four-part test including whether such use will undermine sales of the original) and "charitable" uses, allowing live performances where no performer, promoter or organization receives compensation and any admission, if charged, is used "exclusively for educational, religious, or charitable purposes,"[21] those scenarios are vastly limited.

The PROs, wielding the intimidating sanctions threatened in the Act, and driven by their stated mission to ensure that musical creators are properly rewarded while paying themselves for the effort, scour the horizon for violations. Live performances in music venues, bars, and dance clubs, background music in bowling alleys, restaurants, malls and hotels, on-hold accompaniment, songs on radio stations, television, and streaming services, are all subject to PRO scrutiny and a requirement to license. When a violation is detected, most often the result is a request to cease and desist and a notice to the infringer that a contract must be signed, occasionally accompanied by the demand for back payment. For those that flagrantly or repeatedly ignore copyright, however, courtrooms and six-figure penalties await. Municipalities are also on the PROs' radar, sometimes receiving courteous but undisguised reminders that a paid license is required for use of music.

The Commercialization of Obscurity: It is at this juncture—the consideration of a license with a given PRO--that a major irritant appears, for municipalities as much as any other licensee. Put simply, it is extremely difficult to know what titles are being licensed from whom, or to limit musical use to any one PRO. Given the millions of musical works controlled by the PROs as an industry, a centralized mechanism to determine which PRO controls which work would be highly desirable. None exists. In 2016, BMI and ASCAP announced, at long last, that they would produce such a database by 2018. It had still not appeared by 2019 when the Department of Justice solicited comments to the Consent Decrees. IMLA joined 877 others in a litany of opinions, most of which urged continuation of the regulatory handcuffs on the nation's two largest PROs.[22] One of our IMLA comments was that the combined database should be forthcoming, with the aspirational coda that the other PROs should also be required to contribute their data, allowing a rapid overview of who controls what. The omnibus database mirage did not materialize, but ASCAP and BMI did produce their combined dataset in late December 2020, as the appropriately-named "Songview."[23] Their joint press release proclaimed "Groundbreaking collaboration provides detailed copyright information for more than 20 million songs, including reconciled ownership shares, offering greater transparency for the industry."[24]

Songview undoubtedly adds transparency, but it does not capture songs which are fully controlled by other PROs. What Songview does make evident, however, is a further, and ultimately more troublesome, obstacle. A given musical work is often the product of collaboration, with a lyricist and a melodist joining forces. Beyond that, as noted earlier, the copyright is often shared with a publishing house. Each of these entities is free to align with any PRO it chooses. The result is massive fragmentation, and a given PRO rarely owns 100% of the right to grant a performance license for any single work. (The list of "100% BMI Owned" titles on Songview is surprisingly modest). As the GMR website states "When you acquire a Blanket License from Global Music Rights, you get a legal authorization to play shares of the music we represent in your place of business for the duration of your license."

A glance at Songview reveals the phenomenon, in plain sight. Take Pharrell Williams' 2013 blockbuster "Happy." GMR positions Pharrell as one of its featured songwriters, but as Songview discloses, and GMR's own catalog confirms, 50% of the performance rights in "Happy" are owned by publishers. One publisher is EMI Blackwood, a BMI client; the other, Universal Pictures, is an ASCAP client. In other words, three different PROs would likely require performance licenses from a municipality desiring to play "Happy" publicly or have it performed.

Multiply that fractional ownership scenario across thousands (or millions) of titles and the prospects for performance licensing from only one PRO, or even two, is remote.

This detriment is kept somewhat in check in the case of BMI and ASCAP by virtue of the DOJ and the Consent Decrees. The two original PROs are required to provide municipalities virtually identical

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Clearly, those plans and ambitions for the country did not stand the test of time, nor did the idea that the next most qualified person in the minds of the electors should become vice president last long. But the division of votes among the states within this body of electors remains. as does the unifying basis found in the compromise between the large and small states.

In a previous article *Federalist 62*, Madison discussed the compromise that brought large states and small states together in forming a union, while discussing the proposal for a senate:

> A government founded on principles more consonant to the wishes of the larger States, is not likely to be obtained from the smaller States. The only option then for the former, lies between the proposed government, and a government still more objectionable. Under this alternative, the advice of prudence must be, to embrace the lesser evil; and, instead of indulging a fruitless anticipation of the possible mischiefs which may ensue, to contemplate rather the advantageous consequences, which may qualify the sacrifice.
>
> In this spirit . . .the equal vote allowed to each State, is at once a constitutional recognition of the portion of sovereignty remaining in the individual States, and an instrument for preserving that residuary sovereignty. So far the equality ought to be no less acceptable to the large than to the small States: since they are not less solicitous to guard, by every possible expedient, against an improper consolidation of the States into one simple republic.

The decision to amend the Constitution and allow senators to be elected by popular vote under the 17th Amendment eroded the concept of reserved sovereignty that informed Madison's arguments in *Federalist 62*. Nevertheless, the equal votes accorded each state in the senate that helped define the compromise between large states and small remained. Those concepts of reserved sovereignty and balancing the interests of large states and small remains evident in the Electoral College.

Rather than ignore Hamilton's view that a popular election would likely lead to a person elected to the presidency who might be ill suited to the position due to "the little arts of popularity" or "talents for low intrigue," returning to the original, albeit elitist, design for selecting the president would honor the original design of the Founders and also reap the benefits of good governance. But restoring the original plan would be like putting spilt milk back in the carton. So, are we smarter today than in 1789 that we ignore the cautions expressed by the Founders or renege on the compromise that gained the assent of both the large states and small back in 1789?

Madison and Hamilton presciently envisioned majorities exercising direct democracy in ways that adversely affected minority groups, property rights and personal security. Regardless of which side of the political divide one is on today, a person might end up on the other side tomorrow. The Constitution continues to protect through the Electoral College the interests of people in small states and must continue to do so regardless of shifting demographics, migration of people from one state to another, or popular sentiment. ML

Federal *cont'd from page 23*

pricing scales overseen by the Rate Court.

Thus, each offers blanket licensing prices for localities up to 50,000 in population for $364 per year (2020 pricing).[25] BMI further represents that it has the right to license the properties in its repertoire and indemnifies licensees for claims of infringement with respect to those works.[26]

The absence of DOJ oversight is evident in the other PROs' dealings. GMR, for example, provides a sharp contrast to ASCAP and BMI. GMR is not party to any standardized database and, as noted earlier, licenses only its "share" of musical works. It makes no express representations about rights to the titles in its catalogue and, instead of indemnifying licensees against claims of infringement, GMR requires that licensees indemnify it, and its (unnamed) parent company. Other GMR contractual provisions include the unilateral right to terminate the agreement in the event of any act, law or decree by any entity, federal, state or local, that results in "any substantial increase" in its cost of doing business. And, evidencing the pricing muscle objected to by the RMLC, GMR prices its blanket licenses for municipalities up to 50,000 in population at more than twice the price charged by BMI and ASCAP, to provide a miniscule fraction of the works they license. SESAC also charges significantly higher rates to the under-50,000 localities than do ASCAP and BMI. For the roughly 18,000 American local governments in that small town category, the pricing differential is significant, particularly given the fact that in many cases only minor fractions of the work are being licensed.

Regardless of the PRO, there are material limitations on the scope of the performance license granted. Coupling the musical work

with video is not covered; that process mandates obtaining a separate synchronization license. Nor does the standard municipal license from any of the PROs allow performance at a host of public venues, including conventions or trade shows, colleges and universities, sporting events, theme parks operated by the government, community symphony, or via a jukebox. And the performance of music at "special events" such as marathons requires a separate fee based on revenues generated, under various PRO agreements.

Conclusion

The bottom line is that municipalities are confronted with an opaque and costly system that seemingly demands licenses from multiple PROs. As GMR's example indicates, there appears to be no inherent barrier to additional PROs entering the market, capturing a few high-value songwriters, and commanding still more licenses and payments. Some music users--large, well-funded commercial enterprises come to mind--may be able to curate playlists that filter out specific artists or titles and avoid individual PROs, but that task seems beyond that reach of local governments.

The question arises whether the Act should be construed to allow ever-smaller fractional copyright ownership in a given work to be held by an unlimited number of separate licensors, each with the potential to unleash statutory sanctions unless a costly performance license is signed. While composers, lyricists and others involved in musical creativity are entitled to compensation for their considerable contributions to society, adding more PROs does not create more music. As the Act struggles to stay abreast of changing technologies and industry dynamics, the role of the PRO will require continued scrutiny. ML

Notes

1. 35 U.S.C. § 101.
2. 17 U.S.C. § 102.
3. *Id.*
4. *Id.*
5. 17 U.S.C. § 106 (4) and (6).
6. 17 U.S.C. § 101.
7. 17 U.S.C. § 505.
8. 35 U.S.C. § 154 (a)(2).
9. https://www.copyright.gov/circs/circ01.pdf
10. 17 U.S.C. § 302.
11. https://web.law.duke.edu/cspd/publicdomainday/2021/
12. *Id.*
13. *Id.*
14. 17 U.S.C. §§ 106, 114-115.
15. Stasha Loeza, Out of Tune: How Public Performance Rights Are Failing to Hit the Right Notes, 31 Berkeley Tech. L.J. 725 (2016).
16. Mem. of the United States in Support of the Joint Mot. to Enter Second Amended Final Judgment at 14-15, United States v. ASCAP, No. 41-1395 (S.D.N.Y. Sep. 4, 2000), available at https://www.justice.gov/atr/case-document/file/485996/download.
17. United States v. ASCAP, 41 Civ. 1395 (S.D.N.Y. 1941); *see* https://www.justice.gov/atr/case-document/second-amended-final-judgment.
18. United States v. BMI, 64 Civ. 3787 (S.D.N.Y. 1964); *see* https://www.justice.gov/atr/case-document/bmi-final-judgment.
19. Radio Music License Committee Inc. v. Global Music Rights LLC, 19-cv-03957 (C.D. Cal.).
20. 17 U.S.C. § 501 (a).
21. 17 U.S.C. § 110 (4).
22. Antitrust Consent Decree Review Public Comments - ASCAP and BMI 2019 (justice.gov), available at https://www.justice.gov/atr/antitrust-consent-decree-review-public-comments-ascap-and-bmi-2019
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25. https://www.bmi.com/forms/licensing/gl/lge.pdf
26. *Id.*

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