

Information Center Fact Sheet Music Licensing for Museums¹

Museums frequently use music in various aspects of their operations, from live concerts and performances for special events to recorded music in galleries, shops, restaurants, or elevators. In many cases, such public use of music requires the permission of the copyright owner of the musical composition. To compensate the copyright owner and reduce the risks of legal liability, museums should determine whether it is necessary to obtain a license for their musical performances.²

What is a license?

A “license” is a legal agreement where a party owning certain legal rights (the “licensor”) grants permission to a “licensee” (in this case, the museum) to exercise some of those legal rights. A license agreement will typically set forth terms and conditions that the licensee must obey.

Why might we need a license?

Under United States copyright law, the copyright owner of a musical work has the exclusive right to publicly perform that work. See 17 U.S.C. § 106(5). Therefore, permission from the copyright owner is generally required for most public performances (live, broadcasted, or recorded) of a musical work, to avoid potential claims of copyright infringement.

It is important to note that the copyright in a “musical work” – the creation of a songwriter, composer, or music publisher – is distinct and separate from the copyright in a “sound recording” – a particular recorded performance of a musical work. For example, the composer of a piece of classical music owns the copyright in the musical work (the composition), but the orchestra and recording studio own the copyright in a sound recording of their performance of that musical work. This distinction is important because a license is usually required from the composer to publicly perform the musical work, but a license is generally *not* required from the copyright owners of the sound recording (the orchestra and recording studio).³

What should we consider before obtaining a license?

Most songwriters, composers, music publishers, and other music copyright owners are represented by one of three performance rights licensing organizations: ASCAP, BMI, and SESAC. These organizations’ repertoires include millions of songs, but each organization will only issue licenses covering songs in their own repertoires. If a museum performs music only

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² This information should not be construed as legal advice. Museums are encouraged to seek legal counsel when applying copyright law to their particular circumstances.

³ There are special considerations – outside of the scope of this Fact Sheet – that apply if a sound recording *reproduced or distributed* by the museum, or is *performed by means of a digital audio transmission*. See 17 U.S.C. § 106(1)-(3), 106(6), 114.

from the repertoires of two of these organizations, then it would be unnecessary to seek a license from the third. On the other hand, it may be difficult and burdensome to determine in advance which organizations represent all of the music that the museum wishes to perform.

If a museum is unable to locate a specific title in the repertoires of these three big organizations, it should not assume that the work is in the public domain. Tracking down the copyright owner of a song not represented by one of the three big performing rights organizations can be more challenging, similar to the challenging task of locating a copyright owner for an orphaned book, painting, or any other creative work held by a museum. How to conduct such a search is outside of the scope of this fact sheet, and museums are encouraged to consult with their legal counsel.

Before seeking a license, a museum should carefully consider all of the ways that it uses music. Common uses include background music (e.g., playing the radio or CDs) in museum restaurants, shops, restrooms, or elevators; music or multimedia presentations in exhibitions, gallery spaces, or audio tours; and concerts and other live performances or special events. Each of the big three performing rights organizations will issue a variety of licenses or combinations of licenses, including one-off licenses for special events or concerts, annual licenses directed to a specific use such as a restaurant, or a broader blanket license designed to cover a museum's entire facility. It may be necessary to balance cost and convenience when selecting between a series of one-off licenses to cover the sporadic use of music versus a single blanket license covering all uses of music.

A museum must also pay special attention to the scope of each license offered by the performing rights organization. For example, licenses are typically limited to the physical facilities identified in the license, so a museum should take care to identify all of its facilities. Moreover, most performance licenses specifically exclude jukeboxes and the right to perform musical works in connection with dramatical works, which may exclude some of the museum's public performances of plays, multimedia presentations, or other dramatical-musical works.

Museums which allow outside groups to use or rent their facility or grounds should, as part of their written agreement, require the group to warrant that it will secure all necessary performance licenses and indemnify the museum for any failure on their part to do so. This will simplify matters for the museum, as long as the outside group obtains the necessary licenses and/or has the financial resources or insurance to indemnify the museum for its failure to obtain licenses.

Is it possible to legally perform music without a license?

It can be a difficult task to perform music without implicating a copyright owner's public performance rights. However, there are several situations where it may be unnecessary for a museum to obtain a license to perform music:

1. An existing license: The museum should investigate whether it or a related parent organization (e.g., university, city government) has already obtained license(s) covering its use of music. Moreover, a commercial service for "piped in" music, an artist who developed a multimedia work, or an event organizer for a live performance may already have a license to perform its music at the museum (or the museum may require them to do so). Conversely, a museum considering a blanket license covering all aspects of its

operations should determine whether it is possible to terminate redundant licenses directed at particular aspects of the museum's operation (e.g., a restaurant).

2. Exceptions under copyright law: A museum should consult with its legal counsel to determine whether its music performances are covered by one of the following statutory exceptions to the copyright owner's public performance right:
 - a. Nonprofit performances: This exception allows direct public performances (live, recorded, or broadcasted) without any purpose of direct or indirect commercial advantage and without any payment of any fee or compensation to any event performers, promoters, or organizers if either (1) there is no direct or indirect admission charge or (2) all proceeds are used exclusively for the museum's educational or charitable purposes and the copyright holder has not served a valid notice that it objects to the performance. See 17 U.S.C. § 110(4).
 - b. Fair Use: This exception may allow a museum to perform copyrighted musical works without permission for certain purposes. The law does not provide any bright-line rule about what constitutes a fair use, but requires consideration of four factors: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. See 17 U.S.C. § 107.
 - c. Radio broadcasts: This exception allows a museum to perform a radio broadcast or other transmission on a single receiving apparatus of a kind commonly found in a private home. Alternatively, the exception permits the use of a more sophisticated sound system under certain specific conditions involving the size of the facility and the number of speakers. See 17 U.S.C. § 110(5).
 - d. Teaching activities: One exception authorizes the performance of works in the course certain face-to-face classroom teaching activities of a nonprofit educational institution. See 17 U.S.C. § 110(1). Another more burdensome exception authorizes the performance of works in the course of transmitted educational courses. See 17 U.S.C. § 110(2).
 - e. Others: The Copyright Act contains other exceptions that relate to the performance of works during religious services, 17 U.S.C. § 110(3); at annual agricultural or horticultural fairs or exhibitions, 17 U.S.C. § 110(6); in public shops where the musical work is for sale, 17 U.S.C. § 110(7); or at events promoted by a nonprofit veterans' or fraternal organization, 17 U.S.C. § 110(10).
3. Public domain music: Much music is in the public domain in the United States due to expiration of the copyright term, or failure of the copyright owner to observe all of the formalities required by copyright law. Such public domain works are not protected by copyright law and can generally be used by anyone, without a license. Several online

sources, such as *PD Info*, list a large number of musical works in the public domain. *PD Info* notes that most music and lyrics published in 1922 or earlier are in the public domain in the United States. Because there are many pitfalls in correctly identifying works in the public domain, museums are advised to discuss this issue with their copyright counsel before proceeding with the use of public domain music.⁴

Additional Resources

- U.S. Copyright Act, 17 U.S.C: <http://www.bitlaw.com/source/17usc/>
- Better Business Bureau, “Music in the Marketplace,” <http://www.bbb.org/alerts/article.asp?ID=451>
- *Kohn On Music Licensing*, Al Kohn and Bob Kohn (Aspen Publishers, 2002)
- ASCAP: <http://www.ascap.com>
- BMI: <http://www.bmi.com>
- SESAC: <http://www.sesac.com>
- PD Info: <http://www.pdinfo.com/>

⁴ For example, a new arrangement of a musical work in the public domain may be protected by copyright.