

## Public music performance and copyright infringement | IP Frontiers

TRENT L. RECTOR | [SPECIAL TO THE DAILY RECORD](#)

The Copyright Act provides that, in the case of musical works, the copyright owner has the exclusive right to perform the work Publicly. A work is performed Publicly if it is performed at a place open to the



Trent L. Rector

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. The matter

becomes more complex in establishments that are not open to the Public but allow for more people than a normal circle of a family and its acquaintances to gather. For example, music performed in a club where only members and invited guests are allowed may not qualify as a Public performance but a club that does not restrict attendance could be deemed a Public performance. Businesses that entertain their guests by Publicly performing copyrighted musical works are required to have a license or permission from the copyright owner.

In the U.S. several organizations own most copyrighted music or

the rights to perform such music. Broadcast Music Inc. (BMI) is a corporation that, according to their website, has been granted the right to 18.7 million copyrighted musical compositions. The American Society of Composers, Authors and Publishers (ASCAP) states on their website that they license the performance rights for the music of its members which includes 960,000 songwriters, composers and music Publishers. Both organizations offer licenses to businesses that wish to use copyrighted music at their establishment. When a business performs or causes to perform musical compositions without permission from the copyright owner or a license, they do so in violation of the Copyright Act.

In a recent case, filed in the United States District Court of Florida in 2023, a Business (*Meadows Village Pub*) was sued for copyright infringement for Publicly performing thirteen popular songs in violation of the Copyright Act (See *Broadcast Music, Inc. v. Taste and Spirit, LLC*, (Case No. 8:22-cv-1790-VMC-SPF)). The facts of the case are as follows. BMI learned sometime in 2018 that the *Pub* was offering

musical entertainment without a license from BMI and without permission from the copyright owners whose music was being Publicly performed. BMI then sent cease and desist letters and called the *Pub* on numerous occasions to discuss the purchase of a license but was unsuccessful in selling a license to the *Pub*. BMI sent an investigator to the *Pub* who made an audio recording and prepared a written report regarding the Public performance of copyrighted musical compositions at the *Pub*. The investigator documented thirteen popular songs that were Publicly performed by the *Pub* where BMI was the owner of the copyright. BMI sued the *Pub* for copyright infringement of those thirteen songs.

To establish copyright infringement alleging the unauthorized Public performance of a copyrighted musical composition, a plaintiff must demonstrate five elements: (1) the originality and authorship of the compositions involved; (2) compliance with all formalities required to secure a copyright (3) that plaintiffs are the proprietors of the copyrights of the compositions involved in the action; (4) that the compositions

were performed Publicly by the defendant; and (5) that the defendant did not receive permission from any of the plaintiffs or their representatives for such performance.

BMI alleged in the complaint each of the five elements of infringement. BMI alleged that each of the musical compositions listed in evidence by the investigator was created by the respectively named writer or writers. These allegations establish the first element of copyright infringement. BMI alleged their compliance with the formalities of the Copyright Act and provided the numbers of the copyrights they received to demonstrate the second element. BMI established the third element by alleging that they were, and still are, the owners of the copyrights for the musical compositions performed at the *Pub*. BMI established the fourth element by alleging that *Pub* Publicly performed the musical compositions or caused the musical compositions to be Publicly performed at the *Pub*. Finally, BMI established the fifth element by alleging that *Pub* Publicly performed the musical compositions, or caused them to be Publicly performed, without a license or permission to do so.

Both the *Pub* and the corporate officer of the *Pub*, in this case the owner, were sued for copyright infringement. In addition to the five elements cited above to establish copyright infringement against the *Pub*, to succeed against the corporate officer BMI had to establish vicarious liability for copyright in-

fringement, specifically that the corporate officer had the right to supervise the activities of the *Pub* and the responsibility to operate and manage the *Pub* as well as having a direct financial interest in the *Pub*. These facts were established and the *Pub* as well as the corporate officer were liable for copyright infringement. It is important to note that vicarious copyright liability can be established against a business owner or corporate officer even when the business owner or corporate officer are not present at the time of infringing activity or even if they had no knowledge of it.

Since the *Pub* and corporate officer did not respond to the complaint and failed to defend against it, the allegations in the complaint were deemed admitted and a default judgement was entered against the *Pub* and corporate officer establishing liability. The Copyright Act permits a plaintiff to elect either actual or statutory damages and statutory awards are often elected as damages are not required to be shown and, in this case, BMI sought statutory damages. In awarding statutory damages, the Court may consider several factors, including the infringers' blameworthiness (willful, knowing, or innocent); the expenses saved and the profits reaped by the defendants in connection with the infringement; the revenues lost by the plaintiffs due to the defendants' conduct; and the deterrent value of the damages imposed. In awarding statutory damages, the Court's objective is not just compensating

plaintiffs for their injury, but also to discourage wrongful conduct. Many courts award statutory damages that exceed the unpaid license fees to give defendants an incentive to obey copyright laws and pay for licenses. In some cases, courts have considered an amount three times the licensing fee to be appropriate for discouraging wrongful conduct.

In this case the Court found BMI's request for \$21,412 in statutory damages appropriate. This amounts to \$1,647 per infringed work. The damages award accounts for the fact that the *Pub* knowingly infringed and also accounts for the expenses saved by the *Pub* in failing to pay for BMI's licensing fee. The Court stated, "In light of the continued unauthorized performance of the copyrighted musical compositions despite the repeated receipt of cease-and-desist letters and telephone conversations with BMI licensing personnel, a penalty that exceeds the amount of the licensing fees avoided by Defendants is appropriate to deter future infringing acts." In a copyright action a court may award reasonable attorney's fees to the prevailing party and attorney's fees were awarded to BMI in the amount of \$3,000.00 as well as \$625.00 in costs against the *Pub* and corporate officer, jointly and severally.

*Trent L. Rector is an associate attorney in the Albany Office of Heslin Rothenberg Farley & Mesiti P.C. His experience includes patent application and prosecution, with particular specialization in biotechnology. He can be reached at (518) 452-5600 or Trent.Rector@hrfmlaw.com*