

The \$ound of Music: **Municipalities and the PROs**

Presentation to:

Texas Municipal League / June 17, 2016

Erich Eiselt, IMLA Assistant General Counsel

The \$ound of Music: **Presentation Overview**

- 1. Music and the Copyright Act**
- 2. Monetizing the Song**
- 3. The Performing Rights Organizations**
- 4. Solutions?**

The Sound of Music: **Music and the Copyright Act**

The United States Copyright Act (17 U.S.C §100 et seq)

- Origin
- What works are covered?
- What rights are protected?
- For how long?
- What are the penalties?
- Are there any exceptions?

The Sound of Music: **Music and the Copyright Act**

Origin (Article 1, Section 8, United States Constitution)

Copyright Clause:

Congress empowered “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.”

The Sound of Music: **Music and The Copyright Act**

What Works are Covered? (17 U.S.C. §102)

original works of authorship **fixed** in any **tangible medium** of expression*

- literary
- **musical**
- dramatic
- choreographic
- pictorial, graphic, sculptural, architectural
- motion pictures, audiovisual
- **sound recordings**
- compilations and derivative works (17 U.S.C. § 103)

*registration not needed beginning 1989

The Sound of Music: **Music and the Copyright Act**

What Rights are Protected? (17 U.S.C. §106)

the owner of the copyright . . . has **exclusive rights** to do and authorize others to:

- **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
- **perform** the copyrighted work **publicly** (in the case of sound recordings, perform by **digital audio transmission**)

The Sound of Music: **Music and the Copyright Act**

What Is “Public Performance?” (17 U.S.C. §102)

To **perform** or display a work “**publicly**” 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.

The Sound of Music: **Music and the Copyright Act**

What Is “Public Performance?” (ASCAP)

“A public performance is one that occurs either in a **public place** or any **place where people gather**

A public performance is also one that is **transmitted to the public**; for example, **radio or television** broadcasts, **music-on-hold**, **cable** television, and by the **internet**.”

The Sound of Music: **Music and the Copyright Act**

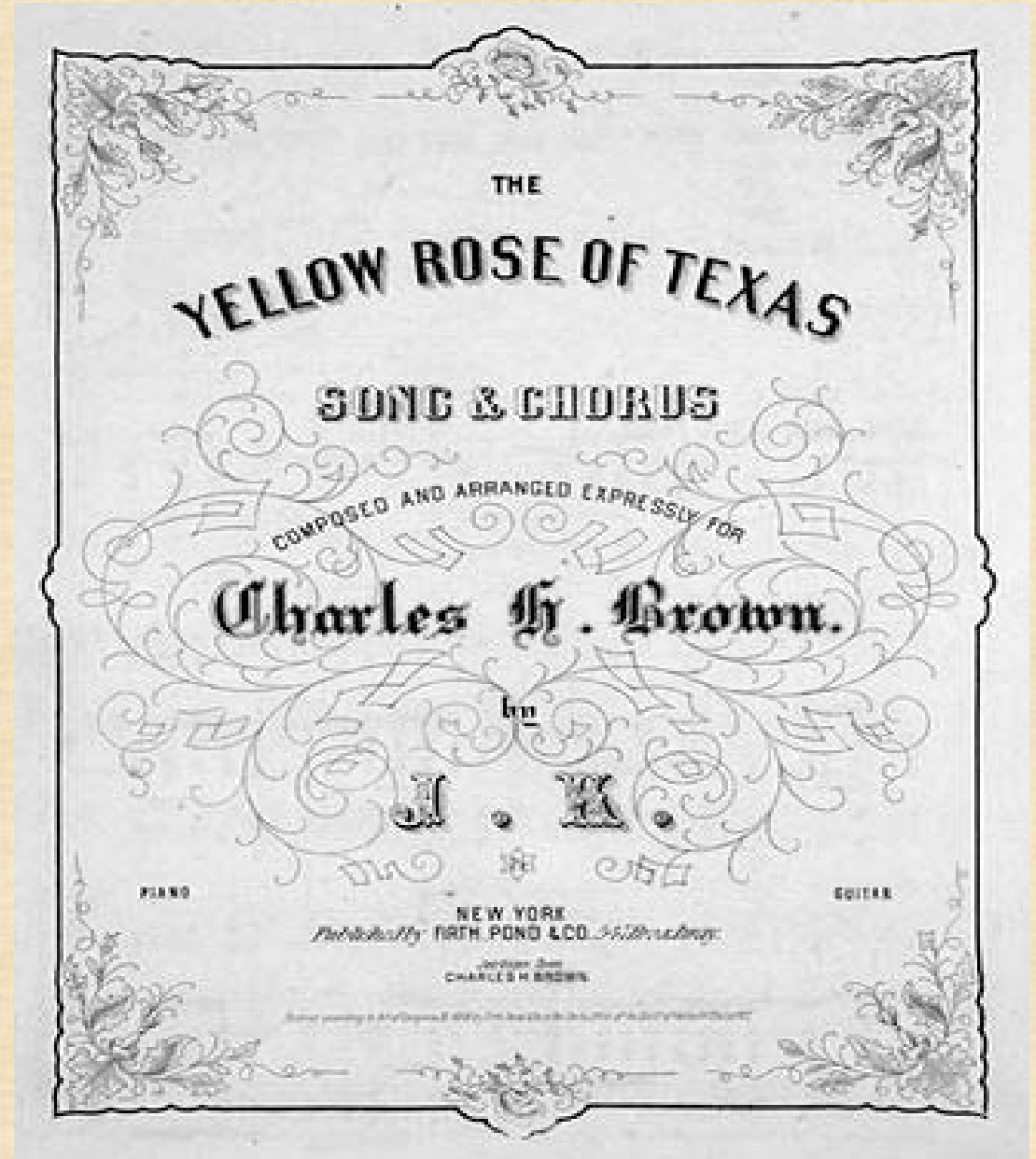
How long is musical composition protected?

- Published* **before 1923—no protection**; in public domain (includes many jazz standards, most patriotic US songs, many Christian songs)
- Published **1923-1977—publication plus 95 years**
- Published **1978-on—author's life plus 70 years**

(*published=public distribution of copies)

The \$ound of Music: **Music and the Copyright Act**

Works published
**before 1923-no
protection—in public
domain**



The \$ound of Music: Music and the Copyright Act

Works Published **1924-1977: publication + 95 years**

- Hendrix / *All Along the Watchtower*
published 1968 + 95 years = 2063



- Lennon / *Imagine*
published 1971 + 95 years = 2066



*Don't forget *Happy Birthday*: 1935 + 95 years = 2030

The \$ound of Music: **Music and the Copyright Act**

Published 1978-later: publication plus 70 years

Josh Kear (Nashville-based songwriter):

<i>“Before He Cheats”</i>	– Carrie Underwood – 2007	= 2077
<i>“Need You Now”</i>	– Lady Antebellum – 2010	= 2080
<i>“Highway Don’t Care”</i>	– Tim McGraw – 2013	= 2083
<i>“Drunk on a Plane”</i>	– Dierks Bentley – 2014	= 2084
<i>“Drinking Class”</i>	– Lee Brice – 2014	= 2084

The Sound of Music: **Music and the Copyright Act**

How long is musical *recording* protected?

Recorded **before 1972: no federal protection-state law only** (all will become public domain in 2067)

- (Why-there were no musical recordings when Copyright Act of 1909 was passed; protected in **Sound Recording Act of 1971**).
- So **record labels have sued** for infringement of pre-1972 recordings under various state laws—for example, **suit against SiriusXM under California copyright law**.

Recorded **1972-on**: generally, publication + 95 years

The \$ound of Music: **Music and the Copyright Act**

How long is musical *recording* protected?

- Side note: The Copyright Act/PROs—do **not** protect the recording (singers and record labels) as played on terrestrial radio (AM/FM), which pays performance royalties to writer/publisher—but **NOTHING** to the label/singer.
- Label/singer looks to **mechanical royalties** from copies of the song, or to performance royalties for the digital/web based playing of their songs, under the **Digital Performance Right in Sound Recordings Act of 1995**.

The Sound of Music: **Music and the Copyright Act**

What are the penalties? (17 U.S.C. §504)

- From **\$750 to \$30,000** per infringement
- Willful violation - may be increased to **\$150,000**
- Innocent violation – may be reduced to \$200
- Court may award **costs and attorney fees** (17 U.S.C. §505)

The Sound of Music: **Music and the Copyright Act**

Who is liable?

For public performance, **both the performer and the venue may be liable.** (Venues can be directly liable, contributorily liable or vicariously liable).

The Sound of Music: **Music and the Copyright Act**

Venue as infringer:

- **La Huerta Restaurant-Conway, AR (2012):**
12 ASCAP Songs – judgment-\$30,000 + \$7,000 legal
- **Foster's American Grille-Raleigh NC (2011):**
4 BMI Songs – judgment-\$30,450 + \$10,700 legal
- **Fody's Great American Tavern-Nashua, NH (2008):**
3 ASCAP Songs – settlement - \$4,000

The \$ound of Music: **Music and the Copyright Act**

Venue as infringer: ASCAP suits filed April 12, 2016:

- FuZion (Huntington Beach, CA)
- Studio 8 (San Jose, CA)
- Black Bear Saloon (Hartford, CT)
- Sportsline Bar & Grill (Lawrenceville, GA)
- Perception Lounge (Chicago, IL)
- Stonewood Tavern (Peabody, MA)
- The Tangiers (Minneapolis, MN)
- Arden Kitchen & Bar (Port Jefferson, NY)
- The Barbary (Philadelphia, PA)
- The Ranch (Austin, TX)

The Sound of Music: **Music and the Copyright Act**

Governments are included (17 U.S.C. §501)

“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**.”

The Sound of Music: **Music and the Copyright Act**

What are the exceptions?

- Fair Use
- Small Business
- Educational
- Religious
- Agricultural
- Charitable

The Sound of Music: **Music and the Copyright Act**

Fair Use Exception (17 U.S.C. §107)

[C]riticism, comment, news reporting, teaching . . . scholarship, or research, is **not** an infringement. . . .

Factors to be considered include-

- **purpose and character** of the use (is it commercial?)
- **nature** of the copyrighted work (creative or factual?)
- **amount and substantiality** of the portion used
- **effect upon potential market** for/value of copyrighted work.

The Sound of Music: **Music and the Copyright Act**

Small Business Exemption-(17 U.S.C. § 110 (5))

(Fairness in Music Licensing Act)

“**single receiving apparatus** . . . commonly used in private homes”
and signal from FCC-licensed “**radio or television broadcast station**”

- food or drink establishment (no live performance or music charge):
 - under 3,750 sq. ft.-no limit on speakers or television monitors
 - 3,750+ sq. ft.-up to 6 speakers, up to 4 television monitors
- other establishments:
 - under 2,000 sq. ft.-no limit on speakers or television monitors
 - 2,000+ sq. ft.-up to 6 speakers, up to 4 television monitors

The Sound of Music: **Music and the Copyright Act**

Education Exemption (17 U.S.C. § 110 (1))

- performance . . . by **instructors or pupils** in the course of **face-to-face** teaching activities of a **nonprofit** educational institution, in a **classroom** or similar place devoted to instruction

Religious Exemption (17 U.S.C. § 110 (3))

- performance . . . in the course of **services** at a **place of worship** or other religious assembly

The Sound of Music: **Music and the Copyright Act**

Agricultural Exemption (17 U.S.C. § 110 (6))

- performance . . . by a **governmental body or a nonprofit agricultural or horticultural organization**, in the course of an annual agricultural or horticultural fair or exhibition . . .
- exemption . . . shall **extend to any liability for copyright infringement that would otherwise be imposed on such body or organization, under doctrines of vicarious liability or related infringement**, for a performance by a concessionaire, business establishment, or other person at such fair or exhibition, but shall not excuse any such person from liability for the performance;

The Sound of Music: **Music and the Copyright Act**

Charitable Use Exemption (17 U.S.C. § 110 (4))

performance . . . otherwise than in a transmission to the public, without . . . commercial advantage and without payment of any . . . compensation to any of its **performers, promoters, or organizers**, if—

(A) **no** direct or indirect **admission charge**; or

(B) **proceeds**, after deducting costs of production, are **used exclusively for educational, religious, or charitable purposes** and not for private financial gain (except where copyright owner has served written notice of objection)

The Sound of Music: **Music and the Copyright Act**

Charitable Use Exception, tested?

1991-NRPA wrote to Senate Committee on Patents, Copyrights and Trademarks, seeking clarification:

- Copyright Act ended blanket non-profit exemption—but **clearly intended to continue exemption** to truly charitable activities
- Examples: Skating parties, dances, aerobics classes, etc. in public parks
- “Distortions and abuses” / contracts of adhesion by licensing entities
- No federal court has construed § 110 (4)—which is “conspicuously absent” from licensing entities’ demand notices

The Sound of Music: **Music and the Copyright Act**

Charitable Use Exemption, tested?

Response from General Counsel of U.S. Copyright Office:

- **“Under appropriate circumstances, the public parks would have no copyright liability under existing law.”**
- “Under section 110(4) of the current Act, ‘nonprofit’ performances of nondramatic music are exempt if the performers, promoters or organizers of the event are not paid and if there is no direct or indirect admission charge. (Even if admission is charged, the performance can be exempt if the proceeds are used exclusively for charitable purposes.)”

The Sound of Music: **Music and the Copyright Act**

Charitable Use Exemption, tested?

General Counsel's Letter does not have binding effect of law,
BUT:

- Could demonstrate **good faith**
- Could be cited as **defense** in enforcement action
- Could **reduce penalties** (\$200 per violation for innocent infringement vs. \$150,000 maximum penalty for willful violation)
- Could form basis for **legislative relief** if courts find infringement

The \$ound of Music: **Monetizing the Composition**

Evolution of a Song (Legally Speaking)

- Lyricist/Composer writes original song—owns copyright
- Lyricist/Composer licenses Publisher—right to **promote**
- Publisher licenses Record Label—right to **record/make copies**
- Record Label licenses Performer—right to **perform**
- Publisher licenses Venues—right to **play/have performed**
- Publisher licenses Radio (AM/FM, Satellite, Web)—right to **play**
- Publisher licenses Film, TV, Advertisers—right to **synch to video**

The \$ound of Music: **Monetizing the Composition**

Evolution of a Song (Legally Speaking)

- Publisher licenses Performer, Venue, Radio—right to perform/play the composition:
 - **Performance License—perform live, play on radio, web**
- Publisher licenses Record Label—right to make copies:
 - **Mechanical License—make CD, Records, sheet music**
- Publisher licenses Film, TV, Advertisers—right to synch to video:
 - **Synch License—synchronize to images**

The \$ound of Music: Monetizing the Composition

License	"Performance"	"Synch"	"Mechanical"	"Digital Rights"
Rights granted	Play/perform composition: Live concerts AM/FM (Terrestrial) Sirius (Satellite) Public Spaces	Synchronize composition to images: TV Films Videos Commercials	Reproduce composition for third parties: CD's Records MP3's Ringtones	Play/perform recordings: Sirius (Satellite) Pandora/Apple (internet)
Parties protected	Composers-Writers Publishers (usually 50/50)	Composers-Writers Publishers	Composers-Writers Publishers (usually 50/50)	Labels (50%) Singers (45%) Back up (5%)
Licensing entities	ASCAP BMI SESAC	Direct from publisher	Harry Fox Agency	Sound Exchange
Rate	Negotiated (or blanket rate via PRO)-subject to Rate Court	Negotiated	9.1¢/copy or 1.75¢/ min. ringtones 24¢/copy	Negotiated (Pandora-1.85% of revenues)

The \$ound of Music: **The Performing Rights Organizations**

Who Enforces Music Copyrights?

For authors, composers, publishers—the
Performing Rights Organizations (PROs):

- **ASCAP** (American Society of Composers, Authors and Publishers)
- **BMI** (Broadcast Music, Inc.)
- **SESAC** (Society of European Stage Authors and Composers)
- 90 more around the world

The Sound of Music: **The Performing Rights Organizations**

ASCAP (American Society of Composers, Authors and Publishers)



- Formed 1914 to help individual composers get paid (for sheet music); owned by its members
- Instituted blanket licenses: covers multiple composers/writers
- In 2014, tracked 500B music performances, collected more than \$1B; paid \$883M to writers/publishers
- 9 million works/575,000 members (half of all licensed works)
- Under Consent Decree-pricing subject to Rate Court

The \$ound of Music: **The Performing Rights Organizations**

BMI (Broadcast Music, Inc.)



- Formed in 1939, owned by broadcasters
- Provided blanket licenses to radio stations, added composers ignored by ASCAP
- Collected more than \$1B in 2013; distributed \$877M
- Includes \$100M from Spotify, Netflix, Apple, YouTube, Pandora
- Uses same blanket license/blanket fee structure for municipalities as ASCAP (“IMLA Form”) – **10% discount to IMLA members**
- 10.5 million works/700,000 songwriters/composers (about half)
- Under Consent Decree - pricing subject to Rate Court

The \$ound of Music: **The Performing Rights Organizations**

SESAC (Society of European Stage Authors and Composers)



- Formed 1930 to serve European writers in US, now US-focused
- Membership by invitation only
- Uses own form of blanket license
- For-profit (retains percentage of royalties collected)
- 400,000 works, 30,000 writers (small minority of all licensed compositions)
- Not subject to Consent Decree; no Rate Court oversight

The \$ound of Music: **The Performing Rights Organizations**

The PROs Under Scrutiny:

ASCAP Exerted Unfair Leverage

- only certain writers/composers could “qualify” to join ASCAP—others were left out of blanket arrangement
- Radio stations and venues had to purchase blanket licenses—or had no music to play

The Sound of Music: **The Performing Rights Organizations**

The PROs Under Scrutiny:

1941 ASCAP **Consent Decree**—subsequently signed by BMI:

- Cannot require exclusivity by composers
- Cannot require music users to purchase blanket licenses
- Must apportion royalties fairly among members
- Cannot discriminate between users who are “similarly situated”
- Government oversees relations between music users and composers/publishers (SDNY is the “Rate Court”)

The \$ound of Music: **The Performing Rights Organizations**

More PRO Scrutiny:

ASCAP Cautions the **Girl Scouts: Don't Sing '**God Bless America**'**

- LAFAYETTE, Calif. -- Something is missing at Diablo Day Camp this year. At the 3 p.m. sing-along in a wooded canyon near Oakland, 214 Girl Scouts are learning the summer dance craze, the Macarena . . . In silence.
- [ASCAP] has informed camps nationwide that they must pay license fees to use any of the four million copyrighted songs written or published by ASCAP's 68,000 members... The demand covers not only recorded music but also songs around the campfire.
- **"They buy paper, twine and glue for their crafts -- they can pay for the music, too," says John Lo Frumento, ASCAP's chief operating officer. **If offenders keep singing without paying, he says, "we will sue them if necessary."** (Wall Street Journal, August 15, 1996)**

The Sound of Music: The Performing Rights Organizations

ASCAP / BMI Music License for Local Governmental Entities:

Right to play/have performed all ASCAP (or BMI) music:

- **Where:** Any governmental property, including buildings, hospitals, airports, zoos, museums, athletic facilities and recreational facilities including community centers, parks, swimming pools, skating rinks.
- **Type of event:** Aerobics and exercise classes, athletic events, dances, other social events, concerts, festivals, arts and crafts fairs, parades.
- **But not:** Conventions/trade shows/conferences, unless sponsored by government and presented entirely on government premises and not open to general public; universities or colleges; professional sports events; permanent theme park or amusement park operated by the government, any symphony or community orchestra, or via a jukebox.

The Sound of Music: The Performing Rights Organizations

ASCAP / BMI Music License for Local Governmental Entities:

Fees:

Annual Base Fee:

- depends on municipality's **population**; and

Special Event Fee:

- **“Special event”** is musical event, concert, show, sporting event, festival, etc. of limited duration for which **“gross revenue” exceeds \$25,000.**
- **“Gross revenue”** is all money received by licensee or on licensee's behalf from **sale of tickets**. If no monies from sale of tickets, gross revenue is **contributions from sponsors or other payments** received by licensee.
- Fee is **1% of “Gross Revenue”**

The \$ound of Music: The Performing Rights Organizations

SESAC Performance License for Municipalities:

Right to play/have performed all SESAC music:

- **Where:** Locations “owned, operated or leased” by the municipality and used for governmental purposes; locations where events are held “under municipality’s sole control and attended by employees, their families, social acquaintances, citizens, and other members of the public...”
- **But not:** Jukeboxes, concerts, professional/semiprofessional sporting events, colleges and universities
- **Fees:** Annual Base Fee only—but can be increased by SESAC at any time, on notice

The \$ound of Music: **The Performing Rights Organizations**

Comparison of Annual Blanket License Fees Among PROs:

	ASCAP	BMI	SESAC
Population	9 million songs	10.5 million songs	400,000 songs
50,000	\$ 336	\$ 336	\$ 755
100,000	\$ 805	\$ 805	\$ 1,230
250,000	\$ 2,145	\$ 2,145	\$ 2,451
500,000	\$ 4,158	\$ 4,159	\$ 3,205
1,000,000	\$ 7,595	\$ 7,596	\$ 5,946
2,000,000	\$12,595	\$12,596	\$ 9,726
10,000,000	\$52,595	\$52,596	\$39,966
Annual increase?	CPI	CPI	Greater of CPI or 5%
Special Event Fee?	Yes	Yes	No
IMLA Discount?	No	Yes	No

The \$ound of Music: **Solutions**

What Can Municipalities Do?

- Do **not use/permit use of copyrighted works** at government locations/events-only public domain/original
- License music **directly from writers/publishers**
- Allow **only live performance** of copyrighted works at government location/events where **no performer or promoter is paid**; no transmission
- Only play compositions from **one PRO** (ASCAP, BMI or SESAC only) – **or only ASCAP and BMI**
- Other