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Duff on Hospitality Law

BMI Strikes Again, Brings Music Licensing Lawsuit Against Kirkland Restaurant

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Broadcast Music, Inc. (BMI) filed suit against the Lake Street Bar & Grill in Kirkland and its individual owners on October 20, 2010, alleging four counts of willful copyright infringement for "unauthorized public performance of musical compositions in BMI's repertoire." BMI asked the court for statutory damages—not BMI's proven lost revenue, but damages that the U.S. Copyright Act allows copyright owners to request if they don't want to bother with calculating actual damages. The court may order damages in any amount between $750 and $30,000. Even worse for Lake Street, if the allegation of willful infringement can be proved, the court may award BMI up to $150,000 under the same statute.

Remember, this is for only four separate instances of copyright infringement.

There isn't a lot of publicly available information about the suit, so we don't know exactly what happened. It could have been a live band doing covers, a CD or iPod playing in the background, hold music, Pandora—you get the picture. Almost every public establishment these days has music playing. Under copyright law, playing music in public = performing, which is the exclusive right of the copyright owner or its licensee. This means you—restaurant owner, hotelier, cruise operator—are performing copyrighted music and therefore, you—not your bands, DJs, jukebox lessors or phone companies—are the one who needs to pay for it.

Usually, you will be paying one of four big performing rights organizations (PROs): BMI, ASCAP, SESAC or the Jukebox License Office, a joint venture amongst the three. PROs are enormous middlemen who collect royalties on public performances of copyrighted songs on behalf of the artists, record labels, etc. Almost every business owner, especially in hospitality, owes them money, whether the owner knows it or not.

Certain PROs' collection methods are unusual. Our firm has received two calls in the last few months about music licensing—one involving BMI, one ASCAP—with remarkably similar facts: owner has no recent relationship with the PRO and suddenly receives a license application (a/k/a bill), that probably looked like this. We are asked: do I have to pay something? Generally, if you play music in your restaurant (in other words, 99.99% of the time), the answer is yes.

BMI may know that you play music in your establishment; then again, it may have simply researched bars and restaurants in your area and seen you pop up on Google a lot. Because BMI make cents on each dollar they collect, and because so much music is publicly played in the U.S., sending out license applications to likely-looking places without previous contact is an efficient way to conduct business. Chances are the recipient, in fact, does need a license (and owes back royalties too).

Consider Lake Street's potential exposure after being sued, and then consider the following. If you play any BMI tunes anywhere in your establishment, you must pay at least $331 a year. BMI calculates royalties based on maximum occupancy of the establishment, so the smaller your place, the lower your bill. A small bar (occupancy 250 people) playing BMI music on a free-play jukebox (pay-per-play jukeboxes are covered under separate licenses) or from a CD player during all business hours will be required to pay BMI $662.50 per year (at current rates). If you let people dance, that's $1087.50 per year.

It's not chump change, but paying when asked, or applying for the correct license before having to be asked, helps protect you from the possibility of having to pay $30,000, let alone $150,000, if BMI decides to sue.

Tags: ASCAP, BMI, copyright, entertainment, infringement, JLO, license, music, performance, rights, SESAC