



THE RIGHT OF PUBLIC PERFORMANCE UNDER THE COPYRIGHT LAW

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This document is a brief outline only and is current as of January 1, 2001. Copyright infringement is a serious matter. For legal advice as to your responsibilities under the copyright law, please contact your attorney.

This document may be used as a starting point for further research into how the act has been applied. It should assist you in understanding the copyright law as it pertains to public performances, and can help your attorney in researching how the act may apply to your specific situation.

This document was produced for general informational purposes only. The right of public performance in the United States has a rich history stretching over two centuries, and the current act, enacted in 1909, and the current act, enacted in 1976 became effective in 1978. The Copyright Office website, www.loc.gov/copyright, maintains an online copy of the complete statute.

THE RIGHT OF PUBLIC PERFORMANCE UNDER THE COPYRIGHT LAW



One of the rights the Copyright Law grants owners of copyrighted musical compositions is the exclusive right to perform those compositions publicly. 17 U.S.C. § 106(4). Under that act, to **perform** a copyright means "to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible." 17 U.S.C. § 101.

AMONG THE ACTIONS THAT HAVE BEEN FOUND TO BE **PERFORMANCES** ARE:

- A. Presentations by live musicians:
Herbert v. Shanley Co., 242 U.S. 591 (1917) (prior copyright statute).
- B. Playing tapes or records:
Cass County Music Co. v. C.H.L.R., Inc., 88 F.3d 635 (8th Cir. 1996).
- C. Playing jukeboxes:
Broadcast Music, Inc. v. Blueberry Hill Family Restaurants, Inc., 899 F. Supp. 474 (D. Nev. 1995).
- D. Providing music-on-hold systems:
Merrill v. Country Stores, Inc., 669 F. Supp. 1164 (D.N.H. 1987).
- E. Broadcasts of radio or television:
Quartet Music v. Kissimmee Broadcasting, Inc., 795 F. Supp. 1100 (M.D. Fla. 1992);
Coleman v. ESPN, Inc., 764 F. Supp. 290 (S.D.N.Y. 1991).
- F. Retransmissions of broadcasts of radio or television stations:
Cass County Music Co. v. Muedini, 55 F.3d 263 (7th Cir. 1995) (radio);
National Cable Television Ass'n, Inc. v. Broadcast Music Inc., 772 F. Supp. 614 (D. D.C. 1991) (television);
Home Box Office, Inc. v. Corinth Motel, Inc., 647 F. Supp. 1186 (N.D. Miss. 1986) (cable network programs).



A **public performance** occurs when there is a performance "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 when one "transmit[s] or otherwise communicate[s] a performance" to such a place. 17 U.S.C. § 101.

AMONG THE PLACES WHERE COURTS HAVE FOUND THAT **PUBLIC PERFORMANCES** HAVE OCCURRED ARE:

- A. Restaurants, Bars, and Nightclubs:
Broadcast Music, Inc. v. R Bar of Manhattan, Inc., 919 F. Supp. 656 (S.D.N.Y. 1996);
Morley Music Co. v. Cafe Continental, Inc., 777 F. Supp. 1579 (S.D. Fla. 1991).

B. Hotels:

Buck v. Jewell-LaSalle Realty Co., 283 U.S. 191 (1931) (prior copyright statute);
Morley Music Co. v. Dick Stacey's Plaza Motel, Inc., 725 F.2d 1 (1st Cir. 1983);
On Command Video Corp. v. Columbia Pictures Indus., 777 F. Supp. 787 (N.D. Cal. 1991) (public performance of motion pictures via in-room movie system).

C. Health Clubs and Fitness Centers:

Chi-Boy Music v. Charlie Club, Inc., 930 F.2d 1224 (7th Cir. 1991).

D. Retail Facilities:

Broadcast Music, Inc. v. Jeep Sales & Service Co., 747 F. Supp. 1190 (E.D. Va. 1990);
Rodgers v. Eighty Four Lumber Co., 617 F. Supp. 1021 (W.D. Pa. 1985).

E. Skating Centers:

MCA, Inc. v. Parks, 796 F.2d 200 (6th Cir. 1986).

F. Bowling Centers:

Broadcast Music, Inc. v. Niro's Palace, Inc., 619 F. Supp. 958 (N.D. Ill. 1985).

G. Private Clubs:

Bourne Co. v. Hunter Country Club Inc., 772 F. Supp. 1044 (N.D. Ill. 1990), *aff'd*, 990 F.2d 934 (7th Cir.), *cert. denied*, 510 U.S. 916 (1993);
Fermata Int'l Melodies Inc. v. Champions Golf Club Inc., 712 F. Supp. 1257 (S.D. Tex. 1989), *aff'd mem.*, 915 F.2d 1567 (5th Cir. 1990);
Van Halen Music v. Palmer, 626 F. Supp. 1163 (W.D. Ark. 1986) (facility licensed as private club under state law);
Hinton v. Mainlands of Tarmac, 611 F. Supp. 494 (S.D. Fla. 1985) (clubhouse of condominium).



Copyright infringement is a **strict liability tort**. Intent is not relevant in assessing liability. Pinkham v. Sara Lee Corp., 983 F.2d 824 (8th Cir. 1992) (copyright infringement of book). Anyone who violates the exclusive right of public performance is an infringer of the copyright. 17 U.S.C. § 501(a).

LIABILITY FOR COPYRIGHT INFRINGEMENT HAS BEEN FOUND WHERE:

A. The proprietor did not pay the performers or profit from the performance:

Major Bob Music v. Stubbs, 851 F. Supp. 475 (S.D. Ga. 1994) (liability found where owner did not directly profit and where band were independent contractors playing for their own enjoyment);
Cass County Music Co. v. Vineyard Country Golf Corp., 605 F. Supp. 1536 (D. Mass. 1985) (liability found where musician was not employed by or paid by owner of establishment).

B. The performance occurred despite proprietor's instructions or notice not to do so:

Realsongs v. Gulf Broadcasting Corp., 824 F. Supp. 89 (M.D. La. 1993) (posting of signs prohibiting playing certain songs);

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continued

Swallow Turn Music v. Wilson, 831 F. Supp. 575 (E.D. Tex. 1993) (band agreed by contract not to play certain songs);
Criterion Music Corp. v. Biggy's, Inc., 701 F. Supp. 802 (D. Kan. 1988) (band asked to use their own or approved material);
Cass County Music Co. v. Kobasic, 635 F. Supp. 7 (W.D. Mich. 1984) (piano player instructed not to play certain songs).

C. The proprietor did not have specific knowledge of which songs were performed:

Southern Nights Music Co. v. Moses, 669 F. Supp. 305 (C.D. Cal. 1987);
Chess Music, Inc. v. Sipe, 442 F. Supp. 1184 (D. Minn. 1977) (prior copyright statute).

D. A license for the performance was not secured because of alleged actions of licensing organization:

Pedrosillo Music Inc. v. Radio Musical, Inc., 815 F. Supp. 511 (D.P.R. 1993) (failure of society to provide list of represented songs);
Collins Court Music, Inc. v. Pulley, 704 F. Supp. 963 (W.D. Mo. 1988) (society conditioned issuance of license upon payment of fees owed for prior license periods);
Forevendevor Music Inc. v. S.M.B. Inc., 701 F. Supp. 791 (W.D. Wash. 1988) (society did not explain the source of its authority to license songs);
Hulex Music v. Santy, 698 F. Supp. 1024 (D.N.H. 1988) (alleged coercive conduct by society);
Hideout Records & Distrib. v. El Jay Dee, Inc., 601 F. Supp. 1048 (D. Del. 1984) (license not secured based on attorney's mistaken advice that society was violating antitrust laws).

E. A license for the performance was not secured because the proprietor believed the license that was offered was unattractive or uneconomical:

Sailor Music v. IML Corp., 867 F. Supp. 565 (E.D. Mich. 1994) (establishment's attempt to alter fee structure of license application was rejected by the society);
Van Halen Music v. Foos, 728 F. Supp. 1495 (D. Mont. 1989) (proprietor did not wish to sign license agreement);
Sailor Music v. Mai Kai of Concord, Inc., 640 F. Supp. 629 (D.N.H. 1986) (license not secured because owner felt fee too high);
George Simon Inc. v. Spatz, 492 F. Supp. 836 (W.D. Wis. 1980) (license not secured because owner had philosophical opposition to the policies of the copyright law).

F. The performance fell outside the exemptions provided in 17 U.S.C. §110 or §107:

Blue Seas Music Inc. v. Fitness Surveys Inc., 831 F. Supp. 863 (N.D. Ga. 1993) (fitness center's direct charge to customers rendered "homestyle" exemption for radio retransmissions inapplicable);
Boz Scaggs Music v. Peppercorn Gourmet Goods & Cooking School, Inc., 1989 Copyright L. Dec. (CCH) ¶ 26,376 (D. Colo. 1989) (Performance was not for the sole purpose of promoting sales of records. Performance was transmitted beyond the immediate area where sale was occurring);
Bourne Co. v. Speeks, 670 F. Supp. 777 (E.D. Tenn. 1987) (exemption for charitable performances was inapplicable where the establishment was operated in the hope of realizing profit, band was compensated for their performance, and proceeds were not used exclusively for charitable or educational purposes);
Schumann v. Albuquerque Corp., 664 F. Supp. 473 (D.N.M. 1987) (performance was not permitted as "fair use" when used as background to community calendar or broadcast as part of radio station remote).

G. The infringing performance occurred beyond the coverage of license that authorized other non-infringing performances:

Broadcast Music, Inc. v. 84-88 Broadway, Inc., 942 F. Supp. 225 (D.N.J. 1996) (license for music provided by background music service did not extend to disc jockey or live band);
Broadcast Music, Inc. v. WPBK, Inc., 922 F. Supp. 803 (W.D.N.Y. 1996) (license for jukebox did not authorize use of the jukebox sound system for karaoke);
Chi-Boy Music v. Towne Tavern, Inc., 779 F. Supp. 527 (N.D. Ala. 1991) (admission charge to enter facility rendered license for jukebox inapplicable);
U.S. Songs, Inc. v. Downside Lenox, Inc., 771 F. Supp. 1220 (N.D. Ga. 1991) (license held by radio station did not authorize retransmission by defendant restaurant).



Courts will impose vicarious liability upon those who have the right and ability to control the infringing activity and a direct financial interest in the infringing activity. Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259 (9th Cir. 1996) (copyright owner could maintain lawsuit for vicarious liability against owner of flea market where counterfeit tapes were being sold). Compare Warner Bros. Inc. v. Lobster Pot Inc., 582 F. Supp. 478 (N.D. Ohio 1984) (finding president and principal shareholder had right and ability to control the infringing activity) *with* Broadcast Music, Inc. v. Behulak, 651 F. Supp. 57 (M.D. Fla. 1986) (finding silent partner who had no participation in management or operation of establishment lacked requisite level of control to be held liable).

Additionally, courts will hold those who have knowledge of infringing activity and materially contribute to the infringing conduct of another liable as a contributory infringer. Gershwin Publishing Corp. v. Columbia Artists Management, Inc., 443 F.2d 1159 (2nd Cir. 1971) (prior copyright statute); Blendingwell Music Inc. v. Moor-Law, Inc., 612 F. Supp. 474 (D. Del. 1985); Warner Bros., Inc. v. O'Keefe, 468 F. Supp. 16 (S.D. Iowa 1977) (prior copyright statute).

AMONG THE DEFENDANTS THAT HAVE BEEN HELD PERSONALLY LIABLE FOR THE ACTS OF ANOTHER ARE:

A. Corporations, Sole Proprietors, or Partners:

Dream Dealers Music v. Parker, 924 F. Supp. 1146 (S.D. Ala. 1996);
Realsongs v. Gulf Broadcasting Corp., 824 F. Supp. 89 (M.D. La. 1993) (owners of radio station liable for performances occurring during airtime that had been sold to third party);
Superhype Publishing Inc. v. Vasilou, 838 F. Supp. 1220 (S.D. Ohio 1993) (owner liable where employees engaged band without his knowledge);
Broadcast Music, Inc. v. Larkin, 672 F. Supp. 531 (D. Me. 1987) (finding owner's personal guarantee of restaurant's financial obligations provided direct financial interest in the infringing activity);
Ackee Music, Inc. v. Williams, 650 F. Supp. 653 (D. Kan. 1986) (owner liable where band was independent contractor);
Italian Book Corp. v. Palms Sheephead Country Club, Inc., 186 U.S.P.Q. 326 (E.D.N.Y. 1975) (owner liable where facility was rented to third party who engaged band) (prior copyright statute).

B. Employees:

Cass County Music Co. v. Khalifa, 914 F. Supp. 30 (N.D.N.Y.), *aff'd*, 112 F.3d 503 (2d Cir. 1996) (manager liable where facility was rented to third party who engaged band).
Jobete Music Co. v. Media Broadcasting Corp., 713 F. Supp. 174 (M.D.N.C. 1988) (rejecting *respondiat superior* doctrine as applied to individual who was general manager and corporate officer of radio station);
Nick-O-Val Music Co., Inc. v. P.O.S. Radio, Inc., 656 F. Supp. 826 (M.D. Fla. 1987);
Boz Scaggs Music v. KND Corp., 491 F. Supp. 908 (D. Conn. 1980) (prior copyright statute).

C. Corporate Officers or Principals:

Unicity Music Inc. v. Omni Communications Inc., 844 F. Supp. 504 (E.D. Ark. 1994) (vice president);
Marvin Music Co. v. BHC Ltd. P'ship, 830 F. Supp. 651 (D. Mass. 1993) (president of corporation that was general partner in a limited partnership was liable where he had dominant influence and control over club's policies and activities);
Rilting Music, Inc. v. Speakeasy Enters. Inc., 706 F. Supp. 550 (S.D. Ohio 1988) (president liable even though a third party was under contract to manage nightclub).

D. Corporate shareholders:

RCA/Ariola Int'l, Inc. v. Thomas & Grayston Co., 845 F.2d 773 (8th Cir. 1988) (shareholder of manufacturer of specialized tape machine liable for infringing copies of sound recordings);
Casella v. Morris, 820 F.2d 362 (11th Cir. 1987) (shareholder of owner of franchise rights of restaurant concept liable);
Crabshaw Music v. K-Bob's of El Paso, Inc., 744 F. Supp. 763 (W.D. Tex. 1990) (out of state shareholder liable);
Fourth Floor Music, Inc. v. Der Place, Inc., 572 F. Supp. 41 (D. Neb. 1983) (shareholder who controlled day to day activity of establishment liable).



Remedies for copyright infringement include: injunction, 17 U.S.C. § 502, statutory damages, 17 U.S.C. § 504(c), which may be increased should the court find the infringer acted willfully, 17 U.S.C. § 504(c)(2), and costs and attorney's fees, 17 U.S.C. § 505.

REMEDIES INCLUDE:

A. Injunction:

Jasperilla Music Co. v. Wing's Lounge Ass'n., 837 F. Supp. 159 (S.D. W.Va. 1993);
Tempo Music, Inc. v. Christenson Food & Mercantile Co., 806 F. Supp. 816 (D. Minn. 1992).

B. Statutory Damages:

1. Statutory damages where willfulness was not found:

Broadcast Music, Inc. v. Star Amusements, Inc., 44 F.3d 485 (7th Cir. 1995) (damages of \$140,000 awarded);
Jobete Music Co., Inc. v. Massey, 788 F. Supp. 262 (M.D. N.C. 1992) (damages of \$200 per song awarded).
Hickory Grove Music v. Andrews, 749 F. Supp. 1031 (D. Mont. 1990) (damages of \$1,500 awarded where defendant was found to have good faith belief that activities were exempt under the then current law), see, 17 U.S.C. § 504(d) (providing for additional damage award of two times license fees that otherwise would have been paid where proprietor does not have reasonable grounds to believe that activities are exempt).

2. Statutory damages where willfulness was found:

Canopy Music Inc., v. Harbor Cities Broadcasting, Inc., 950 F. Supp. 913 (E.D. Wis. 1997) (damages of \$40,000 awarded);
Music City Music v. Alfa Foods, Ltd., 616 F. Supp. 1001 (E.D. Va. 1985) (damages of \$4,500 awarded).

3. Among the factors that have been used to determine willfulness are:

Wildlife Express Corp. v. Carol Wright Sales, Inc., 18 F.3d 502 (7th Cir. 1994) (finding willfulness where defendant knew conduct was infringing or acted in reckless disregard of the copyright owner's right when copying of children's soft sculpture duffel bags);
Broadcast Music, Inc. v. Xanthas, Inc., 855 F.2d 233 (5th Cir. 1988) (finding willfulness where defendant knew of licensing responsibilities and made a conscious decision not to abide by them);
Halnat Publishing Co. v. L.A.P.A., Inc., 669 F. Supp. 933 (D. Minn. 1987) (finding willfulness where defendants had received numerous telephone calls and letters from licensing society);
Wow & Flutter Music v. Len's Tom Jones Tavern, Inc., 606 F. Supp. 554 (W.D.N.Y. 1985) (finding willfulness where proprietor should have known conduct was infringing or acted in reckless disregard of copyright owner's rights);
Milene Music, Inc. v. Gotaucou, 551 F. Supp. 1288 (D.R.I. 1982) (finding willfulness where defendant knew of role of licensing society, had previously paid fees to licensing society, and prior license was revoked due to nonpayment of license fees).

4. Among the factors that have been used to calculate statutory damages are:

a. Multiples of license fees that would have been paid:
International Korwin Corp. v. Kowalczyk, 855 F.2d 375 (7th Cir. 1988) (damages calculated at approximately three times license fee that had been sought);
Broadcast Music, Inc. v. DeGallo, Inc., 872 F. Supp. 167 (D.N.J. 1995) (damages calculated at approximately five times license fee that had been sought).

b. Amounts calculated as being sufficient to deter infringing activity:

Broadcast Music, Inc. v. Sonny Inv. Assocs. Inc., 865 F. Supp. 110 (W.D.N.Y. 1994) (\$2,000 awarded per song for each of thirteen acts of infringement);
Jobete Music Co., Inc. v. Hampton, 864 F. Supp. 7 (S.D. Miss. 1994) (\$2,500 awarded per song for each of three acts of infringement);
Almo Music Corp. v. T & W Communications Corp., 798 F. Supp. 392 (N.D. Miss. 1992) (\$2,000 per song for each of fourteen acts of infringement);
Flyte Tyme Tunes v. Miszkiewicz, 715 F. Supp. 919 (E.D. Wis. 1989) (\$2,500 awarded per song for each of seven acts of infringement).

C. Costs and Attorney's Fees:

Medowgreen Music Co. v. Voice in the Wilderness Broadcasting, Inc., 789 F. Supp. 823 (E.D. Tex. 1992) (attorney's fees of \$4,383 awarded);
Little Mole Music v. Spike Inv. Inc., 720 F. Supp. 751 (W.D. Mo. 1989) (costs and attorney's fees of \$18,246 awarded).