



## 11 questions about music licensing

Music is one of the most important elements in establishing the mood in your restaurant, but under law, you must make sure you have the necessary licensing to comply with copyright statutes before playing it. Performing rights organizations ("PROs"), such as BMI, ASCAP and SESAC, act as intermediaries between restaurants and songwriters to protect intellectual property and make licensing more cost-effective and convenient. Restaurants pay a fee to the PROs for a blanket license that grants permission to use all of the music each organization represents, and they, in turn, distribute the fees, less operating expenses, to their affiliated songwriters, publishers and composers as royalties.

Here are answers to frequently asked questions about music licensing:

### **If I pay a licensing fee to BMI, do I have to pay one to ASCAP as well?**

It depends. Determining which PRO plays what music can be very difficult for restaurant owners and operators. All PROs have searchable databases on their respective websites, but all also include disclaimers stating the information may not be accurate and will not protect you from claims of infringement. As it stands today, if you play music licensed by a PRO you do not have a license from, you can be held liable for copyright infringement.

### **What are the exemptions for radio and TV?**

Federal copyright law, Section 110 (5)(B), exempts restaurants that play music transmitted via radio, TV and cable and satellite sources if they don't charge to hear the music. Music played by other means, such as live bands, CDs, etc., aren't covered by the exemption.

The exemption applies to establishments smaller than 3,750 gross square feet in their premises. It also applies to those with 3,750 square feet or more of gross square footage if the operation has no more than four televisions. "Gross square footage" includes all interior and exterior space used to serve customers, including kitchen space, bathroom and storage space, but excludes the parking lot (unless used for something other than parking). Any foodservice or drinking establishment that is 3,750 square feet or larger, must secure public performance rights for TVs or radios if any of the following conditions apply:

*For TV, if the business is using any of the following:*

1. more than four TVs; or
2. more than one TV in any one room; or

3. if any of the TVs used has a diagonal screen size greater than 55 inches; or
4. if any audio portion of the audiovisual performance is communicated by means of more than six loudspeakers, or four loudspeakers in any one room or adjoining outdoor space; or
5. if there is any cover charge.

*For radio, if the business is using any of the following:*

1. more than six loudspeakers; or
2. more than four loudspeakers in any one room or adjoining outdoor space; or
3. if there is any cover charge; or
4. music on hold.

**If I offer only live music once a month, do I need to pay licensing fees?**

While the exemption in the statute doesn't specifically address this question, the answer is likely "yes." Generally, the exemption doesn't apply to exclusions and situations not covered in the exclusionary language.

**I use Pandora for music. Do I have to pay a fee?**

Pandora's "terms of use" specifically prohibit businesses from streaming music without setting up and complying with the terms of a paid DMX/Pandora business account. If a bar or restaurant has a business account with Pandora or SiriusXM and the music is used only for background, the establishment does not allow dancing to the music, or charge a cover fee to enter, then the provider of the music such as Pandora or SiriusXM, should be paying the public performance fees to BMI, ASCAP and SESAC. Should the business have any additional music, live bands, DJs, or Karaoke, they need to license with the PROs directly for those uses.

**BMI is threatening to sue me. What can I do?**

If you're playing licensable music, it's a better business decision to license than not to. While some business owners may avoid paying licensing fees for a while, it can be much more expensive than the cost of a music license in the long run. Federal penalties for using music without permission, which are set forth by the judge presiding over the litigation and not the PRO, can be high, with each musical composition used without authorization entitling copyright owners to damages between \$750 to \$30,000, or more if the infringement is found to be willful.

**Do PROs share customer lists? If I pay one, will the others know and bill me?**

No. PROs, like most other businesses, do not share customer lists with each other. They do, however, contact thousands of businesses every day, so it's likely they will contact you to license if you're playing music.

**What size businesses are exempt from paying fees?**

The exemption applies only to radio and TV. All other music uses should be licensed despite the size of the establishment. For specific details on exemptions for radio and TV use only, see the second question above.

**My small restaurant with no seating has a television for employees only. Am I exempt?**

Licensing obligations apply only if the communication of the music is "intended to be received by the general public."

If only your employees hear the music, the transmission isn't intended to be heard by your customers or the "general public." If customers can hear the music when they pick up their take-out orders, ASCAP, BMI and or SESAC could argue that the "general public" receives the transmission as well as staff and that licensing obligations apply.

In general however, if your restaurant is less than 3,750 square feet and you have only one TV with a screen size smaller than 55 inches, you're probably exempt if you meet all other criteria. Please review the specific details on the radio and TV exemption above before deciding not to license.

**I don't understand the rules about number of seats and exemptions.**

The square footage of an establishment and not the number of seats is what determines the radio and TV exemption under Section 110 (5)(B) of the federal Copyright Act. Total occupancy, however, may be a factor in determining the license fee for all other uses of music.

**If I use my own iPod and have paid to buy the music, do I need to pay licensing fees as well?**

Yes. Under the Copyright Act, exemptions apply only to radio and TV. Purchasing music allows you only to listen to it privately. Once you play music from your iPod or other device in a business, it's a public performance and must be licensed.

**I play only a few albums from the 1950s. Do I still have to pay?**

Unless the music on the albums is in the public domain and not protected any longer by copyright law, you need a license. All three of the PROs have searchable online databases of the music they represent; it would be best to start there or contact them for assistance.