Avoid Infringement Claims:
Know Your Music Licensing Rules

This Law Review was written by Susan Feingold Carlson and edited by Jed Mandel, both of whom are founding members of Chicago Law Partners, LLC. CLP serves as Association Forum's general counsel.

Q: I have noticed a number of articles recently in the association press regarding music licensing. Have the rules changed?

A: In early August, the Department of Justice (DOJ) issued a statement that put music licensing back in the headlines. The two organizations primarily responsible for licensing performing rights to today's copyrighted music, the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music Inc. (BMI), had asked the DOJ to consider lessening government restrictions on their licensing programs. In its statement, the DOJ not only refused to lift the restrictions, but, according to ASCAP and BMI, effectively placed greater constraints on the two organizations. They promise to take steps, through both the courts and Congress, to challenge the Justice Department position. For now, however, as far as associations, exhibitors and other music users are concerned, the rules remain the same.

Under United States Copyright Law, persons and entities that engage live performers or play recorded music at public events have a legal responsibility to pay a licensing fee to the composer, lyricist or music publisher of any copyrighted music played at the event. As a practical matter, however, it is difficult for individual artists to negotiate licenses with the large number of individuals and organizations that wish to perform their music, and it is equally if not more difficult for those wishing to use the music to track down individual artists. In recognition of those challenges, ASCAP, BMI and others, each known as a performance rights organization (PRO), entered the market decades ago to represent the individual artists, collect licensing fees on their behalf and then distribute the fees back to the artists as royalties. They do so by issuing "blanket licenses," which enable licensees to access all the music in the PRO's collection—literally thousands of artists' works—without need to account for the specific songs performed or how often they are played.

Approximately 25 years ago, ASCAP and BMI aggressively began to enforce their copyright law rights with respect to music played at association and other corporate meetings. Prior to that time, they collected licensing fees from hotels and other meeting sites, but typically not from organizations sponsoring the events. Recognizing that they could earn additional fees if they issued separate licenses to meeting sponsors—and responding to artists' demands for greater revenue—ASCAP and BMI shifted their enforcement focus to associations, exposition management and corporate management.

ASCAP and BMI issue blanket licenses only to meeting sponsors and organizers, not to exhibitors, claiming that event sponsors are responsible for all the music performed. The law on that point is unsettled, however. In fact, some event sponsors have successfully defended charges of vicarious liability for music played in exhibit booths by arguing that they lack the ability to control their exhibitors and do not enjoy an obvious and direct benefit from the infringement.

Antitrust restrictions prohibit ASCAP and BMI from collaborating on a single agreement with meeting sponsors. Nonetheless, both organizations charge a flat fee for use of copyrighted music, regardless of whether it is performed live, recorded or played on an event website. The fees are based on total attendance at the event, including exhibitors. For 2016, BMI charges 7 cents per attendee, with a minimum $150 annual fee. ASCAP charges per event fees, which range from $123 for up to 1,500 attendees to $9,769 for more than 100,000 attendees. Inasmuch as ASCAP and BMI license different music collections, many organizations feel compelled to purchase a license from both organizations.

For those associations that want to avoid music licensing fees altogether, limited options are available. For example, an association may elect not to play any music at its conferences. Or it may limit the music played to that in the public domain (i.e., songs or lyrics published in 1922 or earlier) or not licensed by ASCAP, BMI or another PRO. Organizations electing one of those options should understand the potential risks. For instance, a presenter or exhibitor could ignore music restrictions. In addition, while the arrangements and lyrics for many songs may be in the public domain, many—if not all—sound recordings of those songs may be subject to copyright.

One other issue is worth noting: The blanket licensing agreements between PROs and event sponsors do not cover "synchronization of music." Thus, if an association or one of its exhibitors produces a video using copyrighted music to be played at either a meeting session or in an exhibit booth, the party producing the video must obtain a license for the video separate from the blanket event license. And the license should cover use of the music not only for recording, but also for performance, purposes.

Under United States Copyright Law, copyright owners may recover statutory damages of $750 to $30,000 for infringement of a single work; the recovery increases to up to $150,000 if the violation is deemed willful. Given the severity of those penalties, along with the time and expense associated with defending a claim of infringement, it is important for associations and other event sponsors to recognize and comply with the requirements of music licensing for meetings, conventions and trade shows.

The answers provided here should not be construed as legal advice or a legal opinion. Consult a lawyer concerning your specific situation or legal questions.