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FAIRNESS IN MUSIC LICENSING ACT OF 1997: WILL IT END THE CONFUSION SURROUNDING THE HOMESTYLE EXEMPTION OF THE COPYRIGHT ACT?

INTRODUCTION

Background music is a common sound in restaurants, cafes, nightclubs and retail businesses throughout the country. Often these establishments play music to create a certain ambiance or to help customers relax while shopping or enjoying a meal. It may encourage people to linger longer and sometimes spend more money. Many customers would probably be surprised to know that before such music can be transmitted the proprietor must be properly licensed by the copyright holder.

Federal copyright law gives the author of musical works the exclusive right to perform her work publicly. Consequently, the copyright holder’s “permission” is needed before the song can be played. However, the 1976 Copyright Act provides certain exemptions. These exemptions have caused quite a bit of confusion and led to much litigation over the past twenty years between small businesses and music licensing societies.

In response to this problem Congressman James Sensenbrenner introduced the Fairness in Music Licensing Act of 1997 on

February 13, 1997. This bill seeks to amend section 110 of the Copyright Act in various ways. The most important amendment would seek to clarify section 110 (5), the primary source of much of the confusion. The proposal would exempt copyright protection for the performance or display of a non-dramatic work unless: (1) an admission fee is charged to see or hear the transmission; or (2) the transmission is not properly licensed.

Additionally, the Fairness in Music Licensing Act would significantly change the licensing requirements for the playing of copyrighted music by commercial establishments. This legislation expands the current exemption of section 110 (5) which allows for the public performance of copyrighted work by transmission to the public on a single receiving apparatus similar to the kind used in a private home.

This article will analyze the Fairness in Music Licensing Act and consider whether it adequately protects the rights of copyright holders while also clarifying the current confusion of consumers. Section I investigates the current licensing requirements for the public performance of copyrighted music and the reasons why the bill was proposed. Section II considers the legislation itself and its possible impact. Finally, Section III discusses why this legislation is important and whether or not it should become law.

I. BACKGROUND

A. Right to Public Performance

The Copyright Act provides the copyright holder with certain exclusive rights in her work. These include the right of the owner of literary, musical, dramatic, and other audiovisual works to have the exclusive right to publicly perform the copyrighted work or to grant permission to someone else to publicly perform the work. Section 101 of the Copyright Act defines the performance of a

5. Id.
6. 17 U.S.C. § 110 (5) [hereinafter the homestyle exemption].
work to mean "to recite, render, play, dance, or act it, either directly or by means of any device or process." Consequently, singing a song, playing a compact disk or turning on music from a radio will constitute a performance.

A performance alone will not trigger a violation of the copyright holder’s rights. The performance must also be public. Section 101 defines a public performance as being where one of the four following situations exist: (1) the performance occurs somewhere that is open to the public; (2) there are a substantial number of people at the location who do not fall within the normal circle of a family and its social acquaintances; (3) the performance is transmitted or otherwise communicated to a place open to the public; or (4) the performance is transmitted or otherwise communicated to the public by means of any device or process, regardless of whether the people receiving the performance receive it in the same place or receive it at the same or different times. This definition of a public performance covers the playing of music in virtually all restaurants and bars.

B. Limitations on Exclusive Rights under Section 110

The copyright holder’s right to publicly perform her work is not without limitations. Congress has rejected the notion that all commercial use of music must be licensed, and, in section 110 (5), allows for a small business or homestyle exemption. This section exempts from liability the performance of a copyrighted work by transmission to the public on a single receiving apparatus of a kind commonly used in private homes, unless: (1) a direct charge is

9. Id.
10. Id.
13. Id.
made to see or hear the transmission, or (2) the transmission thus received is further transmitted to the public.\textsuperscript{14}

This exception is intended to protect small businesses who use an ordinary stereo system and are not of a sufficient size to justify a subscription to one of the music licensing societies.\textsuperscript{15} The rationale being that the secondary use of such a transmission is so remote and minimal that no further liability should be imposed.\textsuperscript{16} The homestyle exception has been the source of much confusion and litigation, primarily, because it is unclear what qualifies as a small business establishment and what is meant by a "single receiving apparatus of the kind commonly used in private homes."\textsuperscript{17}

Since the Acts inception over twenty years ago courts have struggled to set clear guidelines for the application of the homestyle exemption.\textsuperscript{18} As technology advances further confusion is likely to develop over what constitutes a home-type receiver. Today it is not uncommon for homes to possess very sophisticated audio and visual equipment. A simple stereo receiver with two speakers can no longer be considered the norm in American homes. Consequently, courts and businesses have difficulty determining whether certain transmissions fall within the home-type exemption.

\textsuperscript{14} Id.


\textsuperscript{16} Id. at 1488.

\textsuperscript{17} Courts in different jurisdictions have developed their own criteria for determining what falls within the homestyle exemption. Some courts analyze the nature of the stereo system employed while others consider both the stereo system and the physical size of the establishment performing the music. See, e.g., Broadcast Music, Inc. v. Claire's Boutiques, Inc. 949 F. 2d 1482 (7th Cir. 1991)(concentrating on the nature of the receiver used when determining that the system fell within the homestyle exemption); Hickory Grove Music v. Andrews, 749 F. Supp. 1031,1039 (D. Mont. 1990)(finding that an 880 square foot facility was too large to fall within the homestyle exemption regardless of the type of stereo system used); Merrill v. Bill Miller's Bar-B-Q Enters., 688 F. Supp. 1172, 1175 (W.D. Tex. 1988) (considering the system as a whole and concluded that the concealed wiring and the recessed ceiling speakers were not the kind commonly found in a private home).

\textsuperscript{18} See cases cited supra note 17.
C. Performing Rights Societies

All establishments that do not meet one of the exemptions discussed above must be licensed by the copyright holder before they can publicly perform the work.19 Individual establishments can not negotiate individual license arrangements with each copyright owner. Consequently, performing rights societies have been formed to act as agents for the individual copyright holder who assigns the right to license the work to one of these societies in return for a royalty.20 In the United States the vast majority of musical compositions are controlled by either the American Society of Composers, Authors, and Publishers (ASCAP) or Broadcast Music, Inc. (BMI).21 A third society, SESAC, has been growing in recent years, but currently does not represent as many songwriters and music publishers as the other two.22 These societies issue individual licenses and are very vigilant in policing the rights of their members.23

Currently, disputes over the licensing fees charged by either ASCAP or BMI must be litigated in New York City.24 This results from the antitrust consent decrees which govern both societies.25 The decrees stipulate that if a music user and one of the licensing

23. Blumenthal, supra note 21, at C11.
24. See Broadcast Music, Inc. v. CBS, 99 S. Ct. 1551, 1558 (1979) (at time of decision only ASCAP had a rate court provision included in their consent decree); United States v. Broadcast Music, Inc., Civil No. 64-CV-3783 (S.D.N.Y. Nov. 18, 1994) (establishing a rate court for the negotiation of fees between BMI and music users).
25. See cases cited supra note 24.
societies can not reach an agreement on a fee, the dispute must be litigated in the district court which supervises the consent decrees, the U.S. District Court for the Southern District of New York. 26 Challenging a music licensing fee under this scenario is prohibitively expensive for many small businesses and has probably led many of them to pay the licensing fee opposed to incurring the expense of litigating the issue in New York. 27 According to Peter Kilgore, legal counsel for the National Restaurant Association, there have been constant requests from small businesses to change this requirement and allow local arbitration of fee disputes. 28

II. THE LEGISLATION

The Fairness in Music Licensing Bill impacts three important areas of music licensing. First, it grants a broader exemption to businesses who play music in the normal course of their business and clarifies much of the confusion caused by the homestyle exception. 29 Second, the legislation allows for local arbitration in the case of fee disputes, thereby ending the requirement that all fee disputes be resolved in New York. 30 Third, the bill requires the performing rights societies to disclose broader copyright and licensing information on the works within their repertoire. 31

The most important change to the Copyright Act would come through section 2 (a) of the Fairness in Music Licensing Act. This section stipulates that the exception to the exclusive right to public performance be allowed as long as no fee is charged to listen to the music and the transmission itself is properly licensed; the bill does not refer to the type of technology used to transmit the music. 32 In deleting this requirement the bill removes the central cause of confusion under the homestyle exemption. The proposed

26. Id.
27. Statement of Kilgore, supra note 3.
28. Id.
29. See supra cases cited in note 17.
31. Id.
32. Id.
legislation instead concentrates on whether the facility profits directly from the transmission of the music and if the transmission itself is properly licensed.  

This is a much clearer and consistent standard. Currently, the confusion surrounding this process has led courts in different jurisdictions to define the scope of the exemption differently. Some courts emphasize the size of the facility itself, while other courts consider the distance of the speaker from the receiver or the size and sophistication of the technology used. Consequently, what is considered permissible use in one state may not be allowed in another jurisdiction. The new language should substantially reduce the amount of litigation and will help unify the licensing requirements imposed by the performing rights societies.

By deleting the homestyle language this bill prevents discrimination against large facilities and those businesses who employ more advanced technologies than what was in existence, or even envisioned, when the homestyle exemption was introduced. Copyright liability will no longer rest on the number of speakers a facility’s stereo system utilizes, the distance of the speakers from the receiver, or the physical size of the facility. This proposal will be more necessary as technology further advances. Moreover, the copyright law should not impede restaurants and bars from purchasing the most modern technology simply so that their equipment can fall within an ambiguous definition of “what is typically found in a private home.”

In addition to amending the home-type exemption, the Fairness in Music Licensing Act provides that if a music user and a performing rights society are unable to agree on fees for past or future use of a work within the society’s repertoire, the music user will be entitled to binding arbitration to resolve the dispute. This would take the place of any other dispute resolution technique established by a judgment or decree governing the performing

33. Id.
34. See supra cases cited in note 17.
35. Id.
36. Id.
37. H.R. 789.
Current, as discussed above, all fee disputes must be resolved in New York City. This is an impractical requirement and places many small businesses at a disadvantage vis a vis the performing rights society. A restaurant located in Missouri, Florida, or Oregon, for example, would not be likely to take their fee dispute to New York. Instead, they would be forced to pay the fee as requested even if their disagreement with the licensing society is legitimate.

Finally, the proposed Act addresses the frequent complaints lodged about the limited public access to the societies’ lists of holdings. Section 5 of the bill directs each society to make available, free of charge, online computer access to copyright and licensing information for each work within its repertoire. Each society must provide a printed directory of each title in its collection. Section 5 also stipulates that a performing rights society will be barred from bringing action against a party for any work in its repertoire which is not documented or identified on the above mentioned lists. Overall, Section 5 of the Fairness in Music Licensing Act would further protect small business owners. Due to the large volume of copyrighted music it makes sense to require each society to maintain and provide access to an official list of the music they control.

III. ANALYSIS OF LEGISLATION

The purpose of the copyright law is to protect both the rights of the copyright holder and the public’s interest in access to the material. The Fairness in Music Licensing Act is a reasonable proposal which strikes a balance between these two concerns. The bill greatly simplifies the small business exemption and makes it clear to restaurants, small businesses and the performing rights

38. Id.
40. See Statement of Kilgore, supra note 3.
41. Id.
42. H.R. 789, § 5.
43. Id.
44. Id.
societies the circumstances under which a license is required for
the transmission of the material. This legislation would do away
with the ambiguity that arises when courts arbitrarily categorize the
size of businesses and the type of technology used to determine
when a use falls within an exemption.

The Fairness in Music Licensing Act would do away with the
homestyle exemption and place the emphasis on whether the
business collects a fee for the transmission of the musical work and
whether the transmission itself is properly licensed. This would
allow most businesses to transmit copyrighted music regardless of
the size of their business or the sophistication of their equipment.
The Amendment will not only make the exception to the exclusive
right of public performance easier to apply, it will address the
problem of technological advancements by making the issue no
longer relevant. This proposed simplification to the copyright law
would reduce litigation and could lead to improved relations
between small businesses and the performing rights societies.

ASCAP, BMI, and SESAC, and other organizations which
represent songwriters oppose the bill. ASCAP, the largest of the
performing rights societies, through Wayland Holyfield, a member
of the Board of Directors, testified that it believes the Fairness in
Music Licensing Act represents clear governmental interference in
its business. ASCAP asserts, if enacted, the law would permit
the government to take their copyrighted property and give it away
without just compensation. Holyfield stated that the Fairness in
Music Licensing Act "represents government interference in the
marketplace at its worst. It is government price fixing; it is "Big
Brother" entering into a purely marketplace dispute..."

45. H.R. 789.
46. See, e.g., Fairness in Music Licensing, 1997: Hearing on H.R. 789
Holyfield, member of the Board of Directors of the American Society of
Composer, Authors, and Publishers (ASCAP), Patrick Collins and Mac Davis).
47. Id.
48. Id.
49. Id.
This argument, however, ignores the fact that the Fairness in Music Licensing Act, while clarifying the confusion surrounding the homestyle exemption, maintains the copyright holder's right to profit from her work. The current fees paid by businesses to broadcasters comprise only a single cut of the revenues they receive from the performance of their work. In fact, songwriters are often able to "double and triple dip" by receiving compensation from more than one source for a single performance of their work. For example, if a college marching band plays a song during half time, the songwriter receives compensation from the band, the stadium where the song is performed and from the radio or television station who broadcast the performance. The Fairness in Music Licensing Act would only stipulate that a songwriter could not collect another time from the restaurant or bar owner who broadcast the game in her establishment.

SESAC further argues that past confusion over music licensing can be resolved through private agreements between the societies and the businesses they license. They assert that discussion and negotiation is the answer, not a major amendment to the federal copyright law, which would result in a further erosion of copyright protection for songwriters. The performance rights societies and the businesses they license have not been able to come to an agreement in the past to resolve the licensing conflict. Since there is no reason to believe that this will change in the future Congressional intervention is needed. Moreover, the size and strength of ASCAP and BMI give them substantial leverage and place small businesses at a disadvantage. Consequently, Congress is in a unique position to introduce reform and guarantee that the rights of each side are protected.

In addition, SESAC argues that the passage of the Fairness in Music Licensing Act would violate current U.S. treaty

50. H.R. 789.
51. Statement of Kilgore, supra note 3.
52. Id.
53. Id.
54. Statement of Collins, supra note 22.
55. Id.
56. Statement of Kilgore, supra note 3.
57. Id.
obligations. This is based on the language of the Berne Treaty for the Protection of Literary and Artistic Works which grants authors of musical works the exclusive right of public performance, communication to the public, and broadcasting, including the public broadcast of the work. SESAC asserts the proposed bill is not consistent with this requirement. However, this legislation, as discussed above, does not interfere with a copyright holder's fundamental right to the public performance of her work. The proposed amendment to the Copyright Act would simply prevent the owner from receiving additional remuneration when a business plays the music for its patrons and does not charge a fee. The copyright holder would still have the right to charge a licensing fee to each of the parties who performed the work up until the point it was broadcast in the bar, restaurant, or store.

IV. CONCLUSION

Members of the House Subcommittee on Courts and Intellectual Property began hearings on the Fairness in Music Licensing Act in July, 1997. The bill has garnered substantial bipartisan support and currently has 158 cosponsors. A similar bill was introduced in the Senate by Senator Strom Thurmond and currently has 24 cosponsors. The Fairness in Music Licensing Act is crucial legislation to Representative Sensenbrenner, the Wisconsin lawmaker who introduced the bill. Sensenbrenner has said he will

58. See Statement of Collins, supra note 22.
60. Statement of Collins, supra note 22.
61. H.R. 789.
62. Id.
63. See Statement of Kilgore, supra note 3.
65. H.R. 789. As of December 4, 1997, there are 158 cosponsors of H.R. 789, 118 Republican and 40 Democrats.
block the passage of other copyright bills if lawmakers do not pass this Act. 67 It is yet to be seen what impact this language will have on his fellow lawmakers and whether it will increase support for the bill.

If the Fairness in Music Licensing Act passes both houses of Congress, President Clinton may choose to veto it. Bruce Lehman, Assistant Commissioner of Commerce and Commissioner of Patents and Trademarks, who testified before the Subcommittee on Courts and Intellectual Property concerning this bill, informed the Committee that the administration opposes the bill. 68 They believe the legislation, as currently drafted, would deprive copyright holders of compensation by restricting their fundamental right to publicly perform the work. 69 In addition, they argue that the music transmitted by restaurants or bars is neither remote nor minimal. 70 Bruce Lehman testified that music "tends to create a vital element of what is known as "atmosphere" and can be that element which determines success or failure of an establishment. 71 Finally, the administration fears clubs who currently charge admission fees will try to circumvent the licensing fee requirement by discontinuing their cover charges and compensate by increasing the price of food and beverages. 72

Despite its opposition the Fairness in Music Licensing Act represents an important proposal for amending the problematic homestyle exemption of section 110 (5) of the Copyright Act. The legislation would clarify which businesses are required to be licensed. This would simplify the collection of fees and decrease the amount of leverage the large performing rights societies currently hold over many small businesses. This legislation would also end the inherent unfairness of requiring all fee disputes to be resolved in New York. In the past this has placed many small

67. Allen, supra note 64.
69. Id.
70 Id.
71. Id.
72. See Statement of Lehman, supra note 68.
businesses at a disadvantage and has discouraged some from fighting unfair licensing demands. Finally, this proposal would increase public access to the societies’ lists of music holdings. This would provide a greater degree of fairness as a business or individual should not be penalized for the public performance of a work when they have no ability to know which society has the licensing rights for that particular work.

If the necessary political support can not be garnered in this session of Congress to enact the Fairness in Music Licensing Act, it is possible that it will be reintroduced in a full or amended version in a future session. In addition, the discussion surrounding the bill may encourage the performance rights societies and small businesses to come to an agreement on their own. The societies, in particular, may conclude that it would be less painful to come to a private solution than to wait for Congress to impose an answer.