

MUSIC LICENSE ISSUES REVISITED

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It's been twenty-five years since NFDA negotiated the blanket music license with BMI, ASCAP, and SESAC that enabled funeral homes to comply with federal copyright laws. However, in an area that is complex and changing, uncertainties continue to persist and new questions arise. We have addressed a number of those issues below:

Q. Why does a funeral home have to pay an annual music licensing fee?

A. The fee is to pay for a license that permits the funeral home to have music performed on its premises or wherever it holds funeral services, whether it is performed live, through recorded music over CDs, DVDs, and cassettes, or by music-on-hold. Without a license, a funeral home that allows music to be performed at its facility commits a violation of federal copyright law.

Q. If I own a main funeral home and two branch locations, do I need only one license or do I need three licenses?

A. You need three licenses. The music license is granted to a funeral home location. Since you have three funeral home locations, you need three licenses.

Q. Does the NFDA music license only cover the funeral home facilities or does it allow music to be performed at offsite funerals?

A. Funeral homes holding the NFDA music license are authorized to have music performed at any place where funeral services are conducted by the funeral home. This would include gravesites, schools, auditoriums, outside parks, private residences and anywhere else where a visitation, funeral or memorial service is held.

Q. If two funeral home businesses operate out of one funeral home facility, will one NFDA music license cover all of the music performed at that facility or does each funeral home business need its own music license?

A. Each funeral home business must have its own music license. The two funeral home businesses may not share a license.

Q. Our funeral home does not have a music system, although we will allow families to bring in their own music to play during funeral services. Do we need a music license?

A. Yes. It does not matter who performs the music or who arranges to have the music performed. The license is required by the operator of the business in which the music is performed.

Q. Didn't Congress pass a music license exemption several years ago for small businesses?

A. Yes, but that covers only music played over the radio and television. The exemption also applies only to retailers with a building less than 2,000 square feet in size. Therefore, even if a funeral home fell below the 2,000 square foot restriction, the exemption only applies to music played over the radio or television. It would not cover music performed live, through CDs, DVDs, cassettes, or music-on-hold.

Q. Isn't there also a religious exemption that allows music to be performed at funeral homes without a music license?

A. If the funeral home only permits music to be performed at a religious service that is conducted by a member of the clergy, then a music license will not be required. If music is performed at any other time, the license is necessary. Therefore, without a license, a funeral home could only permit music to be performed during funeral services presided over by clergy. The performance of music at any other time or place would place the funeral home in violation of federal copyright law.

Q. What are the penalties for copyright infringement?

A. For each song that is performed without a license, damages are set by federal statute at a range of \$750 to \$30,000. However, if the jury finds that the infringement was "willful," the damages can be increased up to \$150,000 per song. In addition, an infringer who loses the lawsuit will have to pay the attorney's fees of the plaintiff.

Because a violation occurs for each song that is played without a license, the damages in copyright infringement cases can mount up very quickly. In a 2002 lawsuit brought by SESAC against a Pittsburgh area radio station that did not have a SESAC license, a jury awarded \$1.2 million because the radio station had played 31 songs from the SESAC library. The award climbed into seven figures because the jury had found that the radio station's infringement was willful. On top of the \$1.2 million verdict, the defendant also had to pay SESAC's attorney fees which totaled nearly \$500,000.

Q. Our funeral home dropped the music license five years ago. Does that mean that we can be liable for any song performed at the funeral home over the past five years?

A. The statute of limitations for copyright infringement is three years. Therefore, liability for performing a song without a license will only go back three years from the date the lawsuit is filed.

In most lawsuits brought by the licensing companies, they will use investigators to compile the list of songs performed without a license. Therefore, it is doubtful that the licensing companies would pursue the funeral homes for songs played in

the past unless they had an investigator on-site to prove that the songs were performed.

Q. Who are the music licensing companies and what gives them the authority to sue funeral homes and other small businesses?

A. The three music licensing organizations are ASCAP, BMI and SESAC. ASCAP has about 8 million songs in its library, BMI has 6.5 million songs and SESAC a lesser amount. The rights to the songs are held by the songwriters or other copyright holders who authorize the music licensing organizations to represent them. The music licensing organizations collect fees from license holders who perform the music and distribute the fees to the copyright holders. For example, BMI reports that it has more than 300,000 copyright holders under contract and that the average songwriter earns less than \$5,000 annually in royalties paid by BMI.

One of the major obligations of the music licensing organizations is to maximize licensing fees. In order to do this, they must pursue businesses that perform music without a license. Their primary weapons in this regard are the federal copyright statutes and the penalties they impose.

In the last several years, the music license organizations have engaged in an enforcement campaign against bars and restaurants. After conducting large-scale crackdowns on internet music swapping companies, the organizations have turned their license enforcement actions against brick and mortar establishments..

Q. Are funeral homes being targeted by the music licensing organizations for enforcement?

A. Yes. From time-to-time, the three music licensing organizations have targeted funeral homes through regional and national compliance and enforcement programs. If music is played at a funeral home without a license, the funeral home could face a copyright infringement action.

Q. What is the price of the NFDA music license?

A. Funeral homes that belong to any funeral service trade or professional organization such as NFDA, NFDMA, CANA, SIFH, OGR, or a state funeral directors association can purchase a blanket music license from NFDA for \$243 for 2015. The music license covers all songs in the ASCAP, BMI and SESAC libraries. This is the **LOWEST** price available to funeral homes.

Q. Our funeral home has the equipment to stream live and recorded broadcasts of funeral ceremonies over the internet to families and friends of the deceased who cannot attend the funeral in person. Is a license required for those broadcasts?

A. Yes, if the funeral ceremonies include the performance of any copyrighted music. NFDA has negotiated a music webcasting license for 2015 of only \$47 that covers

all of the music libraries of ASCAP, BMI and SESAC. This license applies to a funeral home's website so funeral homes with multiple branches will only need one webcasting license as long as all of the branches use the same website for broadcasting live or recorded funeral ceremonies.

Q. Does the NFDA music license allow the funeral home to record popular songs on to DVDs and video tributes?

A. No. The NFDA music license is a "performance" license that allows music to be performed. In order to record music to a DVD or video, a "synchronization" license is required. BMI, ASCAP and SESAC do not issue synchronization licenses. The only way to obtain a synchronization license is through the producer of each song which is to be recorded. This makes it nearly an impossible task for a funeral home to put multiple songs on a tribute DVD or video.

Q. If funeral homes cannot record copyrighted songs on DVDs and videos, what is the alternative?

A. Funeral homes may purchase CDs of royalty-free music on the internet. This music is very generic, but does serve as suitable music for tribute DVDs and videos. The CDs typically cost anywhere from \$50 to \$100 and gives the funeral home an unlimited and perpetual license to use the music. The other alternative is to play the popular songs requested by the family on the funeral home's music system while the DVD or video is playing. As long as the songs are not recorded on to the DVD or video, a synchronization license is not required and the NFDA music license allows the funeral home to perform the songs.

Q. Does a funeral home need a license to record or play old songs? I heard that these songs are in the public domain and no license is needed because no one holds a copyright on them.

A. While it is true that most songs written before the early part of the Twentieth Century would be in the public domain, that does not mean that every recording of those songs are also in the public domain. For example, the song "Silent Night" may be in the public domain and anyone can perform it and record their own version without a license. However, that does not give me a right to record "Silent Night" as sung by Andy Williams on to a DVD. Andy Williams holds the copyright to his version of "Silent Night" and I cannot record it to a DVD without his permission.