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Music Licensing

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Paying for Music Licensing, or What Do You Mean My Music Streaming Service Is Not Enough?

Chances are the last time you were waiting in a doctor's office, shopping in a retail store, having a drink at a bar, or waiting on hold on the phone, you were listening to music. Many businesses rely on music in some form as part of their business model or customer experience. But as a business owner, it is important to understand that paying for a music streaming account—or purchasing a record, CD, or cassette—is not the only step required to maintain compliance with the legal obligations governing the use of music. To avoid running afoul of Canadian copyright law, you must also ensure that you have the appropriate licences to use the music created by others as part of your business. Ultimately, the goal of Canada's licensing regime is to ensure that businesses are able to access and use music in their daily operations, while artists and other music rights owners are properly remunerated for this use of their work. However, the complicated nature of Canadian copyright law can still make it challenging for business owners to understand their obligations and for music rights owners to understand their rights.

There are various forms of music licences which may be

required depending on the nature of your business—and, more specifically, your use of music as part of your business—so what should Canadian businesses understand about licensing and copyright to help them remain compliant?

How is Musical Copyright Law Governed in Canada?

The *Copyright Act* (R.S.C., 1985, c. C-42) governs Copyright law in Canada and establishes the Copyright Board as the responsible body for regulation and enforcement of the Canadian music licensing regime.

The Copyright Board sets and approves tariffs for a fixed period of time, which are rates that businesses will typically be charged to license copyrighted music. The licences are then administered by collective societies, such as the Society of Composers, Authors and Music Publishers of Canada (SOCAN) and Re:Sound, which represent most musicians and record labels. Collective societies collect licensing fees and remit them back to the rights holders as royalties. Each of SOCAN and Re:Sound has its own set of tariffs for different musical rights, and fees for each must be paid should a business require performance rights. The chief reason these collective societies exist is to streamline the administration of these license fees and royalties, and in what is essentially a daily transaction between thousands

of businesses and artists/rights holders.

Generally, if there is a disagreement between an end-user (the business) and a collective society with respect to the payment of any royalties or if the parties are unable to agree on any related terms and conditions, either party may apply to the Copyright Board to set such royalty, related terms and conditions, or both.

While tariffs set the prescribed rates for licensing fees, collective societies and individual musical rights holders are not obligated to make agreements according to such tariffs. In fact, businesses may enter into separate agreements with copyright owners at individually negotiated licensing rates.

Notably, if a business is found to have infringed a copyright, they may be liable to pay, at the rights holder's election: (i) statutory damages ranging from \$500-\$20,000; or (ii) damages, and to surrender part of the profits that the infringer made from the infringement and that were not taken into account in calculating such non-statutory damages. An infringer may also have to pay legal fees that result from responding to any enforcement action.

What Kind of Music Licences Are There?

Performance Licences

When you play recorded music in the conduct of your business, whether for a fitness class, restaurant ambience, or at a conference, it is considered a "performance" for licensing purposes. Consequently, this makes

performance licences relevant for many businesses.

Importantly, there are two types of performance licences which are generally both required, as they are administered by the two different collective societies noted previously: SOCAN and Re:Sound. SOCAN represents songwriters and music publishers with respect to their copyright in the underlying *musical works* – the composition, lyrics, and melodies that comprise the song. Re:Sound represents performers and record companies with respect their copyright in the *sound recordings* of musical works.

In 2019, SOCAN and Re:Sound quite helpfully created a joint venture named Entandem, which simplifies the licensing process by allowing businesses to purchase and manage their SOCAN and/or Re:Sound licences in one place.

Reproduction Licenses

Though not the primary focus of this article, other collective societies exist which grant other types of licences, such as the Canadian Music Reproduction Rights Agency (CMRRA) which grants reproduction licences. Several other forms of licences that might be relevant to your business if you reproduce (rather than perform or play) music, including:

- A “Synchronization” licence allows you to pair a piece of music with a respective visual medium (e.g. TV, film, video game, music video). Where a business has re-created a song (i.e. performed a cover), a synchronization licence from the copyright holders in the musical works is still required.
- A “Mechanical Use” licence allows the licence holder to grant reproduction rights to

another with respect to reproducing music in another format (e.g. reproducing the same recording on CD, or as an MP3).

- A “Master Use” licence allows you to use the master recording of a given piece of music for film, video, or other purposes. It is used for reproducing the original song as part of a project, and is accompanied by a synchronization licence.

Copyright Exemptions

There is a general exemption under the *Copyright Act* called “fair dealing”, which allows users to use another person’s copyrighted material without a licence but only for certain narrowly prescribed purposes. For example, if your business is a religious, charitable, or fraternal organization you may be able to use music without a licence for events that have a specific religious, charitable, or fraternal purpose. However, if such event is run with the purpose of generating revenue, this exemption does not apply. As this can be a very fact-specific analysis, it is always best practice to get specific legal advice before choosing to rely on a fair dealing exemption.

Examples of Performance Licenses and Tariffs

Below are a few current, non-exhaustive examples of tariffs and fee structures applicable in different business cases. Of note, certain tariffs are currently being reviewed/updated by the Copyright Board and may be subject to change:

Gym/fitness classes

Where a business is playing music in conjunction with any kind of physical exercise, the applicable SOCAN tariff is Tariff No. 19 - Physical Exercises and Dance Instruction. In addition to a minimum fee, there is generally a variable fee under Tariff 19, which is equal to an amount per room where music is played multiplied by the average number of weekly class participants in that room.

Under Re:Sound, the applicable tariff is Tariff 6.B – Use of Recorded Music to Accompany Fitness Activities. The fees under Tariff 6.B are contingent on the fitness venue’s number of members during a given calendar year.

But what if you are running online classes in addition to or instead of in-person classes? Tariffs 19 and 6.B above only apply to music performed at a physical location. For the online component, SOCAN Tariff No. 22.D.1 – Online Audiovisual Services may apply as well or instead, which sets fees at a percentage of revenue earned from online classes.

Importantly, there is not always a corresponding license between SOCAN and Re:Sound, so always make sure you have done your due diligence on what licences may be required.

Retail/Restaurant (Background Music)

Where your business is simply using music as background ambience, and you have chosen not to use a separate background music supplier who manages licensing, the applicable SOCAN tariff is Tariff No. 15.A – Background Music in Establishments. The fee under Tariff 15 is based on the square footage of the business where music is played.

The corresponding Re:Sound tariff is Tariff 3.B – Use of Background Music. The fees under Tariff 3.B are set based on various factors, such as building capacity or square footage, depending on the applicability to a given business.

Receptions, Convention, Assemblies, And Fashion Shows

If your business is running a reception (including weddings), convention, assembly or fashion show, whether for industry purposes or otherwise, a separate licence is required. The applicable SOCAN tariff is Tariff 8 – Receptions, Conventions, Assemblies and Fashion Shows. The fees payable are based on event capacity, and whether or not there will be dancing.

Re:Sound's event tariff is Tariff 5.B - Receptions, Conventions, Assemblies and Fashion Shows. As with the SOCAN licence, the fees are based on event capacity and whether or not there will be dancing.

Interestingly, SOCAN licensing applies to both recorded music and live music, so even if the

only music at your event will be a live band performing covers, a SOCAN tariff would still be applicable. However since Re:Sound is only applicable to sound recordings, their tariff would not apply if the *only* music will be through live performance.

When Should I Seek Legal Advice?

It is important for any Canadian business that uses music in any way in its business to ensure that they have obtained the requisite licences to use copyrighted music, as the costs of a copyright violation can often be significantly more expensive than initial compliance. While this article has provided general information, background and examples, specific legal advice should be obtained prior to making any decisions as to required licenses. As noted, each use case may be unique, and there will often be multiple or overlapping tariffs which may be applicable.

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