Tuning In to Music Copyright Rules

Broadcasting "public performance" music at a community is something apartment management must consider.

Watching graffiti artist and motivational speaker Erik Wahl perform for attendees at the 2013 NAA Education Conference & Exposition in San Diego this past June serves as a reminder of how some apartment owners might have to pay a legal price in which many may not even be aware.

Wahl's presentation combined lecture, music videos and painting. The music featured U2's "Beautiful Day," among other popular songs. Because Wahl's use of the music occurred in a "public performance," Bono and the rest of the band are entitled to some compensation for Wahl choosing to include those songs during his speech.

Music and most other published works are copyrighted so authors can enjoy financial benefits for the commercial use of their creations. However, Wahl did not mail Bono a check. U2's music is licensed to SESAC, one of the three organizations that hold licenses from the various music recording companies. The other two are ASCAP and BMI (collectively they are known as performance rights organizations, PROs).

Many owners of copyrighted material allow PROs to grant licenses for public performances. For music, in particular, there are three: SESAC, BMI and ASCAP, each of which represents only certain artists who chose to join those organizations. For motion pictures, there is only one, the Motion Picture Licensing Corporation (MPLC). An agreement with MPLC may provide peace of mind for the broadcast of motion pictures because it represents all the movie studios. By contrast, an agreement with BMI will offer no protection if there is a "public performance" of music by artists who are not represented by BMI.

Fitness Rooms, the Pool and Leasing Office

As multifamily housing developers began to include community rooms and exercise facilities in their buildings, music was introduced into these spaces. This trend pre-dated smartphones and tablets, as well as individual TV/video screens on pieces of exercise equipment or hung on walls. Perhaps the original design was for "Movie Night" to be played in a common area delivered on an oversized TV via a VHS tape (remember those?). The exercise facilities consisted of a couple of TVs, a receiver and speakers to broadcast television and radio programming.

The copyright laws give copyright owners the right to control public (but not private) performances of copyrighted material. A

TV, radio or computer broadcast is a "performance" of music or motion picture.

The distinction between public and private is not readily apparent. In-home use of music and movies are generally considered to be private. A public performance takes place in areas that are open to the public. In the context of apartment communities, this may or may not include community rooms, swimming pools or exercise areas and leasing offices, although no court has ever ruled on this issue.

Thanks largely to advocacy efforts of the National Restaurant Association on behalf of its members, Congress exempted certain types of businesses from compliance with the copyright laws, including restaurants and bars, so long as certain conditions are met. These include that the areas are less than a certain number of square feet and provide a maximum of six speakers or four TVs. These exemptions may be available to apartment communities depending on the size of the rooms and the types of equipment involved. There is no "one-size-fits-all" formula, according to copyright law.

Prices of Licenses

Annual license fees paid to PROs are priced per number of units:

Units	Cost
300	*$197*
300 to 600	*$396*
601 to 999	*$593*

Here's What One Owner Is Doing

Apartment owner and NAA Board Member Frank Barefield, who owns 9,000 units in the Southeast, recently inventoried his properties for exposure for potential copyright infringements after consulting with legal counsel. Some of his communities were compliant. In others, proper equipment was purchased or removed to make them compliant. Barefield also decided to purchase licenses for his remaining properties. Some owners have simply chosen to purchase these licenses from PROs without performing the type of due diligence Barefield used to avoid the problem.

Lately, many owners, including NAA members, have been contacted by PRO representatives (chiefly SESAC; the others less so) and have been urged to buy licenses or risk being sued for copyright infringement. By contrast, the MPLC (motion picture industry) has used an approach that is more education based.

For example, it has exhibited at the past two NAA Education Conference Expositions to facilitate better communication with our members. *units* Magazine published an article that provided guidelines on use of motion pictures for events such as apartment community "Movie Nights" in the December 2012 issue. (Please contact NAA's Lauren Boston at lauren@naahq.org for a copy.)

No matter what the approach, the "license" formula offered by PROs is the same: pay a fee based on the number of units in the apartment community. (See sidebar.)

The assumption PROs are making is that communities with a greater number of residents will have more "public performances" of copyrighted material than smaller ones. Yet no one has been authorized to keep count.

The irony, of course, is that community facilities and exercise rooms are amenities that make an apartment community more attractive to prospective residents but may often remain underutilized. In other words, there may be very few "public performances" occurring because residents, many owners say, rarely use these fitness facilities. Moreover, the aggressive stance of some PROs does not necessarily reflect any property analysis that it may have performed.

Their contact with owners could simply be triggered by photographs it sees that market amenities on an apartment community's website.

This posture has been reflected by ASCAP's threats to sue the Girl Scouts of America and others for sponsoring "public performances" of copyrighted material by organizing campfire songs. In that case, a round of public criticism followed and ASCAP retreated from its position.

More recently, ASCAP claimed that a group singing "Happy Birthday" violated copyright law. The validity of that copyright is now being challenged in a lawsuit in New York.

America's first copyright law passed in 1790 after the Congress was explicitly given that authority in the U.S. Constitution. It has since been periodically revised, with each revision reflecting the ideas and technologies of the times. As is often the case, advances in technology pose unanticipated challenges to the application of laws that were passed during an earlier age.

Changing Channels

As noted earlier, the law often trails the development of new technologies. Witness the explosion of personal-use devices for cinema and music. These are consistent with private, not public, performances. Exercise machines with dedicated screens and speakers intended for use by individuals are similarly inconsistent with the concept of a public performance.

This is a highly specialized area of law. Consult an attorney before entering into a licensing agreement or deciding that no agreement is necessary. Ideally, that attorney should have a history of negotiating with various PROs. This discussion should include the amount of square footage in your common areas as well as the entertainment equipment in each area.

NAA members may direct questions about this issue to NAA General Counsel John McDermott at johnmcdermott@naahq.org.