



LATEST TRENDS IN MUSIC LICENSING AT APARTMENT COMMUNITIES

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Why are we hear?

American Society of Composers, Authors, and Publishers—founded in 1914 and is owned and run by its 700,000 members. They represent 11.5 million musical works; processed over one trillion performances and paid out over a billion dollars last year.



Society of European Stage Authors and Composers—founded in 1930 and now has 30,000 affiliates and over 1 million songs.



Broadcast Music, Inc.—founded in 1939 and represents 14 million musical works and more than 900,000 songwriters, composers and music publishers



Global Music Rights—founded in 2013 and now license over 33,000 songs with about 100 writers and 200 publishers on their roster



Motion Picture Licensing Corporation—founded in 1986 and now licenses the public performance of movies at over 500,000 locations worldwide



They keep calling. Can I ignore them?

Other than annoyance, what's the risk?

If your property needs a license and doesn't obtain one:

Sued for copyright infringement

- Actual damages (not much)
- Attorneys' fees (a little more)
- Statutory damages—\$750 to \$30,000 per song
- Willful—court can increase it to \$150,000

The DJ we use says he has all the proper licenses. Am I ok?

Probably not. The owners and operators of a business are responsible for the performances at their establishment.

If others perform music in my place of business, can I, the owner/operator, still be held liable for copyright infringement?

You can be liable for copyright infringement committed by others.

One way is **vicarious liability** if you profit from the infringement while declining to exercise a right to stop or limit it.

Two-part test:

First: did you have the right and ability to supervise the infringing conduct?

Second: did you have an obvious and direct financial interest in the infringement?

Ignorance about the infringement does not blunt vicarious liability.

However, there are situations where courts have declined to make an owner vicariously liable for infringement involving the owner's business.

For example, if the owner has a nominal title but no real authority

Fee Owner vs. Property Manager?

What is a public performance?

17 U.S. Code § 106

(1) Music performed at:

a place open to the public

or

any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered;

or

(2) Music transmitted or otherwise communicated to:

a place specified by clause (1)

or

the public, by means of any device or process, whether the members of the public receive it in the same place or in separate places and at the same time or at different times.

A place open to the public

- (1) Lobbies?—yes
- (2) Parking Garage?—yes, unless resident only
- (3) Model Units?—probably
- (4) Resident-only Areas?—no (if not publically accessible)
Fitness Rooms; Movie Rooms; Lounges; Clubhouses; Pools

Note: if it's a public space, the number doesn't matter

How many is a substantial number?

No bright-line rule: “routine meetings of business and governmental personnel ... do not represent the gathering of a ‘substantial number of persons’” (House Reports)

- (1) 5 is likely too small (per Nimmer)
- (2) 10 is arguably too small
- (3) Less than 20? Maybe
- (4) More than 20? Probably too many.
--21 members plus their guests was too many (*Fermata v. Champions Golf Club*)

Note: the number can be in the aggregate

Is that the end of the analysis?

17 U.S. Code § 110

Exemptions of certain performances

Exemptions include:

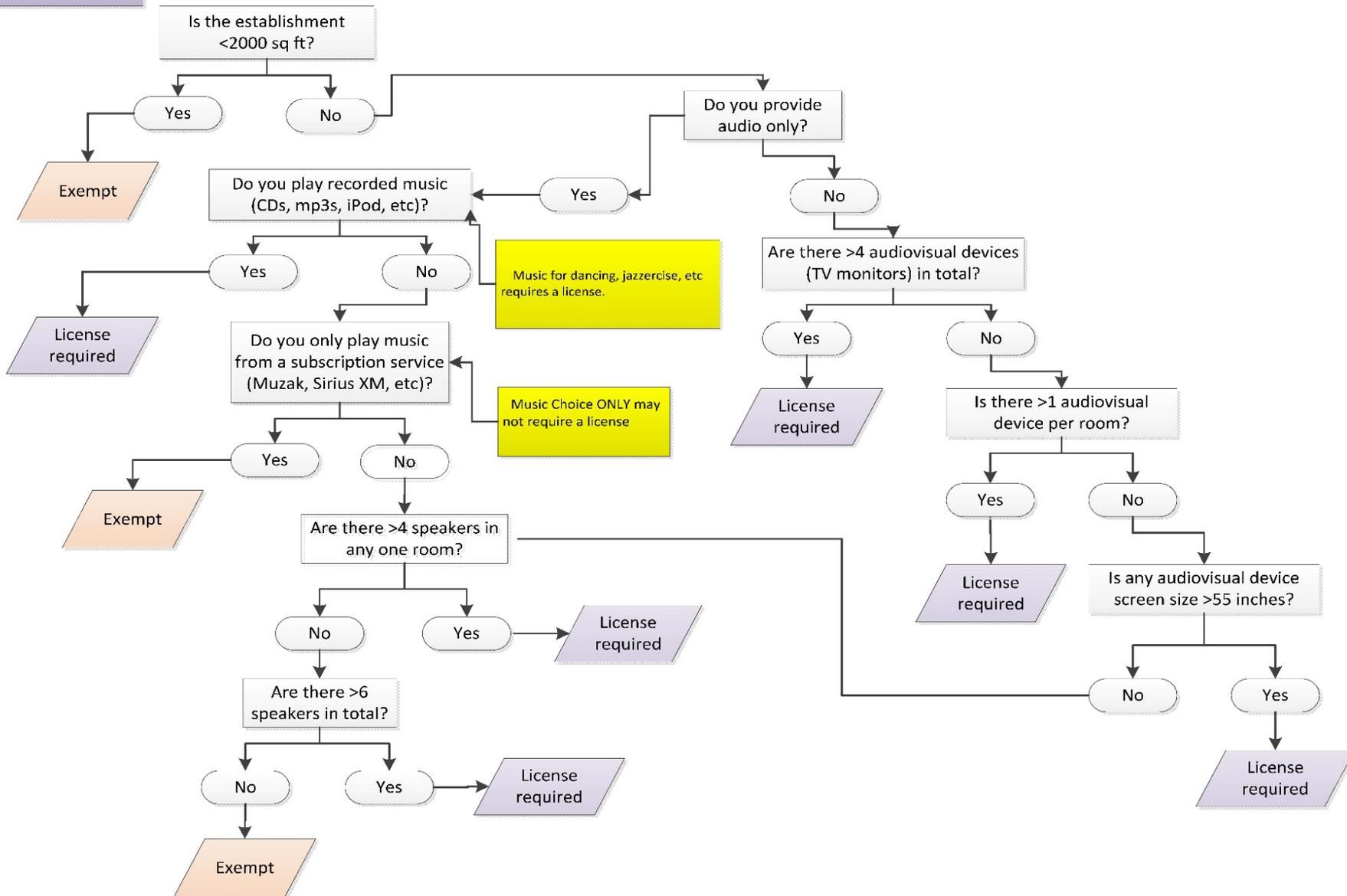
- classrooms,
- places of worship,
- non-profits,
- (5)(A): public broadcasts on a single device commonly used in homes
- (5)(B): public broadcasts by an establishment

UNLESS

- more than 6 speakers;
- more than 4 speakers in any one room;
- more than 1 TV in any one room;
- any TV over 55 inches diagonal;
- more than 4 TVs;

Note: exemption applies only to public broadcasts (over-the-air, cable, satellite)
Does not include CDs, DVDs, mp3s, DJs, Live bands, etc.

Music Licensing



NAA MUSIC LICENSING AT A GLANCE

NATIONAL APARTMENT ASSOCIATION
We Lead the Way Home

The copyright law prohibits the "public performance" of songs without the copyright owner's permission. This chart is not legal advice, but is intended to aid apartment owners and operators in evaluating their music licensing needs.

1 How Many Do You Have?

Number of	TVs	Audio Speakers
Leasing Office		
Clubhouse		
Pool		
Gym		
Media/Game Room		
Other		
Total		

Performance Rights ORGANIZATIONS

For reference, these are the three Performance Rights Organizations that collect music license fees.

ASCAP 1-800-505-4052 BMI 1-800-925-8451 SESAC 1-800-826-9996

2 Is the total number of TVs four or less?
AND Is there one TV in each room?
AND Are the TVs ALL 55" or less?

NO

YES

3 Is the total number of audio speakers six or less?
AND Are there four or less in each room?

NO

YES

4 Are there any other music subscriptions in effect that include a license for public performance such as SiriusXM?

NO

YES

5 Do you play radio, MP3s, CDs or other forms of recorded music; or allow DJs, fitness instructors or residents to play their own music using the property's equipment (at the pool, gym, game/theater room, etc.)?

YES

NO

Licenses May Be REQUIRED

Your property may need to be licensed. Contact your legal counsel to confirm what licenses may or may not be required for your property.

You May Be EXEMPT From Licenses

You may be exempt from obtaining music licenses. Contact your legal counsel to confirm what music licenses may or may not be required for your property.

REMEMBER

- 1 Always consult with legal counsel to confirm if performance licenses are needed.
- 2 Update information for your property annually and whenever your equipment set-up changes.
- 3 Document whether or not your property must be licensed and if so, what licenses you secure.

NAA's *UNITS Magazine*

March 2017

Make the Music Stop:

Dealing with Public Performance License Headaches

<https://www.naahq.org>

“Those firms are checking us out via our Facebook page and our community websites to see what systems we have at our properties.”

Why are they singling me out?

PROs are visiting your website and looking at the pictures of the amenities

- Multiple TVs in the Fitness Room

- Large screen TVs anywhere on the property

- Organized fitness classes

PROs are looking at social media (e.g., Facebook and Twitter) for evidence of music uses

- Pictures from the Christmas party

- Resident appreciation night

- Movie night at the pool

Fitness-on-demand, Wellbeats, Yoga, Jazzercise, Zoomba

Organized events in which a “substantial” number of tenants participate

How much are we talking about?

SESAC	
2019 Fee Schedule (per property)	
Total Number of Units	Annual License Fee
300 and under	\$277
301 - 600	\$558
601 - 999	\$835
1,000 - 1,499	\$1,205
1,500 - 2,999	\$1,483
3,000 and over	\$1,779



Residential Community 2019 Rate Schedule

Schedule A. Recorded Music*

<u>Number of Units in Community</u>	<u>Fee Per Community</u>
Less than 150	\$373.00
151 - 500	\$448.00
More than 500	\$512.00

Recorded Music: This fee applies for the performance of music by mechanical or electronic devices, including, but not limited to, radio, compact discs, internet streaming and other digital audio formats (e.g. MP3/iPod), DVD and other digital audiovisual formats, including multiple or large screen televisions / projection screens.

Schedule B. Live Music

12 or Fewer Events Per Year - \$320.00 per Community
13 - 24 Events Per Year- \$639.00 per Community
More than 24 Events Per Year -\$1,065.00 per Community

BMI

MUSIC POLICY / FEE CALCULATION

Check off the corresponding Rate Per Year Per Occupant for the ways music is used in the Licensed Premises.
Enter the amount(s) on the appropriate line(s) to the right.

Music Type	Frequency Per Week	Rate Per Year Per Occupant	<input type="checkbox"/>	Enter Fee Calculation
1. <u>Live Music*</u>				
<i>(Check only one rate box, if applicable)</i>				
• Multiple Singers/Instrumentalists	5-7 nights	\$6.15	<input type="checkbox"/>	
	2-4 nights	\$5.15	<input type="checkbox"/>	
(1 night = no more than 5 times in any one month)	1 night or less	\$4.65	<input type="checkbox"/>	
• Single Singer/Instrumentalist	5-7 nights	\$4.50	<input type="checkbox"/>	
	2-4 nights	\$3.70	<input type="checkbox"/>	
(1 night = no more than 5 times in any one month)	1 night or less	\$3.40	<input type="checkbox"/>	
Enter ONLY the highest amount checked above here.....→				\$
2. <u>Enhanced Recorded Music*</u>				
<input type="checkbox"/> Karaoke	<input type="checkbox"/> DVDs	<input type="checkbox"/> Video Tapes	<input type="checkbox"/> VJs	
	5-7 nights	\$3.55	<input type="checkbox"/>	
	2-4 nights	\$3.40	<input type="checkbox"/>	
(1 night = no more than 5 times in any one month)	1 night or less	\$3.30	<input type="checkbox"/>	
<u>Recorded Music*</u>				
<input type="checkbox"/> iPod / MP3 / Other Digital Music	<input type="checkbox"/> Free-Play Jukebox	\$3.05	<input type="checkbox"/>	
<input type="checkbox"/> CDs / Tapes / Records	<input type="checkbox"/> DJ			
Enter ONLY the highest amount checked above here.....→				\$
3. <u>Admission or Cover Charge*</u> (at any time)				
		\$1.95	<input type="checkbox"/>	\$
4. <u>Dancing To Live or Recorded Music*</u> (at any time)				
		\$1.95	<input type="checkbox"/>	\$
5. <u>Television and/or Radio*</u> (skip this Section if you have checked any box in Section 2)				
		\$1.35	<input type="checkbox"/>	\$
6. TOTAL RATE PER YEAR PER OCCUPANT (Sum of Lines 1-5).....→				
				\$

BMI

7. **Occupancy***

- **Clubhouse or Other Common Recreational Area(s) Occupancy** _____
(If greater than 1,000 occupants, enter 1,000)

OR

- **If Occupancy cannot be established by local building/fire codes, use formula below:**

Total Square Footage of Clubhouse or Other Common Recreational Area(s) _____ ÷ 20 = _____ Occupancy

8.

ANNUAL FEE (Multiply Line 6 by Line 7)
If \$378.00 or Less, Enter Annual Minimum Fee of \$378.00..... →

“**Occupancy**” shall mean the total of maximum allowable occupancy loads/capacities for the entire premises of the Clubhouse or Other Common Recreational Area(s) calculated under adopted building/fire codes, which shall not be limited to the number of available seats. If no such regulations are in effect in the applicable jurisdiction, then maximum occupancy shall mean one (1) person for every twenty (20) square feet of such total premises.

“**Clubhouse or Other Common Recreational Area**” shall mean a meeting or gathering place used by members of the Residential Community for social, cultural, recreational, or entertainment purposes.

How much are we talking about?

If you have a license with one PRO, do you need one with the others?

Each PRO represents a separate list of songs, so a license to one PRO does not cover the music licensed by the others.

Small Community < 150 units	
Radio/TV only and no live music	
SESAC	\$277
ASCAP	\$373
BMI	\$378
TOTAL	\$1,028

With live music (once a year)	
SESAC	\$277
ASCAP	\$693
BMI	\$877 (3,000 sq. ft.)
TOTAL	\$1,847

Mid-sized Community 350 units	
Radio/TV only and no live music	
SESAC	\$558
ASCAP	\$448
BMI	\$378
TOTAL	\$1,384

With live music (once a year)	
SESAC	\$558
ASCAP	\$768
BMI	\$877 (3,000 sq. ft.)
TOTAL	\$2,203

Subscription Music Services (e.g., Muzak or SiriusXM) :

- Most services have the necessary licenses
- But—those licenses only apply to their music
- They don't cover other music sources (e.g., live bands, radio, CDs, mp3s, TVs, etc.)

Below is a list of subscription music services that do not require additional licenses:

- Cloudstream (www.cloudstream.com - \$30/month per location)
- JukeBoxy (www.jukeboxy.com - \$30/month per location)
- Pandora/Mood Music (<http://shop.moodmedia.com> - \$35/month)
- Music Radio (www.royaltyfreemusicradio.com - free or \$20/quarter for 10 locations)
- Rockbot (<https://rockbot.com> - \$24/month)
- Cloud Cover (<https://cloudcovermusic.com> - \$18/month)
- Custom Channels (<https://www.customchannels.net> - \$35/month)
- SiriusXM (<https://www.siriusxm.com>)
- UMix (<https://umixmedia.com> - \$23/month)

MPLC

Does your property host a movie night or have a theater room playing movies?

You may need a license from the MPLC, which average around \$1,200 per property.

- \$6.00 per unit for the first 300 units
- \$3.00 for each unit from 301-500
- \$1.00 for each unit over 500

Or, use a movie service

- e.g., www.swank.com (\$100-\$200 per movie, depending on size of audience)
- reputable projection companies

What has the NAA done to help?



GUIDANCE PAPER | JANUARY 3, 2017

Public Performance Analysis for Apartment Communities: Fitness Centers and Movie Rooms

BY PROFESSOR DAVID NIMMER, COUNSEL TO IRELL & MANELLA LLP AND PROFESSOR FROM PRACTICE AT THE UCLA SCHOOL OF LAW

Results of the Nimmer Analysis

- When individual television screens are mounted onto **fitness equipment** in the fitness center (which is not publicly accessible), and where each television has its own cable box and the audio can only be heard through headphones.
- When wall-mounted televisions have been set to display **closed captioning** that accompanies broadcasts, but whose audio capabilities have been disabled.
- When a small **movie room** is available to be reserved by residents, but is otherwise inaccessible to the residents when not reserved.

Yes, but what have you done for me lately?

- Engaging Professor Nimmer for another Guidance Paper
 - Small fitness room? Resident private party?
 - Email us specific scenarios you would like addressed
 - jtinker@bellnunnally.com
 - shaislip@naahq.org
- Copyright and the Music Marketplace (2016):

“The Copyright Office believes that the time is ripe to question the existing paradigm for the licensing of musical works and sound recordings and consider meaningful change.”
- NAA speaking with congressional staffers about legislative changes
 - Informative, but not yet fruitful
 - **NO** to restaurant-style exemptions
 - Neither side happy with current arrangement
 - Nothing happening this year or next
 - Questions: Greg Brown gbrown@naahq.org
- Currently looking into options to address apartments at the rate court

Should apartments pay as much as restaurants and bars?

Music Type	Frequency Per Week	Rate Per Year Per Occupant	<input checked="" type="checkbox"/>	Enter Fee Calculation
1. <u>Live Music*</u> <i>(Check only one rate box, if applicable)</i>				
• Multiple Singers/Instrumentalists <i>(1 night = no more than 5 times in any one month)</i>	5-7 nights	\$6.15	<input type="checkbox"/>	
	2-4 nights	\$5.15	<input type="checkbox"/>	
	1 night or less	\$4.65	<input type="checkbox"/>	
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	2-4 nights	\$3.70	<input type="checkbox"/>	
	1 night or less	\$3.40	<input type="checkbox"/>	
Enter ONLY the highest amount checked above here.....→				\$ <input style="width: 100px;" type="text"/>
2. <u>Enhanced Recorded Music*</u>				
<input type="checkbox"/> Karaoke <input type="checkbox"/> DVDs <input type="checkbox"/> Video Tapes <input type="checkbox"/> VJs	5-7 nights	\$3.55	<input type="checkbox"/>	
	2-4 nights	\$3.40	<input type="checkbox"/>	
<i>(1 night = no more than 5 times in any one month)</i>	1 night or less	\$3.30	<input type="checkbox"/>	
<u>Recorded Music*</u>				
<input type="checkbox"/> iPod / MP3 / Other Digital Music <input type="checkbox"/> Free-Play Jukebox		\$3.05	<input type="checkbox"/>	
<input type="checkbox"/> CDs / Tapes / Records <input type="checkbox"/> DJ				
Enter ONLY the highest amount checked above here.....→				\$ <input style="width: 100px;" type="text"/>
3. <u>Admission or Cover Charge*</u> (at any time)				
		\$1.95	<input type="checkbox"/>	\$ <input style="width: 100px;" type="text"/>
4. <u>Dancing To Live or Recorded Music*</u> (at any time)				
		\$1.95	<input type="checkbox"/>	\$ <input style="width: 100px;" type="text"/>
5. <u>Television and/or Radio*</u> (skip this Section if you have checked any box in Section 2)				
		\$1.35	<input type="checkbox"/>	\$ <input style="width: 100px;" type="text"/>

ANNUAL FEE (Multiply Line 6 by Line 7)

If \$378.00 or Less, Enter Annual Minimum Fee of \$378.00

What about fitness centers?

2018-2019 LICENSE FEE SCHEDULE For clarification, refer to Sub-paragraph 9(a) below

<u>Category</u> (choose only one)		<u>Music Use</u>	<u>Member Fee</u> (per member)
<input type="checkbox"/>	A	Group Fitness Classes	\$0.294
<input type="checkbox"/>	B	Ambient Music	\$0.205
<input type="checkbox"/>	C	TV and/or Radio <i>Only</i>	\$0.127

$$\frac{\text{(Category)}}{\text{(Total Members)}} \times \text{(Member Fee)} = \$ \text{(Total Annual License Fee*)}$$

*Pursuant to Sub-paragraph 9(c), the total annual license fee per Licensed Premises shall not be less than \$328, shall not be greater than \$2,237 and should be rounded to the nearest penny.

NOTE: If Licensed Premises music use falls under more than one category, the higher per Member Fee shall apply.

A better model: employee-only portions of a business

7. FEES

(a) You agree to pay BMI for each employee for the first year of this Agreement fees as follows:

LICENSE FEE SCHEDULE

NOTE: The tiers are successive, not cumulative. For example, 800 employees would be covered by 250 in the first tier, 250 in the second tier and 300 in the third tier.

NUMBER OF EMPLOYEES	FEE PER EMPLOYEE
First 250	88 cents
251 - 500	69 cents
501 - 10,000	52 cents
10,001 - 20,000	45 cents
20,001 - 75,000	37 cents
75,001 and Over	24 cents

The minimum annual fee for 2019 is \$218.

This license includes BMI music used in:

- Live or recorded performances by bands or DJs at offsite or onsite company functions;
- Company Training;
- Audiovisual presentations;
- Company fitness facilities;
- Interactive software such as CD-ROM;
- Teleconferencing at company locations;
- Music-On-Hold;
- Radios, tapes and CDs used to enhance company image and motivate, and increase employee productivity.

A better model: employee-only portions of a business



MUSIC-IN-BUSINESS BLANKET LICENSE *2019 Rate Schedule*

FEES FOR PERFORMANCES AT LICENSEE'S BUSINESS LOCATIONS AND AT LICENSEE'S EVENTS

A. Fees for Calendar Year 2019.

The annual fee for calendar year 2019 shall be:

\$0.544 for each of the first ten thousand (10,000) of LICENSEE'S employees;

\$0.434 for each of LICENSEE'S employees from the ten thousand and first (10,001st) to the twenty-five thousandth (25,000th);

\$0.355 for each of LICENSEE'S employees from the twenty-five thousand and first (25,001st) to the fifty thousandth (50,000th); and

\$0.272 for each additional LICENSEE'S employees above the fifty thousandth (50,000th).

Aggregate number of employees across all business locations.
Excludes areas generally accessible by the public.

A better model: public areas of a commercial building

SESAC

2018 Fee Schedule

Number of Employees		License Fee
200,000	And Over	\$ 33,300
175,000	- 199,999	\$ 28,544
150,000	- 174,999	\$ 23,784
125,000	- 149,999	\$ 19,028
100,000	- 124,999	\$ 14,270
75,000	- 99,999	\$ 9,513
50,000	- 74,999	\$ 4,759
25,000	- 49,999	\$ 2,854
15,000	- 24,999	\$ 2,380
10,000	- 14,999	\$ 1,902
5,000	- 9,999	\$ 1,429
1,000	- 4,999	\$ 762
500	- 999	\$ 378
Under 500		\$ 189

Excludes retail facilities, restaurants, nightclubs, taverns, or similar locations



BELLNUNNALLY

QUESTIONS?