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Breezing Through Winds of Licensing--How Not To Get Blown Away

By Brian Taylor Goldstein

While it's critical for composers and artists to understand how to manage the rights in the music they create and perform, it's just as important for those who will be performing or presenting music written by others to understand the rights they will need to do so. I sat down with Elspith Udverhyde¹, Artistic Director of the Drunken Valley Music Festival, to walk through this issue from the perspective of a venue and presenter:

ELSPITH: *We booked the Tuba Choir of Turkmenistan to perform at our festival. Their manager sent a contract saying that the venue was required to obtain any necessary ASCAP, BMI or SESAC licenses, so I crossed that out. Our policy is that the artist is responsible for obtaining all licenses. But their manager called me and insisted that it is legally the presenter's responsibility. Is that true?*

BRIAN: Sort of. But it's not just the legal responsibility of the venue or the presenter. It's the legal responsibility of everyone involved in a concert or performance—the venue and presenter, as well as the artist, the producer, and, in some cases, the manager or agent—to make sure that the necessary rights and licenses have been obtained with respect to all copyrighted music (and all other rights, as well) used during a performance. It's a matter of negotiation as to which parties actually agree to obtain the rights and bear the costs.

ELSPITH: *But Bernie Klupfladel, our volunteer board attorney, says that if the contract clearly requires the artist to get the licenses, then ASCAP, BMI and SESAC can't come after us.*

BRIAN: What kind of law does Bernie practice?

¹ All names have been fictionalized. Only the legal points are accurate.

ELSPITH: *Maritime. He specializes in representing people who fall off cruise ships.*

BRIAN: Ah. Tell Bernie that if unlicensed music is performed at a venue, then U.S. Copyright law potentially allows all the parties involved in the performance—the artist as well as the venue, presenter, producer, and promoter, and even the artist’s manager or agent—to be sued by the composer or composer’s publisher for copyright infringement. Stealing a song is like robbing a bank: the entire gang is arrested. Regardless of who broke open the safe, who drove the get-away car, or who simply served as look out, they all participated in the robbery. When it comes to performances, if no one obtains the necessary licenses, then everyone could be liable.

ELSPITH: *So can’t we just insist that the artist get the licenses so we don’t have to?*

BRIAN: You could, sure, but I don’t recommend it. For one thing, a lot of artists will simply agree to get the licenses and then fail to do so. For another, it’s easier for venues to obtain blanket ASCAP, BMI and SESAC licenses than the artist. With the blanket licenses in place, the artist simply needs to show up. Ultimately, if the party that was supposed to get the licenses fails to do so, everyone is still liable. In other words, there are no magic words or contract which will protect you from liability should the necessary licenses not be obtained. This is why, among other reasons, if I operated a venue, I would much rather rely on myself to obtain ASCAP, BMI, and SESAC licenses than take the risk that the other party fails to do what they were supposed to do.

ELSPITH: *So, you’re saying that if we agree to pay for licenses from ASCAP, BMI and SESAC, then none of them will come after us?*

BRIAN: Correct, but ASCAP, BMI and SESAC only issue performance rights. That is, the right for the music to be “performed” and heard by the audience. They do not manage other rights and licenses that might also be needed for a performance. Other rights could include dramatic rights—such as for dance or theatrical performances—synchronization rights, or recording rights. Also, while they represent most composers, ASCAP, BMI, and SESAC do not represent all of them. Some composers have joined other organizations or just license performance rights themselves or through their publishers.

ELSPITH: *Assuming we agree to pay for ASCAP, BMI and SESAC licenses, would that at least cover an artist’s right to arrange or re-orchestrate a piece?*

BRIAN: No. While a “performance license” includes the right to “interpret” the work to reflect the artist’s own style, artistry, and expression, it does not include the right to re-orchestrate, re-arrange, change the title, change the lyrics or do anything else that changes the fundamental nature of the work. For that, you would need to obtain permission directly from the composer or the composer’s publisher.

ELSPITH: *But they don’t want to change the fundamental nature of the work. They just want to create an orchestral suite of Philip Glass’s “Einstein on the Beach” and orchestrate it for tuba choir.*

BRIAN: The Tajikistan Tuba Orchestra wants to perform “Einstein on the Beach”?

ELSPITH: *The Tajikistan Tuba Orchestra is actually a different group. Our group is the Tuba Choir of Turkmenistan.*

BRIAN: Trust me. Re-orchestrating “Einstein on the Beach” for tuba choir changes the fundamental nature of the work. You would need to contact Philip Glass’s publisher or manager directly to see if he would agree to that.

ELSPITH: *I can’t imagine he would refuse. Don’t all composers want to get their works performed?*

BRIAN: Be sure to mention that when you ask him.

ELSPITH: *Does paying for ASCAP, BMI and SESAC licenses also cover the right to stream the concert live? Bernie says it does.*

BRIAN: Some ASCAP/BMI/SESAC licenses for live performances also cover the right to stream the concert live. However, as with all rights, you only get what you ask and/or pay for. So, if you paid for the right to stream live concerts, then your license covers that. If you only paid for live concerts, then it does not. You need to check the license terms and agreement you received from ASCAP/BMI/SESAC.

ELSPITH: *What about the right to make an archival recording? Or to post the recording on our website for a time after the concert? I had our intern do some research on this and he said it was a grey area in which the law has not yet caught up with the technology.*

BRIAN: There are a lot of areas where copyright law has not caught up with technology. Unfortunately, this isn’t one of them. The right to create an audio recording requires a “mechanical license” and the right to create an audio-visual recording requires a “synchronization license.” These must be obtained directly from the composer or the composer’s publisher.

ELSPITH: *But we would only be making an audio recording for non-commercial use. I was told that a venue always has an inherent right to create an archival recording.*

BRIAN: There is never an “inherent right” to make a recording of any performance of copyrighted music at any time under any circumstances without the permission of the composer, as well as the performers themselves—even for so called “archival” recordings.

ELSPITH: *Does it matter that we wouldn’t be charging anyone to watch the concert on our website? It would just be for educational purposes.*

BRIAN: There is a common misperception that so long as no money is charged or music is used for educational purposes, then no licenses or permission is required. Nothing

could be further from the truth. While many composers and publishers may be happy to grant liberal permission, or even turn a blind eye to unauthorized uses, others are not. The safest rule of thumb is: never assume you have permission to do anything you haven't specifically been given permission to do. Always ask. It protects artists, protects your institution, and perpetuates the value of the arts.

ELSPITH: *Did I mention we are a non-profit? We haven't actually made any money for years.*

BRIAN: Not making any money is not the same thing as being a tax-exempt 501(c)(3). But it doesn't make any difference anyway.

ELSPITH: *So, how do we get a mechanical license?*

BRIAN: Once a musical composition has been recorded and publicly distributed, anyone may obtain a "Compulsory Mechanical License" to record and distribute the work provided, certain requirements are met. These requirements include providing advance written notice to the composer or publisher as well as the payment of the applicable fee, which is set by the U.S. Copyright Office. Provided these requirements are met, the Mechanical License must be granted—the composer or composer's publisher cannot refuse—that's why it's "compulsory." Compulsory Mechanical Licenses can be obtained directly through the composer or the publisher, or through such organizations as the Harry Fox Agency which, like ASCAP, BMI and SESAC, is an organization that represents many, but not all, composers and publishers.

ELSPITH: *We have commissioned the Dutch choreographer Euper Geehye to create a new work for this performance, to be performed by his company "Euper Geehye Says Dance!" Would an ASCAP, BMI or SESAC license cover this?*

BRIAN: No. Dance performances, like theatrical and opera performances, will require a "Dramatic License" for the music to be interpreted and performed dramatically. To obtain a dramatic license to choreograph "Einstein on the Beach", as well as to perform the choreography with that work, you must obtain a dramatic license directly from Mr. Glass or his publisher.

ELSPITH: *What do composers or publishers typically charge for such rights?*

BRIAN: As I love to remind everyone, there is no such thing as "industry standard." Composers and publishers may charge whatever they want. Also, just because you request a license doesn't mean the composer or publisher will even agree. Composers and publishers are free to be as arbitrary as they want when it comes to granting licenses and setting fees. It's like deciding whether or not to loan someone your car. It's entirely up to you. You own it and no one can force you.

ELSPITH: *But isn't it true that most publishers won't go after small venues or non-profits? They are only interested in money.*

BRIAN: That's not true, and, to be honest, also a little unfair. That's the same as justifying a robbery because the store owner wasn't looking and you probably won't get caught. Just because you can't afford a diamond doesn't give you the right to steal it. Are you suggesting that music or talent is less valuable than cars or jewelry?

ELSPITH: *But they make it so hard. Should we just give up?*

BRIAN: Not at all. Keep in mind that, more often than not, you will be able to get the licenses you need, provided you invest the necessary time, energy, and attention. Do not leave the licensing process to the last minute and do not assign this task to a volunteer intern helping out at your office. Also, bear in mind that the same rules that may seem to thwart your ability to use the music you want also protect you when it comes to controlling the ability of other groups to copy and perform works that you might commission, create, or control. If all else fails, you could always consider supporting a composer and commissioning your own music!