

Law Offices
Webster, Chamberlain & Bean

May 8, 2001
Via FAX and US Mail

Ms. Judy Simpson
American Music Therapy Association
8455 Colesville Rd., Ste. 1000
Silver Spring, MD 20910
Re: Use of Music in Hospital Settings

Dear Ms. Simpson:

This is pursuant to our recent discussions about the ability of music therapists to use copyrighted music in their work at hospitals and clinics and what copyright issues are raised by this use. You have explained that certain AMTA members use recorded music to play during therapy sessions with individual patients and that the same kind of music is sometimes also used in group therapy sessions. Members sometimes also publicly perform live music in these same settings. Recently AMTA has learned that some hospitals have questioned the ability of music therapists to use recorded music or to perform music in their work. Hospitals have also received notices from Broadcast Music, Inc., (BMI) that music therapists who use music in this manner may be in violation of the Copyright Act. Our conclusion and discussion of this matter are as follows:

Conclusion

AMTA members may play or perform copyrighted music for their work with patients within a hospital or similar facility as long as the music is not played or performed in a public setting. Use of music in a private setting is not a violation of the copyright law. The uses of music by AMTA members is also covered in the standard "BMI Multiple Use License" which many hospitals enter into in order to address copyright ownership concerns. Music therapists need not rely on BMI licenses for the exclusions that are discussed below.

Discussion

The AMTA members who play copyrighted music (either live or by recording) as a part of the therapy they offer to patients should be aware of the copyright ownership rules concerning the music they choose for their work. Copyright owners have the following rights with regard to their works:

- The right to reproduce the work;
- The right to create derivative works (e.g., a movie from a book, a translation);
- The right to publicly perform the work;
- The right to publicly display the work;
- The right to publicly distribute copies of the work;

In the case of a sound recording, to perform the copyrighted work publicly by means of a digital audio transmission.

A therapist who plays or performs music by way of a tape recorder, CD player, keyboard or guitar in a private hospital room for one patient does not violate any of the above rights. There are two reasons for this. First the Copyright Act provides no public performance right in a sound recording except as noted in (6) above - i.e., except where the sound recording is broadcast by means of a digital audio transmission. Thus, playing a sound recording on a tape player at a public auditorium would not violate an owner's

copyright in a sound recording. [It would, however, infringe the copyright of the musical work contained in the sound recording - but the violation would occur because the performance of the musical work contained in the sound recording is in a public place.] Second, for a violation of the performance right in a musical work (that may be contained within a sound recording) to occur, the setting in which an infringing violation takes place must be public as opposed to private. A hospital room is private. Hence one-on-one patient-therapist work within a hospital room is not the kind of setting where performing music or playing music in the form of a sound recording will result in copyright infringement.

Where a group of patients is receiving treatment in a setting where music is being performed or played, no copyright infringement will occur as long as the group does not constitute the "public". What is the public for purposes of copyright infringement? It is a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered. A performance limited to members of a family and invited guests is not a public performance. [See, Hazard, John W., Jr. Copyright Law In Business and Practice, (Revised Ed)., West, at para. 1.03[2], "Publication Defined".]

The group patient settings described above do not constitute public gatherings, and are, therefore, not subject to the Copyright Act's restriction on public performances of musical works.

Even though no copyright infringement would exist in the above-described situations, I would like to comment on hospitals that enter into what is known as a "Multiple Use License" issued by organization like Broadcast Music, Inc. (BMI). In issuing Multiple Use Licenses to hospitals, BMI seeks to license the use of copyrighted music to the hospitals, usually for public areas like reception rooms and cafeterias. Although no music license is needed in the case of music therapists who are engaging in individual and group therapy activities for their patients, you may wish to note that the BMI license agreements would cover music therapists' activities even if the Copyright Act did not provide the exclusions discussed above. This is because the license agreements allow the performance of music within a facility's "premises", which are defined as "all locations operated and owned or leased by you or your subsidiaries which are used as health care facilities or leased by you or your subsidiaries which are used as health care facilities for the treatment of illness or provision of custodial care, having full-service professional staffs, such as hospitals, nursing homes, ambulatory care centers and clinics." A hospital, clinic or nursing home that has entered into a Multiple Use License Agreement with BMI would be covered for music used by music therapists in the above-described situations, since the music would be played on the "premises" and would be used in "the treatment of illness". Therefore, even if the performance of music by music therapists were to be considered infringing under the Copyright Act, no infringement would arise if a BMI Multiple Use License were in place.

If you have any questions about this matter, please do not hesitate to contact me.

Sincerely,

John W. Hazard, Jr.

Cc: William Grothe, Esq., Counsel, BMI
JWH:jjr