

Livestreaming Without a License: How to Avoid Copyright Infringement Risks

by Andrew L. Goldstein

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One aspect of life during the “new normal” as a result of the Great Lockdown is the increased use of livestreaming platforms, such as Zoom, WebEx, Skype, Google Hangouts, and others. People are using these livestreaming platforms for many purposes including business meetings, virtual happy hours, and family gatherings and events. Various businesses are also using livestreaming platforms to provide services that were previously delivered in person, such as educational services, religious services, weddings, funerals, and fitness classes. However, as discussed in detail below, use of livestreaming platforms to provide these services can create a risk of copyright infringement that was not involved with providing the same services in-person.



The U.S. Copyright Act grants the owner of a copyrighted work various rights, including the right “to perform the copyrighted work publicly.” Unless you have the permission of the copyright owner(s), you cannot, for example, publicly perform a musical composition or broadcast an audiovisual work, such as a motion picture or television program.

With regard to songs and musical compositions, there are performing rights organizations (PROs), such as ASCAP and BMI, which license, collect, and distribute public performance royalties for songwriters and publishers. Songwriters and publishers are entitled to collect a royalty whenever their song is played on the radio, or at a restaurant, a retail establishment, a park district facility, etc. For a fee, the PROs provide “blanket” licenses that allow these facilities and services to broadcast songs in the PRO’s catalog.

Therefore, when, for example, a fitness instructor goes to the local park district community center and plays various songs during his or her class, the park district typically has licenses in place with the PROs that cover the use/performance of the songs by the fitness instructor.

However, these days, with the shelter rules in place, many fitness instructors and others are providing their services by means of Zoom or another livestreaming platform. These livestreaming platforms generally do not have blanket licenses with the PROs that would cover a user’s use/performance of a musical work or other copyrighted work over the platform. Therefore, using or performing a musical work or other copyrighted work over a livestreaming platform creates risks for copyright infringement if you do so without an appropriate license.

The same is true regarding audiovisual works such as motion pictures or television programs, in that you cannot use an audiovisual work in a livestreaming broadcast unless you have permission to do so from the appropriate rights holders. As opposed to musical works, there are no central PROs that provide licenses to use/perform motion pictures or television programs. Therefore, if you use all or a significant portion of an audiovisual work in your livestreaming broadcast without a license, you could be susceptible to a claim for copyright infringement.

The penalties for copyright infringement can be costly. A copyright owner can recover its actual damages for an infringement, or, if the copyright is registered, the copyright owner can be entitled to recover statutory damages ranging from \$750 to \$30,000 per work, or up to \$150,000 per work for instances of willful infringement, plus attorneys' fees and courts costs.

With respect to religious institutions in particular, the U.S. Copyright Act provides an exception from the requirement to obtain a performance license for "the performance of a nondramatic literary or musical work or of a dramatico-musical work of a religious nature, or the display of work, in the course of services at a place of worship or other religious assembly." This exception, however, is limited to performance during a religious service at a place of worship or other religious assembly, and it does not cover use of a musical work or these other works through a livestreaming platform.

Note that, if your use of a copyrighted work constitutes a "fair use," you would not be required to obtain the licenses discussed above. The U.S. Copyright Act provides the following non-exclusive factors to determine whether use of a copyrighted work constitutes a "fair use":

1. the purpose and character of the use, including whether it is of a commercial nature or for nonprofit educational purposes, i.e., whether the use is transformative;
2. the nature of the copyrighted work; i.e., if the work is more factual in nature, as opposed to being more creative, this factor should favor "fair use;"
3. the amount of the portion used in relation to the copyrighted work as a whole; i.e., if the use involves only a small portion of the copyrighted work, this factor should favor "fair use;" and
4. the effect of the use upon the potential market for or value of the copyrighted work.

No one of these factors is determinative.

What constitutes a "fair use" can be a complicated and subjective inquiry and could be the topic of another article. However, to illustrate, if you were to use a short clip from a song or a motion picture during the course of a business meeting and such use was relevant to a point being made, it is likely that this would be a "fair use."

During this period of "new normal," and going forward in general, you should take care not to include copyrighted works, such as songs or motion pictures or televisions programs, in your livestream broadcasts unless you have the appropriate licenses.

If you have any questions, please contact Andrew Goldstein or another member of Freeborn & Peters LLP's Intellectual Property Practice Group. Stay tuned for further developments on [Freeborn's COVID-19 webpage](#).

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Andrew focuses his practice in the area of Intellectual Property and Information Technology. He has extensive experience in the areas of intellectual property law, including trademark, copyright, trade dress; internet, website, cloud computing, technology, outsourcing, IoT and computer law in general; advertising, marketing, and promotion law; and entertainment law, including video production, theater and dance-related matters.

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