

DAVIS WRIGHT TREMAINE LLP

# Playing Music At Your Winery

A Legal Resource Provided by Davis Wright Tremaine LLP

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Davis Wright Tremaine LLP is a full service law firm providing services to the wine industry in the areas of mergers and acquisitions and other business transactions, land use and real estate, alcohol regulatory and licensing, intellectual property, employment, and litigation.

# Music at Your Winery

If you play music (live, recorded, or streamed) to the public at your winery—even if you own copies of the songs, whether you downloaded the copy or created the digital copy yourself—you **must have the appropriate licenses**. It may be a hassle to figure out what licensing structure is right for you, but getting caught without the necessary permissions means potentially significant penalties. For instance, a court awarded over \$200,000 in damages against a restaurant playing recorded and live music without proper permission. And, Napa Valley wineries, and some Oregon Wineries have reported that they are being targeted for enforcement.

## It is important to understand:

- Copyright law treats private performances and public performances differently. You cannot play music from YouTube, your personal Pandora account (including Pandora One), your personal Spotify account, or legally downloaded digital copies of songs audible to customers at your winery unless you have appropriate licenses. Typically this means acquiring a public performance license from ASCAP, BMI, GMR and SESAC, the major performing rights organizations in the United States (but there are two others, AllTrack, and Pro Music Rights) or subscribing to a service that already has these licenses. Each artist will belong to only one, so you may need to acquire licenses from multiple organizations.
- Live performances may require you obtain additional licensed rights, especially if you plan to record or stream the performance.
- There is a very narrow exception to this music licensing obligation if you play only “over-the-air” radio and TV and your tasting room (or other area you publicly play music) is small. **Streaming music does not fit under this exemption; this only applies if you are playing radio or TV and the exception is defined by square footage, amplification, the size of the TV, etc.**
- Be careful if you are regularly playing music not meant for, but still audible to, the public (e.g., in the kitchen). This might cause problems if a music rights holder considers this a “public” performance.
- Copyright law generally doesn’t treat non-profit or non-commercial uses differently so it is unlikely that there will be an exception if you have a non-profit or similar status.
- If you do have a license, be aware of what it covers. A license for a public performance does not mean that you can upload a YouTube video of a live performance.
- Be careful about relying on music libraries made available on social media platforms (e.g. Tik Tok Commercial Music Library). They may have been cleared at the time for certain uses, but the platforms aren’t always careful about keeping them up to date. This is an active area of litigation.

**Deciding What Price is Right for You.** If you want to play music for your customers, every winery’s situation is unique. For recorded music, the biggest questions are how much are you willing to pay to control what’s playing (and when) and do you want to have the ability to play every song of an artist or album. Typically the more control you want over the exact music played, the more expensive the licensing. For live music, the biggest questions are what rights the performing musicians have to the music, what kind of music are they playing, and do you also want to stream or record the performance.

# Music Licensing Options for Wineries

## You Want to Play Recorded Music at Your Winery

- **Option 1: Play Radio or TV:** In this narrow case, you can play music **for free** through over-the-air (i.e. not over the Internet, not cable) radio or television stations so long as you do not charge customers to listen or watch and:
  - The area of your winery where the music is played (e.g., tasting room) has less than 3,750 square feet of space (including kitchen, storage rooms, and offices, but excluding the parking lot and vineyard); **OR**
  - The area of your winery where the music is played (e.g., tasting room) has more than 3,750 square feet, but uses no more than six speakers **AND** no more than four speakers in any one room or adjoining outdoor space.
- **Option 2: Subscribe to Pandora for Business or Sirius XM for Business:** You can subscribe to a business account through Pandora or Sirius XM, and those companies will pay the necessary licensing fees for you. These services will include genre stations and some ability to control the type of music played (e.g. mood or genre), but may not be able to provide all music and may specify the playlists or limit the specific musicians or songs available to you. The subscription fees vary based on the service you select, but they typically include an installation fee (~\$150) and monthly subscription fees of \$25-\$50. (Note: Spotify's current business service is for management only, and does not cover licensing from BMI, ASCAP, and SESAC). Please note that Sirius XM and Pandora have the same ultimate owner, but these two services are different.
- **Option 3: Subscribe to a Similar Subscription Service From a Start Up Company or New Company:** There are a number of new companies that want to provide music subscription services for bars, restaurants and other hospitality businesses. Soundsuit and Rockbot are two such companies. These companies often offer prices and subscriptions that are lower than those offered by their larger competitors. If you're interested in trying one of these services, you will want to ensure that the service is properly licensed by the record labels and publishers (some aren't) and that you are prepared in case the company doesn't have the staff to provide good customer support or is purchased or goes out of business and can no longer provide the service.
- **Option 4: Installation of a Mood Media System in the Winery:** Mood Media, formerly known as Muzak and DMX (and which acquired Play Network), (which is the service that underlies Pandora for Business) offers a full system that they will install in the winery. The system is more expensive than merely subscribing to one of the subscription services, but they offer a fully integrated system in the winery and can integrate branded content and provide consulting services so that you can use the content to better connect with customers of the winery. The system typically has custom pricing and require discussions with a sales representative.
- **Option 5: Obtain Public Performance Licenses Directly from ASCAP, BMI, GMR and SESAC:** Three different performing rights organizations (ASCAP, BMI, GMR and SESAC) enforce the public performance rights of their enrolled musicians' music. ASCAP and BMI are the two biggest, with GMR and SESAC far behind. These organizations charge annual license fees for access to their musicians' music. If you have a public performance license from each of these organizations, you don't have to subscribe to any other service and you can play whatever music that you want, whenever you want, and on or through whatever device you want. In other words, you can play your music collection without concern. There are some administrative headaches. Obtaining a license may require you to disclose certain financial information, one typically needs to obtain a license from all three organizations, and

there is some paperwork that requires you to disclose sample playlists. This is also the most expensive option. The total cost to obtain a license from all three is likely to be \$1500-\$3000 per year and likely will vary based how large your winery is.

## **You Want to Play Music on Your Website or Background Music for a Virtual Event.**

- Videos with music that you want to host and play on your website, as background for a virtual event, or on a video screen in the winery are a different type of use and may require a different license (in addition to the licenses discussed above). This license must be obtained directly from both the performer/record label and the composer/publisher. In short, it can be complicated.
- Linking to someone else's video located on YouTube, Vimeo or another service does not require any permission so long as you do not place the video on your servers, but you still need a public performance license, i.e. one of Options 1-5 above.
- Uploading a video produced by the winery (or a recording of a livestream including music) that includes music will require a synchronization license from both the composer/publisher and the performer/label. There is no obligation for either party to grant permission or license the music at a reasonable price.
- There are very few sound recordings, i.e. performances of music, that are in the public domain so it will be difficult to play background music without a license. Sound recordings from 1926 or earlier are in the public domain.

## **You Want to Play Live Music at the Winery.**

- **Unless the music is in the public domain (i.e. the music was composed in 1930 or earlier), you have to have a license from the corresponding performing rights organization, i.e. ASCAP, BMI, GMR and/or SESAC. You will also have to get consent from the musician's record label and/or from the musician, but that is typically easier and part of the agreement with the performers.**
- To play live music (that is not in the public domain) to the public, whether it's a rock band at the annual summer party or woodwind quintet at a wedding, the winery will need to have a license from the applicable performing rights organization(s) (an additional license at an additional cost from the license described above). The total cost is likely to be \$2,000 and above, plus a percentage of ticket revenue above certain thresholds, to obtain the rights from all three major organizations (but you may only need a license from a single organization where all of the music is part of a single licensing organization's catalog).
- If the winery also makes an audio or video recording of the performance, uses any of the musical performance in promotional audio or video for the winery, or shows the performance later in the winery or on the winery website, the winery will also need additional consents the composer or publisher and from the musician and/or the record label.
- *Be careful, just because the musician claims to have the necessary ability to give permission, that may not actually be the case.*
- Any agreements with the artist performing at your winery should contain certain provisions that can help specifically address these concerns. Please see the sample provisions for live performance agreements on the next page for details.

- Any agreements with artist should also address any promotional obligations of the artist and ensure that you are separately licensing name, image, and likeness rights from the artist. These don't automatically come with either a music license or a commitment by the artist to perform at your winery.

## Information on Legal Provisions to Include in Agreements with Live Music Performers at Your Winery:

You may consider including the following language in the agreement between your winery and the artist performing live at your winery. This language is not meant to constitute an entire contract, nor legal advice. We recommend you contact a lawyer to discuss the specifics of your situation.

In addition to the below, your agreement with the artist should clarify at least the following terms:

- Performance date (including arrival time), location, and duration
- If the winery does not have blanket licenses with ASCAP, BMI, GMR and SESAC—or if you don't have permission from the artist's label for particular songs—consider specifying the songs that the artist will perform. For instance, you could limit songs to: only original content from an unsigned band, songs in the public domain, or songs that the winery has otherwise obtained necessary permissions for the artist to perform
- Whether you will be recording, streaming, or distributing the performance, or if you will be using the performance in any marketing or publicity
- What equipment the winery and the artist will provide, as well as any necessary set up or takedown
- Compensation, including total amount, any revenue shares, and reimbursable expenses
- Whether either party may terminate the agreement before the performance
- Whether the winery will have rights to promote the performance, and if performer will provide promotional materials
- Whether artist will have right to sell merchandise at the performance
- That artist will comply with your winery's policies (fire, safety, conduct, etc.)
- Whether artist must maintain any insurance policies

The following sample contract provisions for example, are intended to clarify that the artist has the ability to perform the relevant songs, and will pay for any legal costs arising from its breach of the agreement. Note that "Artist," "Winery," and "Performance" should match whatever terms you otherwise use in the agreement.

- **Warranties.** [Artist] represents and warrants to [Winery] that: (a) the [Performance] will not violate any agreement or obligation between the [Artist] and a third party; (b) the [Performance] will not infringe or violate any copyright, patent, trademark, trade secret or other intellectual property, proprietary, privacy, personal or publicity right of any third party; (c) any and all worldwide mechanical rights, synchronization rights, master use rights, and performing rights for music delivered to [Winery] or performed in the [Winery] are controlled by [Artist] or fully licensed to comply with this Agreement; (d) [Artist] has acquired all third-party rights and releases necessary for [Artist]'s [Performance] and/or grant of rights to [Winery] under this Agreement without [Winery] incurring any further obligation or payment,

including, but not limited to, copyrights, rights with respect to all individuals and their likenesses appearing in photographs, videos, recordings, and all other media (including, but not limited to, models, members of the public, interviewees, actors, talent), moral rights, music rights, photo rights, sound rights, and video rights; and (e) the [Performance] is not libelous, defamatory or unlawful.

- **Indemnification.**

- [Artist] will indemnify, defend and hold [Winery] its directors, officers and employees harmless from and against any and all losses, liabilities, damages, costs and expenses (including reasonable attorneys' fees) ("Losses") arising from or relating to any claim, action or proceeding (each a "Claim") brought by any third party (including agents, producers, labels, publishers, or other representatives of the party) based upon (a) any breach by [Artist] of its representations, warranties or obligations set forth in this Agreement; or (b) any negligent act or omission or intentional misconduct of [Artist].
- [Winery] will (a) provide [Artist] with reasonably prompt notice of Claims; (b) permit [Artist] through mutually acceptable counsel to answer and defend Claims; and (c) provide [Artist] with reasonable information and assistance to help [Artist] defend Claims at the [Artist]'s expense. Any indemnified party will have the right to employ separate counsel and participate in the defense of any Claim at its own expense. [Artist] will not stipulate, admit, or acknowledge any fault or liability on the part of the indemnified party without prior written consent.

## How You Get The Licenses:

Product Name	Where to sign up or make an inquiry:
Pandora for Business	<a href="https://cloudcovermusic.com">https://cloudcovermusic.com</a>
Sirius XM for Business	<a href="https://siriusxm.com/business">https://siriusxm.com/business</a>
Mood Media	<a href="http://us.moodmedia.com/contact-us/">http://us.moodmedia.com/contact-us/</a>
Spotify for Business* <i>*Note: using this service still requires licenses from the below Performance Rights Organizations.</i>	<a href="https://www.soundtrackyourbrand.com/soundtrack-business">https://www.soundtrackyourbrand.com/soundtrack-business</a>

Performance Rights Organizations	
ASCAP	Template annual license for wineries available at: <a href="http://www.ascap.com/~media/files/pdf/licensing/classes/wineries.pdf">http://www.ascap.com/~media/files/pdf/licensing/classes/wineries.pdf</a> You can search their catalogue here: <a href="https://www.ascap.com/Home/ace-title-search/index.aspx">https://www.ascap.com/Home/ace-title-search/index.aspx</a>
BMI	Web page for wineries available at: <a href="http://www.bmi.com/licensing/entry/winery">http://www.bmi.com/licensing/entry/winery</a> You can search their catalogue here: <a href="http://www.bmi.com/search">http://www.bmi.com/search</a>
SESAC	Provides an interactive licensing process available at: <a href="https://www.sesac.com/Licensing/formreqlicense.aspx">https://www.sesac.com/Licensing/formreqlicense.aspx</a> You can search their catalogue here: <a href="https://www.sesac.com/Repertory/RepertorySearch.aspx">https://www.sesac.com/Repertory/RepertorySearch.aspx</a>

# What To Do If ASCAP, BMI, GMR, Or SESAC Contacts You:

If you have paid the relevant organization, or using either Pandora for Business or Sirius XM for Business, you should be able to resolve the issue by showing proof of your licensing payments. Otherwise, we recommend seeking legal counsel.

**THIS IS NOT LEGAL ADVICE.** Please contact us for an electronic version with live links.  
Contact Sheila Fox Morrison at 503.778.5311 or [sheilafoxmorrison@dwt.com](mailto:sheilafoxmorrison@dwt.com),  
or Kraig Baker at 206.757.8007 or [kraigbaker@dwt.com](mailto:kraigbaker@dwt.com)