



## THE BUSINESS OF COVID-19

### RELIGIOUS SERVICES, LIVE STREAMING, AND THE LOSS OF THE RELIGIOUS EXEMPTION TO THE U.S. COPYRIGHT ACT

The COVID-19 pandemic affected everything, and religion was no exception. No matter the affiliation or faith, COVID-19 restrictions required all religious leaders to address one universal question: how to make religious services available to their congregations if their congregants could not personally attend services? Answers to this question were creative and wide ranging from conducting services in parking lots that were set up for social distancing and broadcasting via FM radio transmitters (or drive-in movie speakers) to live streaming services on all available internet platforms such as YouTube and Zoom to hybrid service models that blended both in person and on line attendance.

As part of this decision making process, these same religious leaders encountered two additional problems: (1) how to acquire and operate the technology infrastructure that was necessary to support their chosen delivery systems and (2) how to create meaningful religious experiences for congregants that were only attending services on line. To overcome these obstacles, religious leaders began looking for (a) funding for infrastructure/operational improvements and (b) ways to create religious content that would both engage congregants and viewers and serve present and future public relations needs. In other words, religious organizations that chose to go online also had to face the realization that they needed to evolve into sustainable webcast/streaming services with quality content or risk losing their congregants to other churches and synagogues that streamed better services and created more meaningful prayer experiences.

As religious organizations began the process of learning how to webcast or stream religious services and create the content necessary to fill their streaming schedules, this evolution also produced an unintended consequence: it removed religious organizations that broadcasted their services online from the protections of the Copyright Act of 1976 ("Act") More specifically, these organizations lost the protection of the Act's "Religious Services Exemption" See: 17 U.S.C. § 110(3) (2012)<sup>1</sup>. What this means for churches and synagogues and the reasons why it is so important to consider are set out below:

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<sup>1</sup> The Religious Services Exemption to the Act permits a religious organization to use a copyrighted work could be without the need for a license if the religious organization's use of the work constitutes a "fair use." The Act provides the following non-exclusive factors as guideposts when determining 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.

### ***Religious Services and the United States Copyright Laws***

Pursuant to the Act, religious organizations are exempt from having to obtain public performance licenses when they perform “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.” In other words, churches and synagogues are Pre-pandemic, this clause minimized the need for religious organizations to be concerned about copyright laws or performance licenses because a vast majority of the “musical works” protected by copyright laws were performed by these organizations only ***during a religious service at a place of worship or other religious assembly***. In other words, if a church or synagogue performs a copyrighted work during the course of a religious service and that service is conducted in a house of worship, then it does not need to get permission from the copyright holders to perform that work prior to the service.

However, with the pandemic and the resulting improvements in livestream technology and congregant acceptance of webcasted/livestreamed religious services, the resulting service model was no longer limited to a single prayer space within a church or synagogue. Instead, this new form of service became accessible to all via the organization’s streaming platform of choice. Once the service literally left the building and could be seen or heard via the internet, the religious organization responsible for broadcast lost its right to the “religious service exemption” (because the service was no longer limited to an in person experience within a place of worship) and became responsible for acquiring the performances licenses necessary for copyright compliance or risk copyright infringement litigation, cease and desist notices, and/or temporary takedown notices from the streaming services that were carrying the service(s). For example, if a church or synagogue includes in a streaming service a prayer that is adapted to music from a Broadway musical, that religious entity must either obtain the requisite license to use the music in a public performance or not use the music at all.

### ***What is a Religious Organization to Do?***

For religious organizations that do not disseminate their religious services beyond the traditional worship spaces, they do not have to alter how they are conducting their business. In contrast, those religious organizations that have incorporated a livestream or internet broadcast component into their service models will need to obtain the licenses necessary for their use of musical works that are protected by copyright before including the music in their service. In addition, religious organizations will need to review and understand the rules by which their chosen streaming and/or webcast service providers (Facebook, Zoom, YouTube, Twitch, etc.) operate their platforms and how they address claims of copyright infringement so that infringement claims can quickly be addressed, and takedowns avoided.

Furthermore, religious organizations need to recognize and understand that obtaining licenses<sup>2</sup> and/or author consent to use a “musical work” may not be as easy or convenient as it would be for secular music. While mainstream music licensing companies such as ASCAP and BMI handle vast repertoires of music, religious music is not a top priority. For example, ASCAP partners with Christian Copyright Solutions (CCS) to help churches and non-profits obtain licenses for everything from blanket to single song licenses. Unfortunately for those looking to license other forms of music such as Jewish music, no all-encompassing professional musical licensing service at the level of ASCAP, BMI, SESAC and/or Global Music Rights or CSS exists. Instead, those looking for Jewish music, can use limited scope companies such as JLicense

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<sup>2</sup> The various music licenses (which are based on use) include, but are not limited to, Print/Reprint, Mechanical, Synchronization, Performance, Master Use and Digital Audio Transmission. Blanket licenses may be obtained directly from the various music licensing services or by associating with a streaming platform or performance venue.

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(created in 2017 to license and monitor music produced by the Transcontinental Music label) or contact the musical work's composer(s), lyricists, performers and/or publishers directly to determine what permissions are needed to livestream or broadcast the selected work.

Finally, religious organizations need to make sure that any licenses or contracts executed with the owners (or their representatives) of the musical works in question grant all of the rights that are necessary to stream their works, such as the right to stream the work initially, the right to rebroadcast the work (residuals), use of the musical work as part of a clip or marketing piece, etc. In addition, the licenses and contracts include the permission of all of the contributors to the musical work (those who wrote the lyrics, music, provided postproduction work, designed the album cover, etc.) to use it in the manner contemplated by the religious organization.

### ***Why Worry About Copyright Infringement?***

Why should religious organizations worry about copyright infringement? This question can be answered by asking another question: How many religious organizations have the financial wherewithal to defend a copyright infringement action and pay any resulting statutory damages and associated fees? The Copyright Act contains stiff penalties if a copyright violation can be proven. Copyright owners who timely register their works are entitled to recover statutory damages ranging from \$750 per work up to \$150,000 per work if the infringement is willful. For those copyright owners who do not register their works with the US Copyright Office, they can still collect actual damages from infringing reproductions or recover profits made by the religious organizations from the selling of recordings or from the donations received by the religious organization from its use of the infringing work.<sup>3</sup>

In addition to the statutory penalties, streaming services will not hesitate to block or restrict any religious services that contain copyright-protected music for which the religious organization does not have a license to perform. The fine print in the streaming services rule and regulations allow them to take immediate action to block copyright infringers meaning that services could be blocked in mid service, special events could go dark, and reproductions of the infringing event could not be sold or restreamed and clips of the event could not be used for promotional purposes.

### ***Summary***

The unintended consequence of moving religious services out of their physical prayer spaces and on to the internet has been the loss of the protections afforded to religious organizations by the religious exemption contained in the U.S. Copyright Act. As a result, churches, synagogues, and other religious entities have to clear the musical works they are intending to perform and make sure that if the music is not part of the public domain, they have secured the necessary licenses in order to perform those works without risk.

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<sup>3</sup> Religious organizations should contact their liability insurance carriers and determine whether it is practical to purchase insurance coverage that will cover intellectual property infringement actions.

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