

Welcome to The Screw The Record Label Podcast: Episode 10. Today we're talking about the new Facebook Terms of Service update happening on October 1st and the music guidelines that have been getting attention over the last two weeks. I asked my friend Gordon Firemark from the Entertainment Law Update Podcast to join me on my Facebook page to talk about the music guidelines and what they mean for musicians. Here is that conversation.

Nancy: There we go. Alright, I think we're live now. So welcome, everyone, to the Rockbition page. If you're new to my page, I am Nancy Halligan and I teach musicians and music venues how to promote and sell their music and shows online. So today we're talking to Gordon Firemark from the Entertainment Law Update podcast, and I'm really excited about this one because this has been making the rounds for at least the last week and everybody is calling these updates new and there's really nothing new. So if you're doing some of these things you might be doing them wrong and you're risking your page doing them.

Nancy: All right. So the one thing I'm going to talk about first is the one line that is actually changing on October 1st. And that is: "*We also can remove a restricted access to your content services or information if we determine that doing so is reasonably necessary to avoid or mitigate adverse legal or regulatory impacts to Facebook.*" I'm kind of reading that as anything they can get sued over, they might just rip it off the site.

Gordon: We get to cover our ass.

Nancy: That's pretty much where I was thinking that was going.

Gordon: Right. So what it used to say, Nancy, is we can remove a restricted access to content that's in violation of these provisions referring to the overall

terms of service. If we do it because of things that are in violation of our Community Standards, we'll tell you why and give you options and those kinds of things. So really they're just clarifying that, look, you already weren't allowed to post stuff that's illegal or unlawful misleading discriminatory or fraudulent and infringing copyright material is unlawful.

So it really doesn't change the meaning of the Terms of Service, it clarifies that, "Hey, if you do it, we're going to take it down."

Nancy: Yes.

Gordon: That's what it's saying

Nancy: And they've been doing that all along so this should really not be a surprise.

Gordon: Right: What's interesting is they've had the right to do it all along. They haven't actually been doing it and that's where this is becoming a startling thing because they announced that October 1st there's some new rules going into effect. Yes, they've made a few other little tweaks here and there but this is the only one that affects this stuff. Bottom line is don't infringe copyrights, don't use other people's stuff without the right permissions.

Nancy: This kind of leads into the whole conversation though with some people are kind of lenient with everything and some people are not.

Gordon: Right.

Nancy: In my research, in looking at what people were saying about this, I found

an article about Don Henley who employs sixty people to troll the internet looking for eagle stuff that he can rip down. Like, "What?"

Gordon: I hope these sixty people have more to do than just that as their job.

Nancy: I hope so, too. But then again Disney employs people for the same purpose on Etsy, so. Yes, I had no idea about that. So I was shocked to read that but then I hear people saying something like Fleetwood Mac. I guess people have been posting their stuff and covers forever and they don't hear a peep, so.

Gordon: It's interesting that's on the music publishing side of it and the businesses that own the copyrights. They have a right to act the way owners act. Some people say get off my lawn and some people say, "Hey, come, let's have a party."

Nancy: Right. Exactly. All right, so getting into the guidelines themselves, there's really like four sections, I guess.

Gordon: Yes.

Nancy: So the first one is I feel pretty cut and dry, you are responsible for the content that you post. I mean that should just be kind of common sense, but we know that's kind of gone out the window these days, so.

Gordon: Personal responsibility isn't something that is popular these days.

Nancy: Correct.

Gordon: That's always been the case. Again, this is not a change. It's a clarification and when it specifically comes to music now, they're coming out and saying it in so many words. "Hey, if you're using music, you're going to be responsible. It's not our fault, if there's an issue and you know. You've got to take care of making sure you're doing things right." Sounds very reasonable to me.

Nancy: Right. Exactly. I've posted some full shows that are cover stuff on YouTube and nothing's ever been flagged on there. But now, the more I really look in and just read about it, I see we could be putting our channel in trouble with that. Now I have to go back and really look at everything.

Gordon: I think one thing that's going on here is that Facebook is now-- because they're seeing the potential for running live events and frankly the need to because of COVID and all that and they're making it a product that they are monetizing. They're going to allow you to charge for attending an event online on their platform. Now, they've got a slightly different position with respect to the music industry than they had before when it was just people sharing their stuff because now they're monetizing it in specifically the event. So I think they did feel the need to be a little more explicit about what's allowed and what's not so it gives them, again, the right to take that stuff done. It's this next one on the list that's really challenging once you read it and then we'll talk about it.

Nancy: So the second section is, "You may not use videos on our products to create a music listening experience."

Gordon: So let's assume for a minute that anything you're going to do using a Facebook tool: Facebook Live, Facebook Video, Facebook Live Events, all of these things is a Facebook product. So what's a music listening experience? I think what they're doing and, again, it's not entirely clear that from their

explanation is we want you to be able to enjoy music videos posted by family and friends, but if you use videos to create a music listening experience for yourself, or for others your videos will be blocked from your page profile or group and may be deleted and this includes Live. Over the last six months, we've seen an awful lot of artists getting on and doing a Facebook Live, it's the Friday evening concert, I have one friend, he's a wonderful singer and he's doing you know cocktails at 5:30 in his lounge which is his front yard.

Nancy: That's awesome.

Gordon. It's fantastic. It's fun. But he's singing standards and those are copyrighted works. The law doesn't distinguish between doing it for free and whether you're charging for it, but when Facebook starts monetizing it with these paid Live events that's going to get the attention of the owners and say, "Hey, wait a minute. Where's our slice of that pie?" So they're saying, "You can't do it. You're not to use our videos on our products to create a music listening experience."

So it's one thing to post a video of your kids piano recital. It's another entirely to get up there and put on a thirty-five-minute or forty-five-minute set in front of whoever whether it's Live or paid or not. So I haven't seen that they're cracking down on it yet because I mean my saw [inaudible] yesterday. But I daresay that's coming, that's on the horizon.

Nancy: I was wondering, too, if this is being paid more attention now because since the shutdowns happened everybody's posting their PayPal and Venmo links which technically was never allowed. That was never allowed before and that would get you yanked anything faster than anything. But they seem to be letting go of that stronghold in the beginning of it for sure because people were posting them everywhere, nothing got taken down.

Gordon: I think part of it was, it's hard to police and they had bigger fish to fry and, frankly, coming down hard on people at that point would have just added insult to injury

Nancy: Right and piss off a lot of people.

Gordon: It didn't have the attention of the music industry side who are the ones who are saying, "Hey, Zuck, you got to start taking care of this stuff for we're going to have to sue you."

Nancy: Right. All right. So the third part here is, "The unauthorized content may be removed." So this is where we get into the music owned by someone else.

Gordon: Again, not new. This law has been around the law that makes this required has been around since 2001. The Digital Millennium Copyright Act basically says, "Look, if Facebook wants to avoid liability for these kinds of lawsuits, they've got to have a policy in place that says, 'We get a complaint, we take it down. You can get it put back up if you want it on YouTube. You and the owner can duke it out.'" And Facebook opens the safe harbor. So this is not new. But again, it's alarming.

Nancy: They usually do allow you an appeal process.

Gordon: Yes, the law specifically requires that if they take it down, they also have to give the party who posted it a notice and an opportunity to say, "Wait a minute. That's legal because."

Nancy: Right.

Gordon: There are defenses and exceptions that apply. Fair Use is one of the ones that everybody hears about. I don't see how running a concert or even posting a full song music video, sing a song, would necessarily satisfy Fair Use unless there's also a lot of criticism and commentary or something like that going on. Even then it's a big if. The mechanism is take down, allow for counter notification and then the two parties go off and fight about it separately and Facebook waits for a court order before they take it down again. YouTube has the same policy and Vimeo, all the video sharing sites have these policies in place because it protects them from being sued directly.

Nancy: I've actually had one video removed and I did appeal it and it was put back up. It was a video of my dog, but the UFC was playing in the background. But the funny thing was is it didn't ping it till almost a year after the event.

Gordon: And that was on Facebook that was YouTube?

Nancy: That was Facebook.

Gordon: Okay because YouTube has a lot of algorithms in place that are going out and finding things that match other things that have been posted on YouTube. So if the original artist posts their video and then I post mine and they match up sort of digital fingerprint style, YouTube will just take it down automatically and that's another way they protect themselves from these things. But I wasn't aware that Facebook and I'm sure they probably do have some algorithms in place. Somebody claiming that little piece in the background.

I'll tell you one of the sort of big landmark cases involving this stuff involved Universal Music taking down a video of this woman had posted a video of her kid running around the kitchen while Prince's, Let's Go Crazy was playing. The video

was not about the song. It was about this kid, a two-year-old going crazy. The kid was twelve or thirteen years old by the time they actually resolved a lawsuit.

Nancy: Wow.

Gordon: She won. She argued to the courts that this was a Fair use, that it was an incidental non-infringing use of the song and Universal had done wrong by getting that taken down. I think in your wrestling background stuff, you might have had a similar argument to make [inaudible].

Nancy: I wasn't even showing the TV in mine so that's how I argued mine. I was like, "It was incidental in the background." So it would have happened no matter what was playing. I would have taken that video.

Gordon: Yes. Copyright owners, they can be responsible for the damages and costs and penalties and things like that if they take things down improperly especially following that Universal suit. But here it's not the copyright owners that are talking about taking it down. It's Facebook saying, "Hey, we're going to take it down proactively" is this from the sound of the updated section that's going into effect. They're saying, "We're going to take it down if it might help us avoid legal stuff."

Nancy: So I do have a couple comments coming in here. I think they're from my group because I can't see who they are. It says, "You read my article Nancy." Yes, and I think that Steve from Cover Band Central which I really wanted to because that's kind of been the biggest people that have been talking about this is people who do perform covers and really what that means for them. So can they never go on and do a cover again? Well, probably not but I think you better be picky and choosy about who you're covering.

Gordon: Well, right, I was going to say. I mean, I think that the the letter of the law, the letter of the rule does say, "No more cover performances on YouTube, on Facebook excuse me. YouTube's got all kinds of deals in place with music owners, music rights holders so that some songs can be posted as covers. I don't think Facebook has gone in that direction and now with Facebook doing this paid events thing, I think the music industry may be a little less inclined to play along that way without a cut of the pie. It's an interesting time, isn't it? If you're a songwriter, you sort of understand the other side of this right?

Nancy: So it did have two questions along that line.

Gordon: Okay.

Nancy: My train of thought just totally went, too. So they have the paid event. Oh, the Rights Manager. So if an artist gets on and they put their stuff into that Rights Manager, and I don't know how familiar you really are with that but I signed up for it, it got approved on this page. I've actually gotten stuff back where it'll say, "Oh, this matched up," and it tells you the minute and the second in each video where it matched up. One was completely. I don't even know why it dinged that it was in a whole different language. I was listening to it and trying to Google Translate what they were saying to see if it even matched my video.

Gordon: Was it there a melodic parallel or something?

Nancy: Actually, it was just an interview style. My video was just me and the other video is four people in a group chat type thing. It was really bizarre.

Gordon: Yes. That's a false positive maybe.

Nancy: Right.

Gordon: So, yes, I haven't really looked at what this Music Rights Manager is, but from the sound of things, it's an opportunity for creators of content to go in and say, "Put this in the database so that if you find matching stuff, you notify me." I guess you could probably set options, just take it down, just mute, whatever. I think that's a great start. If they are hitting false positives like that, chances are it's happening more often than not.

Nancy: It's only happened to me once so far. I've been signed up, I think, almost a year with it so I'd say that's probably pretty good odds.

Gordon: There's going to be a lot of false negatives because there's going to be the ones where they're playing the same song but on instrumentation in a different key or time signature. They're using your melody, but they're doing things differently and that's what arrangements and adaptations often do. The algorithms got to be pretty darn good to catch that kind of thing.

Nancy: And then I'm wondering, too, if also getting dinged-- because I think most people who play a cover Live don't necessarily even sound like the original. It wouldn't maybe flag anything but people who are using pre recorded background tracks to sing over that sound more identical to it are going to be hit harder.

Gordon: Right. Yes, the karaoke track kind of situation.

Nancy: Correct:

Gordon: Actually, that friend that I was talking about that does his front yard

concerts, sometimes he has someone come and play keyboard, sometimes he does karaoke tracks. So that very well could be the kind of situation that you get into. Although, there's something to be said for. It doesn't sound anything like the original. Well, if you wrote the original you may be cringing when you hear that performance of your work and you might even not call it a performance, but you might call it a bastardization or a destruction of your work. So again as the copyright owner, you want to have some control.

Nancy: Right.

Gordon: If it doesn't reflect well on your work, may not want it out there at all.

Nancy: It's true. That's true, too. Okay. So Section 4 is, "You may not be able to post or access videos containing music in every country of the world."

Gordon: Yes. This is also not new. Music rights are administered by different entities in different countries. Mainly here in the US, we're talking about the Performing Arts organizations ASCAP and BMI and there's two others SESAC and GMR. Those four control it only as far as the territory of the United States goes. So as soon as someone in Germany is listening, the German performing rights organization has to also have cleared the use and made the deal with Facebook or whatever. So if Facebook does have the right kind of clearance to allow you to post your kids recital or whatever, people in Germany may have to be blocked because they haven't made the same deal for that particular part of the catalog. That's all.

Nancy: Definitely stuff to think about for sure. The other question I had here is this Digital Rights Management, which I wasn't totally familiar with but what I gathered from looking into it was that it's like encrypted into the HTML code of

websites and it also regulates the usage of copyrighted work.

Gordon: Often times, it's not actually part of the website. It's actually part of the recording of the music in question, of the video or the audio. You can put it into almost any kind. Basically, it's just a little snippet of code or snippet of information that would be inaudible in a recording. But it's there and the machines can hear it or detect it. So the law says, "It's against the law to tamper with Digital Rights Management material." It also violates that DMCA. They're more severe. I don't want to call them punishments but more severe consequences for tampering with it. So you shouldn't remove DRM information in whatever form it is. There was a case recently where a person using a photograph, and this may be what where they're going with this, a photograph that had the photographer's name in the lower right corner as sort of as a watermark. A publication decided they want to use the image. They contacted him. He said, "No, you gotta pay me a lot of money" and they said, "No." So they went ahead and got the image from Instagram and then they cropped it so that you didn't see his name. They put someone else's name in the caption.

Nancy: Oh my God.

Gordon: He sued and won. If somebody's putting attribution of their stuff, even if they're saying go ahead and use it freely, you're not allowed to take that attribution material off of the thing, whatever it is.

Nancy: Okay, that's definitely a lot to think about for sure.

Gordon: Well, yes and no. I mean bottom line, this is about stuff we learned in kindergarten. What's the name of that book, Everything I Need to Know About Life I Learned in Kindergarten? Be nice. Don't take other people's stuff without their

permission. It's what it really comes down to that for some reason a lot of folks feel like they're entitled to do their thing because they want to. I have my YouTube channel up and where I talk about these kinds of issues a lot and I keep getting these comments, "Well, we need to fix copyright law. This is unfair." I'm not sure I agree. I know for a fact I don't agree. If I create something, it's mine. And if I don't want you to do something with it, hey, that's what it being mine means. If he was like, "Okay, it's ours" then it's out of my hands.

Nancy: Definitely. So moral of the story here is these are not new. This has been this way.

Gordon: Yes. What I would say is and notwithstanding the rule about music listening experiences, I think this is something you want to do. I think it may be feasible for an artist to create their own version. have a site where people can go and pay you an admission. I think Facebook is just saying, "Hey, don't do it on our platform because we don't want the headaches. If you're willing to put up with the headaches, you could become a live stream concert promoter where you make deals with ASCAP and BMI whoever else and give out some royalties and pay some money to the people who need to get paid and then you have the right to do these things." I think it's doable. Not easy but--

Nancy: There are websites that allow this. The one I've been promoting recently is Veeps.com. I've watched a few on there. You get to set your fee for your show. But like the ones I watched, they were five dollars. I mean, it was quick easy cash.

Gordon: And there's some split between you and the website and then the website is splitting some of that with the rights holders and everybody's getting paid and making some money and doing it right. My sense is Facebook doesn't

want to be in the business of doing that. They don't want the headaches, frankly, because there's such a large platform. The royalties would be big and managing it would mean a whole staff of people. Facebook's got other things to worry about these days.

Nancy: Definitely, for sure. So could people also create even like a password-protected type page on their website and do live shows there?

Gordon: I mean the technology's certainly there. Legally speaking, I think you're still supposed to get and secure the rights properly. Putting it behind the password makes it harder for the owners to detect but not impossible.

Nancy: Not impossible. Right.

Gordon: They'll eventually fire. What happens is someone twigs to the fact that you're doing this, pays the money, gets the password and then comes in and says, "Aha! Here it is." They go around, take a bunch of screenshots, make a few screen recordings and now that's evidence in the lawsuit against you.

Nancy: Right. I mean, I've been trying to brainstorm ways for these people to be able to do that. I mean, I have a cover band myself. So if we can't be in a bar where the bar is paying the fees, it's kind of up in the air how you can do this unless you do use one of those sites and you're sure that they're paying their fair share that you won't get dinged for it.

Gordon: Right? And then the other thing to be careful of is don't then embed the feed from that site into your Facebook page, those kinds of things. I think really the answer here, Nancy, is instead of looking for loopholes and workarounds, let's look for the way to make it a win-win for everybody involved so that the right

folks that deserve to be compensated for their efforts, do get compensated.

Nancy: I one hundred percent agree.

Gordon: It isn't easy and it isn't cheap, but nothing worth doing ever really is, is it?

Nancy: Correct, very much so.

Gordon: I'm going to show my age when I say if you're making albums.

Nancy: I still have albums.

Gordon: If you were putting out a cd, if you were going into the studio to make recordings, you're spending some money to make that happen so you have something to sell. Here, you'd need to spend some money to make it just pop up on my screen. Something changed. We good? All right.

Nancy: I think we're okay.

Gordon: Yes. Well, anyway, so as I was saying, this is a cost of doing business and if you're in the creative performance business, you got to pay to keep the lights on, you got to pay for the music rights that's the bottom line.

Nancy: Absolutely. Well, thank you so very, very, very much for coming on and walking us through all of that. I so appreciate that and very grateful to have you do that for us so that we make sure we're doing everything right and not getting our pages taken down. Especially right now because the pages are really what's helping people create their communities and reach their fans since they can't be in a bar doing that.

Gordon: Yes. Well, I mean, I'm a big fan of live music. I love to, when I could, go out to bars and hear music performed live and I think it's a wonderful art form. We just have to navigate the new paths. Thanks for giving me the opportunity. It's been great to be here.

Nancy: Thank you so much. All right, we will see you guys later. Bye.

Gordon: Thanks.

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