

## Overview of Licensing Issues

### **I. Introduction**

There have been many questions asked over the last several years regarding the use of copyrighted materials in conjunction with animated Christmas displays. Animated Lighting, Inc. has been asked by customers on occasion to discuss the requirements, if any, for licensing a song for use with a Christmas display. This article will attempt to discuss the current status of the law on this matter and set out the obligations of the various residential or commercial customers of Animated Lighting, Inc. This is for informational purposes only. Any customers who may have additional questions is encouraged to see the advice of their own counsel.

The company sells various plug and play products that allow customers to have highly polished animated Christmas displays. The company also sells a computer software package called "Animation Director" that allows a customer to design his or her own show. The company also sells completed sequences which can be used directly with its software. When a sequence is purchased, the company provides the purchaser with a sequence file and a memory card containing the song file. The song is purchased on behalf of and is sent to the customer along with the sequence file.

### **II. Residential Customers/ Private Use of Songs**

When a person purchases music, he or she acquires the right to listen to the music for private, non-commercial purposes. Any other use of the music is strictly prohibited. Under the current status of the law, it is irrelevant which format the music is acquired. A residential purchaser of music has the right to change the format of the music so that a CD audio format can be converted to an MP3 format and used with a Christmas Display.

This concept can be traced back to the first revolution in the video industry with the creation of video recorders. Initially, the movie industry attacked the use of video type recording devices as violating their copyrights. In *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), also known as the "Betamax case", the Supreme Court of the United States ruled that the making of individual copies of complete television shows for purposes of **time-shifting** does not constitute copyright infringement, but is a fair use of the copyrighted material. The Court also ruled that the manufacturers of home video recording devices, such as Betamax or other VCRs, cannot be held liable for copyright infringement.

In the music industry, a similar suit was initiated against the first MP3 player devices. In *Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072, 1079 (9th Cir. 1999), the Ninth Circuit Court of Appeals applied the "space shifting" argument in the context of the Rio device (a portable MP3 player). The Court stated that a "Rio merely makes copies in order to render portable, or 'space-shift,' those files that already reside on a user's hard drive. . . . Such copying is a paradigmatic noncommercial personal use." The court held that the public's right to "space-shift" copyrighted music under the fair use privilege for non-commercial personal use was permissible and not a violation of any copyright.

Fair use grants citizens the personal freedom to use and enjoy music in ways enhanced by new technology. The court held that the purpose of the fair use privilege is to protect noncommercial copying by consumers of digital and analog musical recordings. Under the court's ruling, consumers have a fair use right under copyright law to make portable digital copies of their music recordings for their personal use.

Since 1999, there has been explosive growth in the portable music player industry and song files can now be readily purchased in an MP3 format. Additionally, it is now more readily acceptable that music files will be converted from one format to another.

In reviewing the various legal authorities available and based upon the knowledge of the industry today, it is our opinion that a song being used for private home use, even in conjunction with a Christmas light display is authorized under the fair use doctrine and is not a violation of the copyright granted with the purchase of the song. We believe that whether a song is being played over speakers or a low powered FM radio transmitter, there should not be any requirement to obtain any additional license. However, this opinion is provided with a caveat. As the use of computer displays continues to grow, this issue may be reevaluated and the current position of the recording industry could change in the future. Residential customers are encouraged to stay abreast of this issue over time to ensure that they stay in compliance should there be any changes in the law or should the music industry shifts its position.

### **III. Commercial Customers and Other Public Use of Songs**

The public performance or presentation of songs by a commercial customer presents different issues than face the residential customer. There is no corresponding right to present music in a manner like a residential private presentation environment.

There are basically three types of rights that require licenses: a mechanical right, a performance right and a synchronization right. A mechanical license is written permission from the publisher to manufacture and distribute a record, CD or audio tape for a specific copyrighted composition. The amount of the royalty paid to a songwriter from a mechanical license is determined by how many recordings are sold.

The second license arises from a "performing right" which is granted by the U.S. Copyright Act to owners of musical works to license their works for public performance. Businesses which typically license music include broadcast radio and TV stations, cable radio and TV stations, places such as nightclubs, hotels, discos, and other establishments that use music in an effort to enhance their business. There are hundreds of thousands of establishments - radio and television stations, nightclubs, hotels, amusement parks and the like - in the U.S. where music is publicly performed. It would be virtually impossible for individuals to monitor these music users themselves. Therefore, companies such as Broadcast Music, Inc. (BMI), the American Society of Composers, Authors and Publishers (ASCAP) and other acquire rights from writers and publishers and in turn grant licenses to use their entire repertoire to users of music. These companies collect license fees from each user of the music they license, and distribute to its writers and publishers all the money collected, other than what is needed for operating expenses.

A license acquired from one of these companies authorizes the purchasers to perform any and all of the songs in the licensor's repertory as often as they like, without having to worry about trying to obtain permission for each individual song performed. This is called a blanket license. The blanket license is very practical. If a person was able to identify the author of every song that would be used on a project, it would be extremely challenging and expensive to contact each copyright owner of each song planned to be played in order to obtain performance permission. The blanket license has long been recognized as the most efficient and convenient way of clearing rights of copyright holders in the United States. In fact, the United States Supreme Court summarized the virtues of the blanket license in *CBS v. Broadcast Music, Inc.*, 441 U.S. 1 (1979) as follows:

. . . the blanket license developed . . . out of the practical situation in the marketplace: thousands of users, thousands of copyright owners and millions of compositions. Most users want unplanned, rapid and indemnified access to any and all of the repertory of compositions and the owners want a reliable method of collecting for the use of their copyrights . . .

A middleman with a blanket license was an obvious necessity if the thousands of individual negotiations, a virtual impossibility were to be avoided. Also, . . . (individual licenses would pose) a difficult and expensive reporting problem for the user and policing task for the copyright owner. Historically, the market for public performance rights organized itself largely around the single-fee blanket license, which gave unlimited access to the repertory and reliable protection against infringement.

Id. at 20-22.

The determination of whether a performance license should be acquired should be made using the following guidelines:

1. If you are a residential customer and are not charging any admission fee, then it is believed that no additional license should be necessary.
2. If you are a commercial customer, whether you charge admission or not, you should purchase a performance license.
3. If you charge admission, under any circumstance, you should consider purchasing a performance license.
4. A gray area exists for residential customers who utilize sponsorships or donations to assist with the construction or running of their display. No reported case has been found addressing this issue. However, we recommend that if sponsorships or donations (for the benefit of the residential or commercial customer) are used, the customer should strongly consider obtaining a license.
5. Municipal displays present a gray area. These displays usually are not commercial,

but at the same time are not residential. In this situation, if a license is acquired, it would normally be for a minimal fee. However, if the municipality is charging admission, again, it is governed by the same rules as a commercial display and should obtain a performance license.

The final right is the “synchronization right.” The “synch license,” as it is sometimes called, pays copyright owners when their music is used in combination with visual images such as music in films, TV, videos, etc. Companies such as BMI and ASCAP do not offer synchronization licenses. The producer of the production usually purchases a synchronization license from the song publisher. These rights are administered and licensed by the publisher who accounts directly to the writer.

#### **IV. Responsibility of Customer**

Ultimately, it is the primary responsibility of customers to ensure that they are in compliance with the law. The individual customer is responsible for knowing who holds the license for a particular song. This can even be problematic at times. Relying on label information to determine the Performance Rights Organization (PRO) affiliation is often an ineffective strategy. PRO information on record, CD and tape labels, when present, is frequently outdated, incomplete or inaccurate. This is the result of several factors: PRO information on a label can become outdated when a songwriter or publisher changes affiliation and joins a different PRO. Further, due to the space limitations on cassette tapes and compact discs, many times PRO information is omitted all together. Often songwriters will collaborate, and the names of all of the co-writers of the song may not be listed. In addition, record companies are under NO obligation to furnish the correct PRO affiliation information on label copy, as it would be impractical for them to attempt to recall and correct all records, tapes and CDs every time a writer or publisher changed affiliation. Also, the United States is a signatory to and adheres to the 1989 International Berne Convention which removed the requirement for notice of copyright and correct PRO affiliation on label copy. Therefore, as of March 1, 1989, a copyright notice is not required on published CDs and other music works.

Even though determination of which company to contact for a license can be difficult, it is the customers ultimate responsibility to make certain that they have obtained all of the required copyright clearance authorizations for the works used. It is suggested that the licence holder keep records of licences acquired and that each song played is covered by the license purchased. If a commercial customer already has licenses in place which allow them to play music at their facility, an additional license may not be needed. In this situation, the customer should determine whether their existing license includes the songs sought to be played for their Christmas display.

#### **V. Conclusion**

This memorandum has attempted to set out the various rights and obligations of the various customers of Animated Lighting, Inc. regarding the use of copyrighted songs. The rules are different regarding whether you are a residential customer or a commercial customer and whether the customer is charging admission. We hope that this information is helpful to you in preparing your display.