

Student Press Law Center: Copyrighted Music in High School News Broadcasts

I. Overview.

The use of copyrighted music as background to a non-commercial high school television production is a tricky legal issue. Unfortunately, getting an individual license for a copyrighted recording released by a major music label is a cumbersome process (if a blanket license is not available or if you wish to distribute actual copies of the production, you will have to use the licensing process). That said, experience suggests that there are certain contexts that will qualify as Fair Use. Most commonly, a Fair Use is for the purpose of criticism, commentary, or reporting about the work in question, but the concept of Fair Use is not limited to these uses. *See generally* 17 U.S.C. § 107. Only courts can determine whether a use qualified as a Fair Use, but there are steps one can take to make a Fair Use finding more likely; and where a Fair Use finding seems unlikely, or absolute certainty is necessary, the licensing process can be used.

II. The 30 Second Myth: What The Law Says (And Doesn't Say)

Many students and advisers have heard that there is a statutory “30 second rule” that allows use of a music clip no longer than 30 seconds without the need to obtain a license. **In fact, no such rule exists in the law.** Here are the facts about the 30 second myth:

- a. *The length of the clip used does not, by itself, determine whether or not the use is Fair.* “[T]he “amount and substantiality of the portion used” is one of the statutory factors to be weighed in making a Fair Use determination, 17 U.S.C. § 107(c), but the law does not recognize an across-the-board “30 second rule” for using music. First, the factor is merely one of four to be weighed by courts in determining whether Fair Use exists, so even when the amount of use is minimal, the other factors could come down against Fair Use. Second, the Supreme Court has observed that a copyright infringement can take place even where the use is minimal if the use takes the “heart” of the work. *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 565. Putting it another way, the group charged with umbrella licensing for the digital performance of sound recordings—SoundExchange—says on its Web site, “Generally speaking, one is not allowed to take the ‘value’ of a song without permission, and sometimes that value is found even in a three-second clip.”
<http://www.soundexchange.com/licensing101.html#a17>.
- b. A number of industry licensing and commercial practices rely on clips limited to 30 seconds, but there is no rule making these periods *generally applicable to non-commercial uses*. For example, SoundExchange exempts “brief performances” of copyrighted music from royalty payments if made during a licensee’s non-commercial news Webcast where the amount of music used is less than 30 seconds long. *See Rates and Terms Available to Certain Noncommercial Webcasters*, Appendix A, 9(c). This rule, however, is a license term—a benefit given only to those online broadcasters who sign up to generally make royalty payments. As for the general public, SoundExchange writes in its Licensing FAQ, “[c]ontrary to popular belief, there is no 30-second exception to copyright law.”
<http://www.soundexchange.com/licensing101.html#a17>.

Other music industry groups have made their position on the “30 second” myth clear. Performing rights organizations ASCAP and BMI have, in the past, stated their belief that even a 30-second performance requires a license. *See* Beth Lipton Krigel, *Music Site Closed Over Copyright*, CNET News.com, June 12, 1998, at <http://news.com.com/2100-1023-212236.html?legacy=cnet>. Finally, a Recording Industry Association of America spokesman told the Student Press Law Center in December 2003 that any unlicensed use of music on a high school television broadcast—however minimal—would be pursued as an infringement if brought to the group’s attention.

While certain uses of music clips as in the background of high school television broadcasts will qualify as Fair Use, there is no blanket 30-second rule.

III. Making Fair Use of Music in Broadcasts

If you don’t have the time to get a license, or want to avoid the cost of doing so, your program should try to keep its use of music within the statutory bounds of Fair Use. The difficult part in

doing this is that there are no bright-line rules in the Fair Use evaluation; it requires a balancing test that takes into account the facts of each situation. If you are unsure whether your use qualifies as a Fair Use, call the Student Press Law Center at the phone number at the end of this document and we will be happy to discuss your situation. If you are using a small portion of a piece of music for the purpose of reviewing or commenting on the music itself or the artist, you are probably making a fair use anyway. Even if that's not the case, however, other uses could qualify as fair; some basic rules of thumb are:

- a. *Don't use the "heart" of a song in the clip.* For example, if the last two lines of a song or the opening guitar riff are particularly well-known, avoid using them when possible. While these may or may not be the "heart" of the work (as that is a subjective standard), a copyright holder could certainly argue that they are, and if a court agrees, your use probably won't qualify as Fair Use. Additionally, using the catchiest part of the song might make it seem as though the video segment was a substitute for buying the song, a consideration in the Fair Use balancing. *See generally* 17 U.S.C. § 107(1) and (4).
- b. *Don't use the title of a song as the title of a news segment.* This creates the appearance of affiliation or endorsement and raises issues of "synchronization"—that is, that you are trying to create a derivative work from the original work without permission, something that a court may view as trying to piggyback on the song's success.
- c. *Use the shortest possible clip.* The less you use, the less likely your use is going to do economic harm.

IV. **Licensing Your Broadcast or Cable Station**

If your program goes out over a local broadcast television or cable station, it could qualify for, or be covered under, a blanket performance license from performing rights societies ASCAP, BMI and SESAC. A blanket license covers all use of music on the station; it doesn't matter whether the station plays one song a year or nonstop music.

- a. *Obtaining a blanket license.* If the school has a broadcast or cable station that is accessible by the general public, it could be covered by a blanket license from the performing rights societies. There are a wide range of possible fees for both blanket licenses (that cover all station activities) and per-performance licenses (that cover a particular program) because the societies calculate fees based geographic market and the audience reached by the station. If the market is small enough, however, it could be possible to obtain licenses from all three societies for relatively little money.

For example, the ASCAP rate for licensing a cable station is, as of January 2004, \$0.083 cents multiplied by the average number of viewers; therefore, a small cable system reaching two thousand viewers would have to pay \$166 per year to use all the music in the ASCAP catalog. For broadcast stations, the formula is more complicated. First, ASCAP calculates an industry-wide fee it believes covers the value of all music used on all broadcast stations. Next, it breaks that fee down into geographic markets by population. Finally, it allocates within that geographic population by relative market share. The cost of licensing a broadcast station therefore varies from one region to another and from one audience size to another.

To apply for a blanket license, visit the Web site of the society or societies from which you are interested in obtaining a license (<http://ASCAP.com>, <http://BMI.com>, <http://SESAC.com>). Be aware that you must apply as a station and not as a school, as these groups do not issue licenses to primary or secondary schools.

- a. *Systems that may already be licensed.* While closed-circuit systems and programs recorded to videotape will need to track down their own licenses, programs that go out over local broadcast or cable systems might already have performance licenses through ASCAP, BMI and SESAC. If the stations themselves have such licenses, these licenses would cover background music used in programs sent out over their airwaves or through their cables. While these licenses would not cover the preparation of derivative works (such as a video where the action is synched to the music), they would still cover the majority of uses not

covered by Fair Use.

Most stations of any significant size will have licenses from all three performing rights societies; some smaller stations might only have a license from one or two. Ask your contact person at the station about which licenses, if any, are in place; if the station only has licenses from one or two of the societies, use the Web sites <http://ASCAP.com>, <http://BMI.com> and <http://SESAC.com> to see which works you have the right to use.

V. Licensing Individual Music

If you want to use a song in a way that probably doesn't qualify as a Fair Use and you are not covered by a blanket license, or if you want to synchronize the music and video (see *c* below), you will likely need to acquire licenses for the music. Note that if you want to distribute copies of the broadcast, either digitally or physically, you will need reproduction licenses from the music publisher and record label as well.

- a. First, unless your program is being transmitted on a broadcast or cable station with a blanket license from the relevant performing rights society, you will require a *performance license* for the *underlying musical work*. Blanket licenses are handled by ASCAP, BMI and SESAC; individual licenses are handled by holder of the rights in the work (see below).
- b. Second, if the broadcast is being transmitted digitally (such as over the Web), you will need a *performance license for the sound recording*. In most cases, the copyright holder will be a record label. A list of licensing contacts for the five major record labels is available online at <http://www.soundexchange.com/licensing101.html#a9>. Typically, obtaining this license will take several weeks.
- c. Finally, if you want to use the song in some way that creates a connection between the video and audio content (e.g., having students perform a play with a plot that follows the story in the music's lyrics, or using a song as the theme for a show or news segment), you will need a *synchronization license* for the *underlying musical work*. The U.S. Copyright office Web site (<http://www.copyright.gov>) will let you search recent records to discover the individual or publishing company who holds the rights; for older works, the performing rights societies (ASCAP, BMI and SESAC) will be able to direct you to the publisher.

VI. Royalty-Free Music

If you need to use music in a way that will not qualify as a Fair Use, don't have the time or money to obtain a license, or just want a simple and legally-certain way to find music for your production, there are a number of free and low-cost ways to get music for your production.

- a. *Royalty-free music compilations*. One option is to buy a CD of music recorded for the specific purpose of being included in television and radio broadcasts. These vary in price from around \$30 to several hundred dollars and span a broad range of musical styles. A short list of some available compilations is online at <http://www.pdinfo.com/source/TtlRFree.htm>, but a search for "royalty-free music" on your favorite search engine will turn up more.
- b. *Opsound.org*. Opsound is a record label where all the artists make their tracks free to download, listen to, modify and include in other works. Some of the works are in the public domain, and these are free to use in any way you like. Others are licensed in a way that requires you to give attribution to the artist and to make any derivative work available for the public to use under the same type of attribution license.
- c. *LegalTorrents.com*. This is an archive of electronic music that is free for noncommercial use with attribution, but derivative works are not permitted. Note that merely playing the music in the background is unlikely to create a derivative work, and therefore such uses will usually be permitted.
- d. *CreativeCommons.org links*. Creative Commons is a site that helps content creators choose licenses for their works that give consumers much greater rights than general copyright law—in fact, both Opsound.org and LegalTorrents.com use Creative Commons licenses. Creative Commons has links to other music authors who allow the free use of their works with few or no restrictions. Visit <http://creativecommons.org/getcontent/> to find a list.

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