



To All Broadcast Clients

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THE TOP 10 COPYRIGHT MYTHS -- A REAL LOOK AT "FAIR USE"

Every day, radio and television broadcasters confront numerous issues involving the use of copyrighted materials in their programs. The most frequently encountered copyright problems deal with misconceptions about the concept of "fair use." Most everyone in the broadcast industry has heard this term, but few non-lawyers know exactly what it means or encompasses. Often, laymen apply it to any situation in which they believe they were justified in using a copyrighted work. Although the use might have comported with the user's sense of "fair play," that does not necessarily mean the use was "fair" under the law. In order to give you a better understanding of what uses are and are not "fair," we have compiled the following list of ten of the most common copyright myths and a brief explanation about each.

Myth #1: If a work doesn't have a copyright notice, it isn't copyrighted.

This was true in the past, but today no notice, publication, or registration is required to secure copyright in a work. Copyright is secured **automatically** when the work is created and cannot be lost unless the copyright owner specifically grants the work to the public domain (using language such as "I hereby grant this work to the public domain"). Publication of a work, with or without a copyright notice, is not sufficient to inject any work created after March 1, 1989 into the public domain. Moreover, works need not be registered with the Copyright Office to receive copyright protection.

Myth #2: We can use video clips to broadcast highlights of sports or news events so long as we don't broadcast the entire event.

Many people incorrectly believe that the fair use doctrine of the Copyright Act allows them to use a fixed amount of a copyrighted work without the permission of the copyright holder. Although the fair use doctrine allows a certain amount of copying for the purpose of news reporting, the Copyright Act fixes no specific amount or percentage. Instead, courts analyze each instance of infringement individually, weighing numerous factors. The **quality** of the material copied matters just as much as the **quantity** of the material copied. Thus, the use of even a small portion of a work will be considered the same as wholesale copying if that portion constitutes the most significant part of the work. By definition, sports and news highlights constitute the most significant part of a work. For example, courts have found television stations liable for copyright infringement where a news program aired thirty seconds of a four minute, forty second videotape showing the beating of a man during the 1992 Los Angeles riots and where a cable sports program broadcast less than two minutes of highlights from a baseball game. In both cases, the courts held that the defendants used the "heart" of the work at issue. Therefore, while it may be considered fair to use a portion of a copyrighted work for news reporting, there is no clear line as to how much copying is acceptable.

Myth #3: We do not need permission to broadcast a song clip that is less than 30 seconds long.

Although rumors abound that using 30 seconds or less of a song does not require a license, there is generally no quantitative amount of a copyrighted work that may be used without the authorization of the copyright holder. Instead, courts look to both the quantity of the materials used and their quality and importance. For example, the reproduction in a beer commercial of just four bars of a musical composition was not fair use because the four copied bars constituted the portion of the composition upon which its popular appeal and commercial success depended. Courts have also refused to find fair use where one part of a four-part musical composition was broadcast and where amateurs performed copyrighted songs in a country music theater at which admission was charged.

Generally, the use of even a small part of a song will not be considered fair if it is for commercial purposes. Of course, there are exceptions to this. For example, record companies may permit certain businesses to broadcast song clips for the purpose of promoting album sales, and, in certain educational contexts, educators and students may reproduce up to 10%, but no more than 30 seconds, of the music and lyrics from an individual musical work in a multimedia project. In addition, webcasters are allowed to transmit portions of sound recordings in certain limited situations.

Myth #4: Using a copyrighted work is okay as long as we modify it.

Copyright owners have the exclusive right to create derivative versions of their works. Thus, making a movie based on a copyrighted novel requires the copyright holder's permission, as does music "sampling," or incorporating portions of a prior musical composition into a new recording. Even using characters

and plot lines of a copyrighted work to create a new story is a violation of copyright if it is done without the copyright holder's permission.

However, fair use permits the use of a copyrighted work for the purpose of criticizing the copyrighted work. For example, selected lyrics from a song may be published in a review of a CD, so long as the review does not contain so much of the copyrighted work that it damages the market for it. In contrast, posting the full lyrics of a song on the Internet without any critical comment is usually not considered fair use.

Myth #5: Using a song or jingle is okay because parodies are considered fair use.

Although the Supreme Court has ruled that parodies may constitute fair use of a copyrighted work, the Court's definition of a parody is very limited. "Parody" is a legal concept and means more than just a funny riff on a well-known song or other copyrighted work. In order to be considered a parody, the work must comment on or criticize the **original** work. In the words of the Court, a work that imitates the original simply "to get attention or to avoid the drudgery in working up something fresh" will not be considered a parody and, thus, will probably not be considered fair use. In other words, replacing the original lyrics of a song with humorous ones or using a copyrighted work to criticize something other than the copyrighted work itself will likely not be considered fair use. Not only must a "parody" make use of the copyrighted work in order to criticize the work itself, but it must also use as little of the copyrighted work as possible and must not harm the derivative market for the copyrighted work.

Myth #6: We can publicly perform a really, really old song because it must be in the public domain by now.

Just because a song is old does not necessarily mean it is in the public domain. Gener-

ally, music and lyrics published and authored in 1922 or earlier are in the public domain, which means anyone can use them. However, the lyrics to a song may have been written years after the musical composition. As a result, simply knowing that the music to a song was written before 1923 gives no indication as to whether the lyrics are in the public domain.

For example, the lyrics to the song "Happy Birthday" will be protected by copyright until at least 2030 (due to term extensions in the Copyright Act of 1976 and the Copyright Term Extension Act of 1998). Although the musical composition to the song was originally written in 1893, the lyrics were not copyrighted until 1935, making them eligible for copyright protection renewal.

Moreover, even if a song itself is in the public domain, the arrangement may not be. Once a song is in the public domain, anyone may create a new version or derivative of the song and copyright the new work. Consequently, in addition to knowing that the original music and lyrics to a song are in the public domain, potential users must also determine whether the version of the song they wish to use is the original one, or if not, whether it is in the public domain. Simply assuming a song is in the public domain is risky; instead, check and make sure before publicly performing it. One way to do this is to find a copy of the song with the original copyright date. If the copyright is before 1923, it is probably safe to use.

Myth #7: Material that is widely available on the Internet is no longer copyrighted.

As we stated back at Myth #1, publishing a work without copyright notice does not put the work into the public domain. The Copyright Act gives the copyright holder the exclusive right to display a work publicly, which includes displaying it on the Internet.

In addition, there is no guarantee that the person who posted the work is the one who owns the rights. Since copyright holders do not lose their copyrights just because they do not take action against infringers, even if a work has been widely reproduced without the permission of the copyright holder, it is still not safe to use that work without permission.

Myth #8: We can use a copyrighted work as long as we give credit to the author.

Attribution provides no protection from liability for copyright infringement. It might protect you from a charge of plagiarism, but that is an ethical, not legal, transgression. Because copyright holders have exclusive rights to their works under the Copyright Act, parties who wish to use a copyrighted work must get explicit permission from the copyright holder. Simply giving the author credit is not enough.

Also, do not assume that you do not need permission from the copyright owner because you think he will be happy with the way you intend to use the work or with the publicity you might generate for him.

Myth #9: Because we bought a copy of a copyrighted work, we can use it in any way we wish.

By purchasing a copy of a copyrighted work, the buyer obtains the private performance rights to that work. That means a buyer who purchases a CD may play it in her home or her car, for example, but not for customers in the restaurant she runs. Further, although she may give the entire CD away, she may not copy a song to give away. Similarly, the purchase of a DVD gives a buyer the right to play it in his home and even show it to his friends and family, but he may not charge people admission to come to his home to watch it. Even a written work may not be read aloud in public without permission from the copyright holder.

Myth #10: We can copy facts from a breaking news story and sell the information because facts cannot be copyrighted.

While it is true that facts and ideas cannot be copyrighted—only the forms in which the facts and ideas are expressed are copyrightable—copying factual information from a news story with the intent to sell the information can result in liability for misappropriation under the “hot news” doctrine. The theory behind the doctrine is that if a party’s property rights in the news it gathers is not protected, then there is no incentive for the party to expend the effort necessary to obtain the information in the first place; for that reason, courts should prevent others from free-riding on the party’s efforts.

In 1997, the U.S. Court of Appeals for the Second Circuit held that the “hot news” doctrine is still good law, but the court limited it to cases where: (1) the copyright owner generated or gathered the information at a cost; (2) the information is time-sensitive; (3) the misappropriator’s use of the information constitutes free-riding on the gatherer’s efforts; (4) the misappropriator is in direct competition with a product or service offered by the party that gathered the information; and (5) the ability of other parties to free-ride on the efforts of those who gather such information would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened.

Applying this test to a suit in which the NBA accused Motorola of misappropriation for disseminating real-time scores and statistics of NBA games to its pager customers, the court held that Motorola was not liable for “hot news” misappropriation because the NBA failed to show any damage to any of its products based on free-riding by Motorola.

However, the “hot news” doctrine has been held to protect from appropriation a scoring system developed by the Professional Golf Association (“PGA”) to compile golf scores in

real time from dispersed locations. Unlike scores and statistics from an NBA game, which anyone watching the game can compile, the information contained in the PGA’s scoring system would not have been available but for the PGA’s effort in compiling it. Essentially, the “hot news” doctrine will protect factual information from appropriation where a party has expended effort to gather the information and where permitting the appropriation would reduce or destroy that party’s incentive to gather the information. Once the information has been released to the public, however, and the party that has gathered the information has had time to profit from its efforts, any property rights in the information will cease to exist, and anyone may disseminate it.

Bonus Myth #11: Our ASCAP license allows us to use any of the ASCAP licensed works for any purpose.

An ASCAP license, like licenses from BMI or SESAC, only gives the license holder the right to perform the licensed works publicly. Public performance licenses authorize only certain rights—namely, the non-dramatic performance rights to a song; they do not license the dramatic performance, mechanical, or synchronization rights. Accordingly, the holder of an ASCAP license does not have permission to stage a public performance of a dramatic work; manufacture and distribute a record, CD, or audio tape; or use a song in combination with visual images in films, television, videos, or computer programs. Nor does the license holder have the right to create a derivative work, such as a jingle that uses the original music but changes the lyrics (unless, of course, such use would clearly be considered parody or another form of fair use).

Further, most music licenses only cover certain types of public performances of sound recordings. A license that allows a radio station to broadcast songs over-the-air will not necessarily permit the station to broadcast the same songs over the Internet. Because multiple parties may hold copyright to different aspects of a musical work, and licenses often

govern only one type of transmission, it is important to ensure that all the necessary permissions and licenses have been obtained and not to assume that one license permits all uses.

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The rules governing the fair use of copyrighted works are vague and extremely fact and context specific. Rarely are there any clear-cut answers to a copyright question involving fair use. As a result, people tend to create their own rules for determining whether

a given use is fair—as many of the myths surrounding copyright demonstrate.

Although it may be difficult to know whether a particular use will be considered fair without legal analysis, we hope that this memo will help you identify situations that may have copyright consequences and concerning which you should contact our office.

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This memorandum is intended only as a general discussion of these issues and should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired. To discuss any of the issues presented here, please contact Suzanne Head (202-416-1082) or any other attorney in our office.