GOVERNMENT AND REGULATORY AFFAIRS BLAST

Considerations Regarding Copyright Obligations When Photos or Videos Are Synchronized To Music

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STATUTE/REGULATION SOURCE

The Constitution and United States Copyright law. U.S. CONST. art. 1, §8, cl. 8; 17 U.S.C. §102 et seq.

BRIEF DESCRIPTION

Companies that own the rights to popular music generally require that institutions and individuals license synchronization rights from "master" and "publishing" rights holders prior to synchronizing those songs to photos and videos. Performance licenses (such as those offered by ASCAP or BMI) do not cover synchronization rights. Properly acquiring such rights is time-consuming, costly, and inefficient. Rights holders have sought settlements from large institutions and statutory fines for copyright violations can range from the hundreds to hundreds of thousands of dollars per violation.

SCOPE and POTENTIAL IMPACT

While synchronizations rights have been enforced for decades, the ease with which nearly anyone can create and post a video that violates such rights have led some rights holders to seek compensation for unlicensed use and engage in fairly vigorous campaigns to take down instances of certain songs that are synchronized to photos or video without license. Higher education institutions have received demand letters for significant sums over videos posted by institution officials and students on institution websites and social media channels. Litigation could result in substantial judgments if facts are proven and present public relations challenges for institutions whose mission includes the creation of significant and innovative intellectual property.

DISCUSSION

A decade ago, much ink was spilled discussing peer-to-peer file sharing, lawsuits from the entertainment industry, and requirements in the Higher Education Act to actively combat copyright violations and explore legal alternatives. [1] Technology and the rise of legal streaming services have, in many ways, caused such concerns to recede, but other technological changes are raising new copyright concerns.

Creating memorable videos where popular or timeless songs are set to videos or photos used to be the domain of a few highly specialized professionals. Synchronized videos were created painstakingly, were expensive to produce, and were mainly created by well-resourced institutions or media organizations. But in recent years, technological changes have allowed millions of people to use widely available technologies to quickly synchronize photos and videos to music with no specialized training. Millions of such videos (of varying quality) are uploaded to YouTube pages, institutional websites, and other digital sources each year.

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1. *See generally* Joseph Storch and Heidi Wachs, "A Legal Matter: Peer-To-Peer File Sharing, The Digital Millennium Copyright Act, and the Higher Education Opportunity Act: How Congress and the Entertainment Industry Missed an Opportunity to Stem Copyright Infringement," 74 *ALBANY LAW REVIEW* 313 (Apr. 2011).

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While creating and uploading such videos is easy, efficient, and inexpensive, properly acquiring licenses to synchronize music to photos and videos is generally difficult, inefficient, and costly. There is currently no efficient or automatic system for acquiring synchronization rights.[2] Rights[3] to use each song must be acquired by negotiating with multiple rights holders simultaneously,[4] and sometimes accepting arduous terms and high license fees.[5] Synchronization licenses are separate from mechanical licenses,[6] or performing rights licenses, such as those offered by ASCAP, BMI, and SESAC.[7]

Technology allows more and more people to quickly create and upload videos featuring photos set to copyrighted music on institution-controlled websites, YouTube and social media channels. This includes professionals in communications, media, marketing, admissions, student affairs, athletics, and other areas of the campus who create videos synchronized to music in their day-to-day work, but also may include faculty, staff, and students[8] who create videos for personal reasons and then upload them to institution-controlled sites. Few, if any, of these video creators will take the considerable time necessary to obtain synchronization rights.

Although the numbers are still small, rights holders have been increasingly asserting their rights, mostly by reaching out to major institutions of higher education with takedown notices and settlement demands. Risk managers must be mindful of this issue, even if institutions have been reluctant to speak publicly about these experiences. For example, affected institutions, many of which maintain sprawling websites hosting terabytes of content, often do not even have a central authorization requirement for posting of content.

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2. For a detailed discussion of the negotiation and contracting process for synchronization rights, *see* Joseph Storch, Stephanie Morrison, and Jack Bernard, "Synching Your Teeth Into Copyright Law: Legal and Practical Considerations For Public Performances Of Video and Photos Synchronized To Copyrighted Music," *NACUA NOTES*, Vol. 15, No. 8 (May 8, 2017) at 6-11.
3. Note that synchronization rights are not established in the Copyright Act. Rather, since an owner enjoys rights to control how copies are of their works are made, these rights were carved out by the recording industry to be licensed alongside other rights to a work. A license for one type of right does not necessarily offer license to other rights.
4. Synchronization rights are generally jointly owned by one or more "master" and "publisher" rights holders. These are dated terms used by the recording industry to indicate the rights over *this* recording of *this* song by *this* artist (master rights, from the days of a single wax cylinder used to make all phono-records) and the words/lyrics and melodies/music of the song, regardless of who actually recorded the version you use (publishing rights). If a license seeker is recording their own version of a work, they do not need to seek master rights. Whether the license seeker uses the recorded version or records their own, they would still need to license publisher rights.
5. Remember that the Lady Gaga, Taylor Swift, Imagine Dragons, or Journey song that you believe perfectly sets the mood for your admissions, student event, or athletics video may also be licensed for use in a movie, video game, or commercial (by advertising companies that have the same belief in their value, but much deeper pockets).
6. Mechanical rights are governed by 17 U.S.C. §115. More information may be found via the Harry Fox Agency, which generally licenses mechanical rights. *What is a Mechanical License?*, HARRY FOX AGENCY. https://www.harryfox.com/license_music/what_is_mechanical_license.html.
7. Maintaining such licenses, as most institutions of higher education do, does not provide synchronization rights in covered music. The organizations either explicitly exclude synchronization uses or indicate that the contract covers only those public performances the performing rights society is itself permitted to authorize (a list that does not include synchronization uses).
8. It is outside the scope of this GRAC *Blast*, but certain defenses may exist for content not created by institutional staff but uploaded to institutional digital properties.

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In general, when faced with a challenge, public institutions of higher education can assert defenses that may limit rights holders to injunctive relief in litigation (i.e., they can require institutions to take down the content but cannot obtain money damages)[9] but private institutions do not have the same defenses. The Copyright Act sets penalties for violations ranging from actual damages to the statutory damages amounts of $750 to $150,000 per infringement (with the penalty for willful infringement yielding $30,000 to $150,000 penalties).[10] Beyond these damages, there is the cost of potentially negative press coverage, especially since higher education institutions themselves create and protect billions of dollars of intellectual property annually.

YouTube has instituted an automated system which removes many synchronized videos based on analysis of the audio track against a database provided by the recording industry.[11] Blocked videos can be unblocked by, among other narrow exceptions, proving that a license was obtained for such use. But, in general, colleges and universities do not maintain similar blocking technology on their own sites, and social media services have a mixed record in blocking or taking down content. It is very easy for rights owners to search for owned content, determine where it is hosted, and seek to have the content taken down or a license paid. Some institutions have been contacted by rights holders demanding a costly license be paid for each video hosted on the institution's site (which itself can be high in number). Institutions have had mixed success in negotiating the amount demanded by rights holders.

A number of companies offer synchronization licenses for songs developed as "background" tracks and similar options (but generally do not include Top 40 hits). Some narrow exceptions apply to the requirement that a synchronization license be obtained, including a faculty member who creates a synchronized video for classroom use but does not display the work or make it available publicly. There may also be narrow fair use exceptions, and (much) older recordings may be in the public domain. But such exceptions likely do not extend to the common practice of synchronizing well-known but unlicensed music to photos and videos, uploading them to be consumed by the public, and indeed even promoting them through traditional and social media channels.

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9. *See* Hans v. Louisiana, 134 U.S. 1, 10 (1890); Ex Parte Young, 209 U.S. 123 (1908); Verizon Md. Inc. v. Pub. Serv. Comm'n of Md., 535 U.S. 635, 645 (2002).
10. *See* 17 U.S.C. § 504
11. *See* https://support.google.com/youtube/answer/2797370?hl=en.
12. *See* 17 U.S.C. § 110.
13. *See* 17 U.S.C. § 107.

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ACTION

Institutions can reduce the risk of settlement demands or litigation, as well as help the institution respect intellectual property rights of those who create and manage content, by taking these steps:

- Create a system for licensing official institutional content, training for institution professionals who may create such content without a license in their day-to-day work promoting the institution or its students, and others who can upload content to officially owned or maintained websites and channels.
- Develop guidelines and provide training for communications, media, marketing, admissions, student affairs, athletics, and other relevant offices to ensure that they obtain licenses prior to uploading music.
- If a video is created that is not licensed, it should not be uploaded to the institution's website or to official institution marketing or social media channels.

CONCLUSION

Even as creating content is becoming less expensive and easier to obtain all the time, the law around synchronization rights remains confusing, and properly acquiring rights is expensive and time-consuming. Risk managers must weigh the litigation and settlement demand risks that arise when content is created, uploaded, and hosted without licensing content — as well as the impact of negative public relations in being accused of having "stolen" content — against the challenge of educating professional staff about the law and how to follow it, and the inevitable complaints as less content featuring the institution and its students will be created and shared.

SOURCES AND REFERENCES

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