General Counsel

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An Introduction to Music Licensing for Planetarians

In the December 2004 issue of the *Planetarian*, I provided some insight into the often-misunderstood area of copyright law. That article, entitled *Beyond the Fair Use Fallacy: A Copyright Primer for Planetarians*, began with a brief history of copyright law, discussing its cultural and political underpinnings. I then discussed the general rights conferred by a copyright, several exceptions to those rights, and the importance of seeking permission for using someone else's copyrighted material in cases where none of the exceptions apply.

This inaugural installment of the *General Counsel* column builds on the 2004 article by focusing on a specific application of copyright principles to a situation that planetarians face frequently: the use of commercially available music in the planetarium. Many planetarians ignore the copyright issues surrounding the use of music, while others, fearing the unknown, simply avoid using music in their productions. Still another subset of planetarians believes, albeit erroneously, that so long as a facility is covered by licenses from the likes of ASCAP or BMI, they are free to use music in their shows. None of these situations are optimal.

Like the 2004 article attempted to demystify copyright law, this article endeavors to shed some light on the complex world of music copyright and music licensing. This column, however, should not be considered as a substitute for professional legal advice; it merely provides some general background into the area of music licensing. For advice specific to your particular circumstances, it is important to speak with an attorney.

Fundamentals of Music Copyright

Music licensing can become complicated because, unlike other copyrighted works, a commercially-recorded song is generally covered by two distinct copyrights. The first covers the musical work, that is, the "melody" or "tune" of a particular piece of music. The second covers the sound recording - the specific recording of the musical work on embodied on some kind of recording media, like a CD. What makes music copyright law so complex is that each of these copyrights can be divided into its component rights (reproduction, distribution, public performance, etc.), and different parties can own each of those rights.

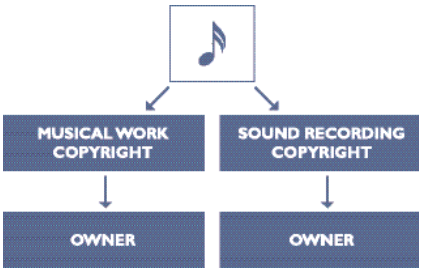

Figure 1: One song, two copyrights: one on the musical work and one on the sound recording. Graphic by Greg Dina.

This "dual-copyright" phenomenon is perhaps best illustrated with an example: consider any famous piece of classical music. The copyright on the *musical work* has likely long since fallen into the public domain, that is, anyone is free to use it without paying royalties to a copyright owner. But suppose you buy a copy of that music on a CD performed by the London Philharmonic Orchestra ("LPO") which performed and recorded the piece in 1996. While the copyright in the *musical work* remains in the public domain, the LPO, or more likely, the record label that distributes the recording, owns the copyright in the *sound recording*. A planetarian would be free to use the musical work in a production without any rights clearance whatsoever, but if one wanted to use the LPO's performance, permission would be required from the copyright owner of the recording in order to remain compliant with copyright law.

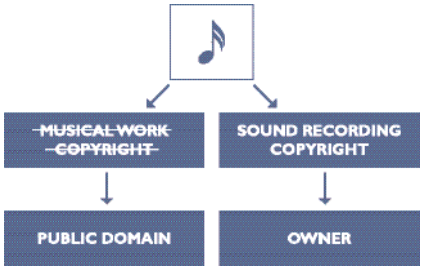

Figure 2: One song, but only one copyright, because the musical work has fallen into the public domain. Graphic by Greg Dina.

The two copyrights in a particular piece of music, particularly those which are commercially released by large distributors, are almost always owned by different parties. The publisher typically owns the copyright in the musical work while the record label that distributes the recording owns copyright in the sound recording.

Fundamentals of Music Licensing

There are three basic licenses that are of interest to planetarians:

Public performance licenses are granted by the owner of the musical work copyright (usually the publisher), and allow the licensee to publicly perform the works covered by the license. Because there are literally thousands of copyright owners and thousands of individuals and companies that perform copyrighted materials (e.g. broadcasters, restaurants, bars), the transaction costs of individual copyright owners dealing directly with licensees would be prohibitively high. To resolve this problem, several licensing agencies have been established to function as clearinghouses for licensing public performance rights. Collectively referred to as performance rights organizations, the major players in the United States include the American Society of Composers, Authors,

General Counsel is intended to serve as a source of general information on legal issues of interest to the planetarium community. Planetarians seeking information on how the principles discussed in a General Counsel column apply to their own circumstances should seek the advice of their own attorneys. Christopher S. Reed is currently pursuing Juris Doctor and Master of Intellectual Property degrees at the Franklin Pierce Law Center in Concord, New Hampshire, where he also serves as editor in chief of IDEA®: The Intellectual Property Law Review.

and Publishers ("ASCAP"), Broadcast Music, Inc. ("BMI"), and the Society of European Stage Authors and Composers ("SESAC").

Synchronization ("synch") licenses are granted by the owner of the musical work copyright (usually the publisher), and are granted directly since, unlike public performance licenses, there is no established clearinghouse to handle synch licensing. The process of synchronization is at the heart of most music use in audiovisual productions as it involves affixing, or synchronizing, the music track with visual material, just as a planetarian would be doing when producing a show. Although "synchronization" is not a specifically mentioned in the Copyright Act, it was developed out of the reproduction right found in Section 106(1) since the fundamental process that underlies synchronization is the reproduction of the musical work onto a soundtrack.

The third and final music license of interest to planetarians is the *master use* license, which is granted by the owner of the copyright in the sound recording (typically the record label). A master use allows the licensee to use the licensor's specific recording of a particular musical work (usually called the "master"). Without the rights to the underlying musical work, the master use license is of little value (note, however, that the converse is not true – without a master use license, the licensee of a musical works license would simply have to re-perform the music and create their own recording).

Careful consideration of these licenses reveals that there is no license that covers the public performance of the master. While the publisher grants both synchronization and public performance licenses, the record label grants only a master use license. The reason for this apparent anomaly arises from the exclusive rights granted to copyright owners in Section 106 of the Copyright Act, which simply does not grant a right of public performance in sound recordings. Section 106(4) grants public performance rights to a variety of copyrighted works, but makes no mention of sound recordings. Section 106(6) does provide a public performance right to sound recordings, but only in cases where such recordings are performed "by means of a digital audio transmission."

Which License(s) do I Need?

The specific licenses that a planetarium will be required to obtain vary with the intended use. For those who simply want to play music during the pre-show seating and post-show exit periods, only a public performance license is required. Most planetariums, however, also show visuals while audiences are being seated (e.g., advertisements for the museum shop) or as they exit (e.g., "please exit to your left") which may be deemed to be sufficient "synchronization" with the music so as to require a synch license. It is this type of precise determination that cannot be adequately expressed in general terms and thus underscores the importance of seeking advice of an attorney.

Beyond seating and exit music, most planetarians want to use music as part of the soundtracks for their shows; it is this type of use that requires all three licenses: public performance, synch, and master use. Fortunately, public performance licenses, discussed more fully below, are typically granted on a "blanket" basis, allowing a planetarium to perform any number of musical works in a particular PRO's catalog in return for paying one annual fee. Once the requisite public performance licenses are in place, a show producer need only concern him or herself with the synch and master use licenses for the musical works used in a particular production.

Note that none of the licenses discussed in this article give a planetarium the rights necessary to distribute a planetarium show to other facilities. Such an endeavor requires additional rights that are separate and distinct from those discussed here.

Mechanics of Public Performance Licensing

Of the three licenses necessary to use music in show productions, public performance licenses are probably the most basic. Because the vast majority of public performance licenses are granted by way of the three PROs, planetariums need only secure licenses with, at most, ASCAP, BMI, and SESAC, a process that is relatively straightforward. All three organizations now have web sites that provide a wealth of information about the licensing process and the necessary forms.

Of the three, only SESAC has a rate schedule that is designated specifically for informal education entities, which provides an annual license to publicly perform anything in the SESAC catalog for $0.00284 per attendee, subject to a minimum annual license fee of $112. BMI covers planetariums under their Amusement/Theme Park license, the fee for which is calculated by taking a planetarium's total attendance for the year, divided by 1,000, and then multiplying by the appropriate rate set forth in the license, which, for 2005, is $4.87. ASCAP licenses planetariums based upon their Museums Rate Schedule that provides for a flat fee of $5.00 per show fee for the first 25 shows a year and $4.00 per show in excess of 25.

While you are not required to obtain licenses from all three PROs, if you want to have public performance rights to the widest range of music, then obtaining licenses from all three is advisable. Note that the fees presented here were accurate as of this writing but change frequently, so readers are advised to contact the three PROs before budgeting or planning your licensing approach.

Public Performance Licensing Considerations

While the rates above from ASCAP, BMI, and SESAC are generally difficult, though not impossible, to negotiate, if they are beyond your budget, you might consider direct public performance licensing as an alternative. A direct performance license is one that is granted directly from the publisher and writer of a particular piece of music, thereby eliminating the need to secure blanket licenses from the PROs. Securing direct performance licenses can be cumbersome, since it requires identifying and contacting each writer and publisher that owns rights to a particular track, and frequently there are numerous parties involved. Direct licenses are also limited to specific pieces of music and do not offer the same convenience as PRO licenses, which allow performance of anything in the respective PROs repertoire.

Another consideration to be mindful of is the classroom exception, found in Section 110 of the Copyright Act, and discussed at length in my December 2004 article. Although the precise contours of the exception are beyond the scope of this column, generally, the provision allows for the public performance of copyrighted materials, without a license, in "face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction."

While the individual facts and circumstances surrounding any particular planetarium vary greatly, it is conceivable that cer-

LICENSE TYPE	WHAT IS LICENSED	WHO GRANTS THE LICENSE
PUBLIC PERFORMANCE	MUSICAL WORK	PUBLISHER (via ASCAP, BMI, or SESAC)
SYNCHRONIZATION	MUSICAL WORK	PUBLISHER (direct)
MASTER USE	SOUND RECORDING	RECORD LABEL

Figure 3: Types of music licenses. Graphic by Greg Dina.

tain uses of music in a planetarium may fall under Section 110. Like most statutory provisions, Section 110 is subject to a number of its own exceptions and court cases that interpret it. Accordingly, careful application of the provision requires a comprehensive legal analysis that must be performed by a qualified and competent attorney.

Mechanics of Synchronization & Master Use Licensing

Unlike public performance licenses, there are no central clearinghouses in place to administer synch or master use licenses. Accordingly, for synchronization rights, a planetarian must contact directly the publisher of each musical composition, and for master use rights, one must contact the record label directly. Rather than standardized forms, most synch and master use requests take the form of a letter which outlines the major features of the production in which you hope to use the music. Such a letter should include a brief description of the production, including its approximate total length, a full description of the song you wish to use, including names of the artists, publishers, and writers that were involved, how many times you will use the song in your production and how long each use will be, and a brief description of the visuals with which the music will be synchronized.

The description of the song's intended use should be very comprehensive. A license to use a song in a production may not, for example, extend the right to use that same song in a trailer for the production. Accordingly, it is helpful to fully evaluate your intentions before applying for the synch and master use licenses to ensure that you obtain the appropriate rights for your project.

Fees for synch and master use licenses vary widely among record labels and publishers. Some are willing to grant gratis licenses for noncommercial users of their music, though such requests often take substantially longer to be processed because they tend to get pushed behind commercial license requests. If you are seeking a gratis license, then it should be noted in the letter. Some publishers and labels are more receptive to requests that offer *something*, even a small amount, in return for the license. This offering helps the publishers and labels cover their costs of processing the request while also demonstrating some respect for the creative investment that the parties have made in the work.

Like the fees for synch and master use licenses, response times from labels and publishers vary widely. Some smaller outfits are more apt to respond to requests quickly, while larger organizations often have substantial backlogs in their licensing departments. Note, however, that never receiving a response to a licensing request does not constitute a default granting of permission. Absent formal written permission from the publisher, in the case of synchronization, and the record label in the case of master use, one should not use the song in production.

Identifying the PRO, Publisher, and Label

In the case of a commercial recording, identifying the publisher, label, and performing rights organization that cover the work is fairly straightforward. The record label is generally noted, rather prominently in some cases, on the back of the CD, along with its contact information. The proper department to receive master use requests is generally Business Affairs, though the label's mailroom will typically route your request to the appropriate department in any event.

Finding the publishing and PRO information is a bit more involved. For that, one must look to the liner notes, which usually list, song by song, the writers and publishers involved with each track. Also found in the liner notes are the PRO affiliations for each of the writers and publishers. This information is not only helpful to determine which public performance licenses must be in place, but also to find contact information for the publisher, which is not often listed on the CD itself. For such information, one can turn to the PRO databases, each searchable from their respective web sites, which provide contact information for their publisher members.

Alternative Licensing Options: Music Libraries

Perhaps the safest way to comply with copyright laws without the hassle of going through the licensing process is to use music that has been specifically designed and licensed for production use. Several composers and producers offer music libraries designed specifically for the planetarium industry, and there are hundreds of other general-use music libraries that offer their products along with the necessary rights to use the music legally.

There are two primary licensing models used by commercial music libraries. The first is a *blanket license*, which allows you to use anything in the library for specified purposes for the duration of the license. The second is a *laser drop license*, also sometimes still referred to as a *needle drop license*, so called because under this license arrangement, a user of music pays per use, or every time the needle drops on the vinyl LP (which today, of course, has given way to compact discs). On top of the blanket or laser drop license fee, commercial music libraries usually charge a nominal fee to lease their CDs, if you wish to have them on-hand at your site. With the advent of broadband Internet connections, many libraries no longer use CDs as the primary distribution mechanism, instead opting to distribute music via password-protected web sites.

Commercial libraries should be used with care, since many of their standard license terms do not include public performance rights, so licenses from the PROs may still be required. Alternatively, some libraries are willing to grant direct public performance licenses to users of their music, which eliminates the need for ASCAP, BMI, or SESAC licenses. But if a planetarian wanted to use commercial music in addition to the library tracks, such PRO licenses would be required.

Conclusion

Using music in a planetarium production can be one of the most effective ways to set the tone of the presentation and conveying a sense of energy and excitement about the show's topic. But using such music without the appropriate licenses robs the creators of such music from earning a reasonable return on their creative investment. Moreover, such illicit use can potentially expose your institution to considerable legal liability. Although the area of music licensing can be one of the most challenging aspects of copyright law, a thorough understanding of this area can help make a good planetarium show into a great one by expanding the universe of music from which to choose. ☆

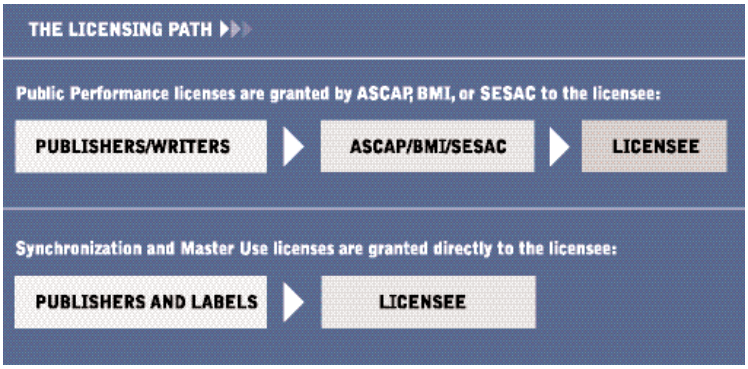

Figure 4: The licensing path. Graphic by Greg Dina.