

ED CLIPS!

“But it’s for the kids!”: Fair Use of Music in Your District Kevin Rhyne

In this time of social distancing, every school district is searching for ways to provide some normalcy to their students’ education experience in an abnormal time. The technology at our fingers today provides seemingly endless possibilities to do so. Live stream graduation ceremonies, senior appreciation slide shows posted on the district website, and online proms are just a few of the ways districts are honoring their students during this time.

One of the consistent pieces of each of these online events seems to be background music where songs downloaded or streamed from a playlist fill the background while the event is taking place. What is often missed is the potential for copyright infringement. The assumption often is that if a district event is in on school property or the district is not charging for admission, it is for an education purpose and therefore the use of background music falls under “fair use” and, so, educators do not need to compensate the owner or obtain permission to use the music. This is not always the case and it may be helpful to review whether the planned use is likely copyright infringement considering the current context.

What’s Protected and What’s Fair Use?

The federal Copyright Act is found in Title 17 of the United States Code. Several categories of “works” are protected by the Act, including “musical works.” Congress gives copyright owners a monopoly of their covered works for how that work is used by others. Specifically, those rights are to reproduce, distribute, perform, display, create derivative works, and perform sound recordings via digital audio of the protected work. Doing any of that with a song without permission is copyright infringement.

An exception to that monopoly is “fair use” which can be found in §107 of the Act. Fair use allows someone other than the copyright owner to make use of portions of the work for “**purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research.**” However, fair use does not mean indiscriminate use and Congress acknowledged that “courts must be free to adapt the [fair use] doctrine to particular situations on a case-by-case basis.”

In addition to the traditionally non-infringing examples listed above, Congress spells out four nonexclusive “factors to be considered” when deciding whether an unauthorized use is infringing on a copyright owner’s rights. Those four factors are

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.

Non-profit educational use of a copyrighted work is generally permitted as fair use. The duration and availability of the use, however, must be considered. A one-time educational use would seem to weigh in favor of fair use, while repeated use of a work over several years without permission would seem to weigh against it. This is a concern with copyrighted music being used for online events due to their continued “publication” on YouTube and other platforms at later dates.

In determining whether the use is fair, the district should ask additional questions. Does the use by the district add value or new expressions while using snippets or portions of the song or does it simply play the whole song? What is the effect of the district’s use of the song on the market? Are there limited hearers, such as a classroom, or does the district’s use for an online event expose the song to being enjoyed by consumers that way instead of purchasing the song? What is the sound quality of the background music for the event? Is it like what you would play in your car or is it faint and not prominent?

It may not be fair use. Now what?

If answering some of these questions leads the district to determine that the intended use may not be fair use, the district can obtain permission by identifying and contacting the owner, publisher, or one of the [collective rights organizations](#). After submitting a detailed written request that includes why and how the district plans to use the work and how many people are expected to hear it, the district may need to pay a licensing fee for the use. The cost will depend on the publisher: [ASCAP](#), [BMI](#), and [SESAC](#).

Remember, fair use of copyrighted works is a case-by-case determination and should never be assumed. Consult with your school law attorney for guidance in your situation.