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A CORPORATE COUNSEL SONG AND DANCE Keeping Your Corporation in Tune and Out of Court

BY PETER M. THALL

According to Edward Coke, “corporations cannot commit treason, nor be outlawed, nor be excommunicated, for they have no souls.” But they can be sued for copyright infringement. Times have changed. Corporate counsels are dealing with matters formerly left to rock and roll lawyers and their offspring (hip hop lawyers?). Corporations are using music as they have never before. Gone are the days when IBM looked only to its advertising agencies to clear rights to music used in their commercials. All major and minor corporations in the world today are utilizing music on their websites, on phone lines, and in their offices, lobbies, and meeting rooms. Holiday parties feature “Do You Hear What I Hear” and “Little Drummer Boy,” not to mention “I Saw Mommy Kissing Santa Claus.” Websites include music

clips to bring down the age of their visitors and to characterize them as more hip than their competitors.

Many of my clients in recent years are institutions that have greatly increased their use of copyrighted musical and other material—a challenge when in-house corporate counsels’ awareness of the rights and obligations of users of music is less than complete. Even when their knowledge is in fine tune and they are able to communicate the responsibilities of corporations to copyright owners, the turnover within corporations is such that no sooner are these employees taught the right stuff than they are replaced, or added to, by new employees who are as mystified as their predecessors were as to these responsibilities.

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A CORPORATE COUNSEL SONG AND DANCE

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Trust me. Copyright owners are surprisingly good at finding out when their songs are being used without their permission. One client of mine used a song during a corporate meeting without permission and a video clip of the ruckus at the meeting by shareholders over a totally unconnected matter popped up on CNN (in Austria!) and the woman (from Spain) whose father had composed the song 50 years earlier happened to be watching CNN to assist her children to learn English after a day of skiing. Lo and behold, there was daddy's song. Statutory damages anyone? Legal fees assessed by the court as the Copyright Act invites? Sure. Avoidable? Certainly.

It used to be that the "copyright" vested in the author/creator was comprised of a "bundle" of rights that were quite easily discernable: print rights (sheet music), recording rights (a phonograph record or eventually a CD), performing rights (live or on radio), and display rights (for artwork mostly). Nowadays, kindly add an enormous number of new rights: digital streaming, digital downloads, webcasts, podcasts, webinars, ringtones, YouTube clips, telephone tones, mobile apps, etc. And then there is the copying: peer to peer, links converted into home CDs and DVDs, PowerPoint presentations with music, and the like.

Many corporate counsels are aware of the "service" that the performing rights societies provide. These are organizations that have aggregated the performing right aspect of the copyright bundle of rights and, via their monopoly, sanctioned by the Justice Department under some understandable controls, offered to users of music. These organizations, the PROs, customarily offer a "blanket" license for the customer to use as many or as few of the millions of songs at their disposal for a period of time. Depending on the nature of the use (for example, actual reproductions of sound recordings or new recordings initiated by

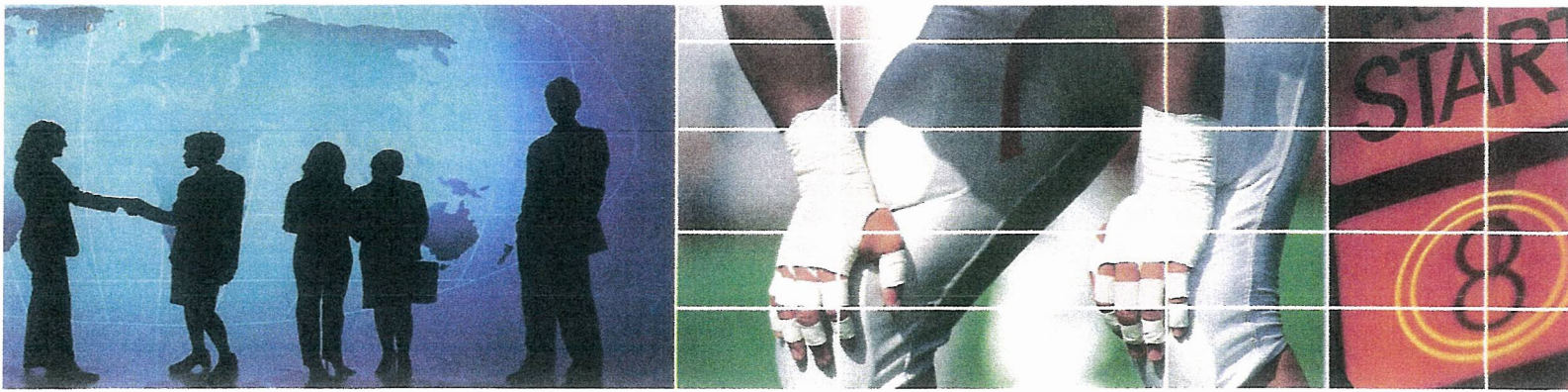
Peter M. Thall is a member of the International Association of Entertainment Lawyers and The Copyright Society of the United States, the Association of Independent Music Publishers (former Board member), Founding Member of the Entertainment Law Initiative of the National Academy of Recording Arts and Sciences, and a member of the Songwriters Hall of Fame.

the host of the website) and the traffic (people visiting the websites), the cost can vary significantly. While not clear under the Copyright Act, the U.S. Copyright Office has established a standard position that even a MIDI file sent over the Internet to a visitor constitutes a sound recording that "performs" the song constructed by the MIDI file. (A MIDI file, for those of you who delve in books rather than algorithms, is a set of instructions that provide a literal realization of the notes of a song manifested automatically with little or no other input than the score data itself. The MIDI rendering can be joined up with the graphical data and other embedded metadata to create sheet music that "sings" or other manifestations of the music.)

If I have not made it clear already, this is a critical area of concern for corporations across the board . . . and across the world. PROs outside the United States operate singly—and usually exclusively—as opposed to the way ASCAP, BMI, and the orphan SESAC operate in the United States. (SESAC controls the rights of Bob Dylan, Neil Diamond, and dozens of hip hop writers whose sometimes merely fractional contributions to hit songs make them a factor to contend with when clearing rights for an event—so don't count them out so fast.)

Performing rights do not just apply to musical compositions. They may apply to sound recordings as well (or they may not). Recordings presented/performed in an analog environment are not yet protected for copyright purposes in the United States, but they are outside of the United States. Recordings presented/performed in a digital environment (for example, satellite radio—Sirius/XM to be specific) are so protected.

Fortunately, fees for the use of music on certain webcasts are dictated by law and there is no need to seek clearance from copyright owners themselves. But fees for the use of music in the United States are notoriously all over the place, and if a corporation does not use a person expert in the field, with the relationships with music publishers and record companies to match, the cost can be astronomical. Then again, there is the cost of the professionals handling the clearances. Nothing's easy. Nothing comes cheap. If you want to use music to enhance the "vibe" of your corporation, you have to expect to pay dearly just as you



pay for your electricity and other utilities.

Most corporate counsels are familiar with the Digital Millennium Copyright Act (DMCA), which was passed predominantly to comply with international treaties designed to protect Internet service providers from liability when an infringing work pops up on sites provided by, or serviced by, ISPs. There are many other provisions of the DMCA that a corporation can come into contact with without realizing it and it is the rare corporate counsel who is expert in this area.

with copyright and associated laws—is essential for the modern corporation. Companies whose legal counsel are dispersed throughout the world should establish an intellectual property network within their global corporation so that lawyers and managers who touch on areas of intellectual property exploitation can keep each other informed. One way to accomplish this is to select a central rights-management person as well as one person in each division designated as the contact person for corporate compliance. Furthermore, I recommend creating and

ALL MAJOR AND MINOR CORPORATIONS IN THE WORLD TODAY ARE UTILIZING MUSIC ON THEIR WEBSITES, ON PHONE LINES, AND IN THEIR OFFICES, LOBBIES, AND MEETING ROOMS.

In my book *What They'll Never Tell You About the Music Business: The Myths, the Secrets, the Lies (and a Few Truths)* (Billboard Books/Random House, 2006), I quoted a copyright law expert who wrote an article titled "Ignoring the Public, Part I: On the Absurd Complexity of the Digital Audio Transmission Right" for a respected law review. In a word (two words): Watch out! Nothing is as simple as it looks. No, you can't use eight notes or two measures or eight measures, or whatever, and call it "fair use." Whatever your colleagues may tell you, there is no such thing as fair use when you are using music without permission for a commercial enterprise. Parody, as a concept, is often asserted as a defense. It's not going to fly.

The good news is that the performing rights societies, and the music industry in general, while awfully late, are beginning to comprehend the realities of the new world of musical uses. Whether they are attuned to the constantly evolving aspect of this world is subject to question and therein lies a significant lapse of protection for the user of music. For, while the copyright owner can rely on its own ignorance of the law, the user has no such protection.

All of which brings me to the purpose of this article: to counsel the counselors that rights management—the science of managing intellectual property and complying

issuing educational pamphlets on copyright, rights of privacy, and other intellectual property issues. Materials are actually available via the Copyright Society of the USA, the U.S. Copyright Office, and the PROs. It would be useful to make this data part of the "office manual" of the company so that they will be placed in front of all existing and new employees. Thus, no interruption of corporate consciousness will occur. Updates can be provided periodically.

So—what am I suggesting? A rights management attorney (separate or part of the general counsel's responsibilities). The dangers are actually quite considerable. Cooperation and coordination with the actual rights holders is quite achievable. The problems are not insoluble. But the ramifications of ignoring the pitfalls are enormous.

For a company that does not define itself as particularly identified with music, the pitfalls are many. And they are not just limited to the United States. In most instances, one-stop shopping for world rights is simply not available. Without unnecessarily promoting the role of music lawyers like myself, if you don't get it right, the consequences are horrific. Education of your employees is essential; use of experts in the field to walk you through the pitfalls is elemental. ♦