

Date: June 18, 2007

To: Edward Leibensperger

From: Melise R. Blakeslee
Gregory Parks

Re: U.U.A. Copyright Questions

This memo responds to the Unitarian Universalist Association's ("UUA") questions about the use of music in its member churches. In this regard, the UUA brought to our attention the Church Music Publishers Association's "Guide to Copyright Information" (the "Guide")¹. It provides good basic information although it does not address all of the questions raised by the client. The purpose of this memo is to respond to the client's outstanding questions.

As the client probably already knows, but it is worth repeating here, the owner of a copyright is assured certain exclusive rights under the law. Specifically, only the copyright owner can reproduce, distribute, display, and or perform the work. Anyone who wishes to use a work in one of these ways must obtain a license from the copyright owner unless there is a specific exception in the statute. With respect to church music, there is one very narrow exception—permission is not needed in order to *perform* (such as singing) or *display* (such as projection of lyrics) in the course of a service conducted *in a place of worship*.² This "church music exemption" does not permit use of the work outside of the place of worship and the section does not permit copying of any sort. Unfortunately, scenarios envisioned by the client do not fall within the narrow scope of the statutory exemption.

The UUA's envisioned scenarios involve either, (1) copying, (2) distributing (activities outside of the church music exemption) or (3) displaying the work outside of the place of worship. We have grouped the client's questions and our answers under each of these headings.

I. Copying

A. Questions

- Are instrumentalists allowed to copy pages of music to avoid and/or ease page turns without obtaining permission from the copyright holder(s)?
- When teaching a song by rote, can one distribute lyric sheets for review outside of rehearsal without obtaining permission from the copyright holder(s)?

¹ Church Music Publishers Association's "Guide to Copyright Information," is located on the organization's website at <http://www.cmpamusic.org/html/main.isx?sub=13>.

² 17 U.S.C. Section 110(3).

- Can one copy a song and take it home for review without obtaining permission, if the copy is made from a legal copy owned by the church?
- Is it legal to print lyrics in Orders of Service without obtaining permission, if the church owns an equal number of copies?
- Since hymnbooks are frequently shared, can the church print lyrics in the Order of Service for twice the number of legal copies owned by the church?
- For UUA gatherings where legal copies of music are not present, can lyrics and/or music be printed or copied without permission?

B. *Analysis*

In order for any UUA church to engage in the activities envisioned above, the church will need to obtain permission. A copy is made in each instance. Copying is not within the church music exemption.³

Specifically, unauthorized copying and distribution of a copyrighted work falls outside of the §110(3), religious exemption.⁴ Furthermore, neither the religious nor not-for-profit elements of a performance will protect a religious institution from copyright infringement.⁵ For example, religious music copyright owners “can prevent congregations from copying or publishing [those owners’] copyrighted works, even if the churches only intend to use the copies or publications at not-for-profit religious services.”⁶ A church that distributes copies of copyrighted songs to its members must request permission to do so prior to such copying and distribution.⁷ Copying of copyrighted songs by a religious institution does not even rise to the level of fair use.⁸

³ Section 110(3) provides an exemption for performance of musical works by religious bodies. There is no infringement of a copyright owner’s exclusive rights where there is a “performance of a ... musical work or of a dramatico-musical work of a religious nature, or display of a work, in the course of services at a place of worship or other religious assembly.” *Id.* §110(3). Furthermore, there is no infringement where there is a “performance of a ... musical work otherwise than in a transmission to the public, without any purpose of direct or indirect commercial advantage and without payment of any fee or other compensation for the performance to any of its performers, promoters, or organizers.” *Id.* §110(4).

⁴ *Worldwide Church of God v. Philadelphia Church of God, Inc.*, 227 F.3d 1110, 1115 (9th Cir. 2000).

⁵ *F.E.L. Publications, LTD. v. Catholic Bishop of Chicago*, 214 U.S.P.Q. (BNA) 409, 410-411 (7th Cir. 1982) (citing *Whitol v. Crow*, 309 F.2d 777 (8th Cir. 1962); *F.E.L. Publications, LTD. v. Catholic Bishop of Chicago*, 199 U.S.P.Q. 85 (N.D. Ill. 1978)).

⁶ *F.E.L. Publications*, 214 U.S.P.Q. (BNA) at 410.

⁷ *Id.* (holding that “[i]f a church distributes copies of a copyrighted song to its members, this amounts to a publication of that work and can only be done by permission of the copyright owner”) (citing *Macmillan v. King*, 223 F.2d 862, 867 (D.C. D.Mass. 1914); *Tiffany Productions, Inc. v. Dewing*, 50 F.2d 911, 914 (D.C. D.Md. 1931); *F.E.L. Publications, LTD. v. Catholic Bishop of Chicago*, 199 U.S.P.Q. 85 (N.D. Ill. 1978)).

⁸ *Whitol v. Crow*, at 780 (holding that “it is not conceivable ... that the copying of all, or substantially all, of a copyrighted song can be held to be ‘fair use’” where defendant-agent of church infringed even with no intent to do so).

II. Displaying

A. Questions

- If the church owns enough legal copies of the song for every congregant to have one, can they project lyrics and/or music on a screen during a worship service without obtaining permission?
- For UUA gatherings where legal copies of music are not present, can lyrics and/or music be projected without permission?

B. Analysis

Assuming that the UUA has one legal version of the song and that is the image being projected, then projection of the words and music during a worship services is not a problem pursuant to the church music exemption 17 U.S.C. §110(3). If there are no legal copies of the words and music then projection is not permitted. The operative facts are a legal copy, projection of the legal copy, the viewers are present in the same place as the legal copy, and it is in a place of worship.

Displaying a work requires one “to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or ... to show individual images nonsequentially.”⁹ A copyright owner, “or any person authorized by such owner, is entitled, without the authority of [said] owner, to display that copy publicly, either directly or by the projection of no more than one image at a time, to viewers present at the place where the copy is located.”¹⁰ Where the copy is intended for display via projection (e.g., a photographic slide or transparency), the public projection of a single image is permitted as long as the viewers are “present at the place where the copy is located.”¹¹ Public display of a copyrighted work’s image is not exempt from copyright control if that copy is outside the presence of the viewers.¹² For example, the display of a copyrighted work’s visual image “would be an infringement if the image were transmitted by any method ... from one place to members of the public located elsewhere.”¹³ Thus, to project a copy of lyrics and/or music on a screen during a worship service does not constitute infringement since there is no transmittal of that display to members of the public not located at the place where the actual copy is located.¹⁴

⁹ *Id.* §101.

¹⁰ *Id.* §109(c).

¹¹ H. Rep. No. 94-1476, at 79.

¹² *Id.* at 80.

¹³ *Id.* at 79-80.

¹⁴ *Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc.*, 192 F. Supp. 2d 321, 334 (D.N.J. 2002).

III. Performing

A. Questions

- Is it necessary to own a legal copy of the song in order to teach it by rote to others?
- Is it necessary to obtain permission from the copyright holder(s) to teach a song by rote that the teacher has learned from a recording?

B. Analysis

Both of the questions raised in regards to teaching songs by rote may be addressed similarly. Such rote teaching presumes performing the music for students. Such performance does not constitute copyright infringement if it is in the course of a service within a place of worship. Unfortunately, if the song is performed outside of those two limitations, then the performance might be prohibited depending on what constitutes a “service” and a place of worship, as discussed below.

There is no infringement of a copyright owner’s exclusive rights where there is a “performance of a ... musical work or of a dramatico-musical work of a religious nature ... *in the course of services at a place of worship or other religious assembly.*”¹⁵ Furthermore, there is no infringement where there is a “performance of a ... musical work otherwise than in a transmission to the public, without any purpose of direct or indirect commercial advantage and without payment of any fee or other compensation for the performance to any of its performers, promoters, or organizers.”¹⁶ Performing a work means to “recite ... it, either directly or by means of any device or process.”¹⁷

Performing a hymn from rote at a religious institution fits within the religious exemption.¹⁸ This presumes that this music is either performed from legal copies or “from memory.”¹⁹ So long as rote performance of the hymns is restricted to the place of worship, there is not likely to be an infringement.²⁰

¹⁵ 17 U.S.C. §110(3).

¹⁶ *Id.* §110(4).

¹⁷ *Id.* §101.

¹⁸ *F.E.L. Publications*, 214 U.S.P.Q. (BNA) at 410 (holding that “the singing of a hymn at a religious service is a not-for-profit performance and [religious music copyright-holders] cannot prevent congregations from performing any of its copyrighted works at a service”).

¹⁹ *Id.* at 410, 412.

²⁰ *Simpleville Music v. Mizell*, 451 F. Supp. 2d 1293(M.D. Ala. 2006).

The religious service exemption is inapplicable to the public at large and restricted to performances at the particular place of worship or where congregants are assembled.²¹

IV. Copying and Displaying

A. Question

- What are the copyright issues in regards to distribution of worship services via cassette, CD, DVD, web streaming, cable, TV, and podcasting? What permissions, if any, are needed to distribute sermons, readings, recorded music, original music, hymns, anthems, and instrumental selections?

B. Analysis

Distribution of worship services via cassette, CD, DVD, web streaming, cable TV, or podcasting would likely violate the copyright owner's exclusive rights, as outlined in 17 U.S.C. §§107-122. The religious exemption is likely inapplicable, because it only applies where there is a "performance of a . . . musical work or of a dramatico-musical work of a religious nature, or display of a work, in the course of services at a place of worship or other religious assembly."²² Distribution of worship services via cassette, CD, DVD, web streaming, cable TV, or podcasting would transmit the performance and/or display the services to individuals beyond the place of worship or religious assembly.²³

Religious institutions can address these issues in a number of ways: First, they can obtain approval from copyright owners, in advance, to make and distribute recordings of or web-stream services where copyrighted works are performed. Second, they can avoid the use of copyrighted music in recorded or streamed services. Third, they can turn off the recording or web streaming device when copyrighted music is performed during the service. Fourth, they can enter into a blanket license agreement with copyright owners. Finally, they can obtain a compulsory license.

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Please let me know if the client has any other questions on this matter.

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²¹ *Id.* (citing H. Rep. No. 94-1476, at 84 (indicating that the §110(3) exemption does "not extend to religious broadcasts or other transmissions to the public at large, even where the transmissions were sent from the place of worship").

²² 17 U.S.C. §110(3).

²³ *Simpleville Music*, 451 F. Supp. 2d at 1298 (holding that §110(3) "does not allow [defendant] to broadcast copyrighted songs [to places other places], performed during church services, without authorization").