

MEMORANDUM

To: Harlan Limpert
Mary Benard

From: Charles P. Bacall
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Date: March 8, 2016

Re: Projection of Legally Obtained Song Lyrics During Worship

This memo responds to the following questions raised by the Unitarian Universalist Association (“UUA”):

1. If a congregation has obtained a legal copy of song lyrics, can that copy be projected on a screen during worship without obtaining permission from the copyright holder?
2. If a congregation has obtained a legal copy of song lyrics, can that copy be scanned (such as in .pdf form) and projected on a screen during worship without obtaining permission from the copyright holder?
3. If a congregation has obtained a legal copy of song lyrics, can the lyrics be retyped and displayed on a screen (such as on a PowerPoint slide) during worship without obtaining permission from the copyright holder?

Copyright law provides a copyright owner several exclusive rights, including the exclusive right to reproduce, distribute, display or perform a work. Typically, in order to use a work in one of these ways, permission or a license must be obtained from the copyright owner. However, there are several statutory exceptions to this rule. One such exception applies specifically to use of a copyrighted work during worship. According to the Copyright Act, the following activities are not considered an infringement:

17 U.S.C. § 110(3): *“Performance of a nondramatic literary or 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.**”*

This exception is narrowly worded and requires that we carefully examine the meaning of the term “*display*” to understand whether projection (either by opaque projector or digital presentation) of song lyrics during a worship service falls within the scope of this language. The Copyright Act defines “*display*,” as follows:

17 U.S.C. § 101: *“To ‘display’ a work means to show a copy of it, either directly or by means of a film, **slide, television image, or any other device or process** or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially.”*

Keeping this definition in mind, our analysis with regard to each scenario posed by UUA appears below. Throughout this memo, we assume that at least one legal copy of the song lyrics that will be projected for view during a religious service is owned by UUA or the applicable congregation. We also assume that the viewers are present in the same location as the copy being projected (i.e., the services are not broadcasted, streamed online, or viewed remotely) and that the projection occurs during a religious service (which does not include congregation sponsored events for social, commercial, fundraising, or entertainment purposes).

1. Projection by Opaque Projector of Legally Obtained Copy of Song Lyrics on a Screen During Worship:

Under the worship exception, projection using an opaque projector of a legally obtained copy of the lyrics of a song for view by congregants during a religious service does not constitute an infringement. As a result, permission need not be obtained from the copyright holder for this activity.

The term “*display*,” appearing within the text of the worship exception, specifically provides the ability to “*show a copy, either directly or by means of a film, slide, television image, or any other device or process....*” Projection using an opaque projector (that projects a direct image of an opaque object, as opposed to use of a transparent slide) of a legally obtained copy of the lyrics of a song clearly fall within the scope of this language as a “*device*.” Therefore, permission from the copyright owner would not need to be obtained.

2. Projection of a Transparent, Scanned or Digitalized Copy of a Legally Obtained Copy of Song Lyrics on a Screen During Worship:

Under the worship exception, projection of a transparent, digitalized, scanned or .pdf version of a legally obtained copy of the lyrics of a song for view by congregants during a religious service likely does not constitute an infringement. In our view, scanning or any typical digitalization process falls within the “*any other device or process*” and “*either directly or by means of a film, slide*” language in the definition of the term “*display*.”

More specifically, according to 17 U.S.C. § 101, “*a “device,” “machine,” or “process” is one now known or later developed.*” It is likely that the “*now known or later developed*” language would provide coverage for the modernization of projection processes. While opaque projectors were popular many years ago, it is rare for such devices to be in common use. Use of transparent slides and overhead projectors is also no longer common practice. Instead, projection methods have evolved to use of digitalized or scanned versions of works to make this process more efficient, relevant, and compatible with current technology.

Further, the definition of the term “*display*” also allows for the lyrics to be projected “*either directly or by means of a film, slide.*” The use of an overhead projector and transparent slide would clearly fall within the scope of the term “*slide*.” Interpreted within the context of current technology, projection of a scanned, digitalized or .pdf version of the song lyrics is essentially the modern equivalent of a “*slide*.” Therefore, these projection methods likely do not constitute an infringement under the worship exception.

3. Display of Retyped Lyrics of a Legally Obtained Copy of a Song on a Screen During Worship:

Under the worship exception, projection of retyped lyrics of a legally obtained copy of a song for view by congregants during a religious service is a more complicated analysis. However, in our view, it is likely that this method of projection will still fall within the “*any other device or process*” language within the definition of the term “*display*.” In the event that this specific activity is not covered by the worship exception, it could be argued that it constitutes a “fair use” of the work, due to its noncommercial nature.

The retyping of the lyrics into some other medium (such as a PowerPoint slide) is undeniably making a reproduction of the work. As noted above, the reproduction right is one of the exclusive rights of the copyright holder. The worship exception explicitly addresses the *display* right not the *reproduction* right.¹ The *display* right, however, contemplates the showing of a copy by means of “... *any other device or process*.” Therefore, the question in this instance is whether the transcribed copy should be considered a process integral to the display right, or an unauthorized reproduction.

Some within the industry view the process of retyping a work for projection purposes as falling outside the parameters of the worship exception. See Alliance of Christian Organizations, <http://www.lifechangingworship.com/wp-content/uploads/2014/05/Projection-of-Song-Lyrics-Legal-Advice-from-ACO-Feb-2012.pdf> and CCLI licensing as interpreted by the United Methodist Church Discipleship Ministries, <http://gbod-assets.s3.amazonaws.com/legacy/kintera-files/worship-music/CopyrightandLicensingfortheChurchMusician-Handout.pdf>. Their argument, consistent with the analysis above, is that it is a reproduction, which would require permission from the copyright holder.

While we acknowledge this view, the practical distinction between the process of retyping the lyrics of a song, scanning the lyrics to create a digital copy or transparent slide, or the use of an opaque projector is relatively limited. In our view, retyping is a process used to project a legal copy of the work, and within the context of the worship exception; therefore, this process should still be considered a lawful display.

If retyping a work does not qualify within the worship exception as a “*display*” by “... *any other device or process*,” the risk presented to a congregation would be relatively low. Moreover, the fair use defense could be available in certain circumstances.

The fair use defense allows for copyrighted materials to be copied or otherwise used for “*criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research*.” To determine whether a particular use of a work is a fair use, the Copyright Act outlines several factors that must be balanced and considered. These factors, detailed in 17 U.S.C. § 107, include the following:

¹ Arguably, the digitized or scanned copy required in question #2 is also a reproduction; however, it is intuitively easier to see that as a necessary step in a newly developed technology for displaying the work. We believe this is the better view of the digitized or scanned copy required in question #2.

- “(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.”*

The nature of worship services are inherently for non-commercial purposes, therefore, this first factor would likely weigh in favor of a fair use. The second and third factors appear less favorable and the fourth factor is difficult to pin down without specific facts. While copies of song books are presumably sold commercially, the effect on the market of this use is no different from the effect of projecting the lyrics by another permissible means, such as by using an opaque projector. Moreover, if the UUA or one of its congregations owns 100 copies and projects the lyrics to 100 congregants, the effect on the market is presumably non-existent.

Fair use is a notoriously flexible doctrine; a complete analysis of the fair use factors is beyond the scope of this memo. Therefore, we recommend obtaining advice from counsel if a particular situation is more complex or strays from the general circumstances and assumptions detailed above. As always, when in doubt, obtain permission from the copyright owner prior to using a work.