

BY DOUG LALONE

What to Do When the Copyright Knocks on Your Door

ASCAP takes a stand against music copyright violators

ON DECEMBER 13, 2003, the St. Louis Police Department arrested three flea market vendors and 16 other vendors from a local flea market. They were under investigation for purportedly manufacturing and selling nearly 30,000 counterfeit and pirated CDs. This effort was spearheaded by the Recording Industry Association of America (RIAA). On December 9, the RIAA announced that it was hiring Bradley Buckles, the director of the Federal Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), to head the RIAA's Anti-Piracy Unit. On December 4, the *Wall Street Journal* reported that the RIAA had filed an additional 41 lawsuits and sent 99 warning letters to people it alleges illegally shared music via the Internet. In September 2003, the RIAA filed 261 lawsuits against people who allegedly downloaded illegal music. The efforts of the RIAA to stop college students from swapping music files have certainly grabbed headlines lately. However, did you know that some of the laws that give the RIAA the ability to sue college students for music file swapping are the same laws that might expose your client to litigation for playing the radio next to the checkout cashier? Watch out, the copyright cops are coming!



Policeman



The basis of ASCAP's knock on your door is because you allegedly have violated the author's exclusive right to publicly perform the music.

Other organizations protect the rights of the musically inclined. The American Society of Composers, Authors and Publishers (ASCAP) was founded in 1914. ASCAP is comprised of 170,000 members who are songwriters, performers, lyricists, and publishers. ASCAP and counterparts such as BMI are like a "Big Brother." These organizations have immense tools to investigate and collect data on business practices. Radio stations are an easy target for ASCAP because music is broadcast over the free airwaves, and is now being streamed digitally even further over the Internet. However, any business that plays music is vulnerable. Think of all of the stores and restaurants that have music wafting in over the public address system, or the shop floors with boom boxes belting out the latest Eminem re-makes.

ASCAP often has local investigators collect evidence from radio stations and store owners including what music is performed, the name of the artist, and the time of the broadcast. I know because I've seen this well-organized evidence used against my clients. This evidence is logged in and the investigator reports it to ASCAP, who then compares the songs that were played to ASCAP's repertory.¹ For example, if a station's songs are part of ASCAP's repertory, but it has no license, there may be a knock on the door—and it won't be the Optimist Club looking for new members!

Not all songs are in ASCAP's repertory. There are many other organizations that are enforcement houses for the rights of musicians. My brother, Garry, is a drummer for the John Conley band, and he is based out of Nashville. Garry is affiliated with BMI. Some country musicians join BMI or ASCAP, while gospel musicians often join SESAC. By joining one of these groups, your copyrights will be enforced by that group. The Jukebox Licensing Office also grants licenses to jukebox owners. The music industry has all of their bases covered.

ASCAP has more than 100 different types of licenses that cover almost every manner of broadcasting at almost any business activity you can imagine—including bizarre events like clogging and my favorite, truck pulls. Watching truck pulls was a pastime of mine while growing up in Indiana. I cannot recall

what music was played at those events, maybe it was "I lost my pickup truck in a card game." If you are curious, a detailed list of the numerous events ASCAP grants licenses for can be found at <http://www.ascap.com/licensing/types.html>. A regional licensing representative can help your client fit his or her needs to the right license. Failure to do so could result in one of ASCAP's brigade of attorneys sending your client a desist letter demanding a paid-up royalty for the past and offering a license for the future use of the copyrighted materials. Or worse yet, a complaint could be filed that results in copyright counsel being retained to resolve the matter. Either way, it is best to meet with ASCAP and resolve any potential issues before you get the knock on the door.

My experience with ASCAP's attorneys is that they are persistent, well funded, and they desire to work out licensing arrangements. Let's face it—we, the end users, the people that fork out \$14.99 for CDs at Kmart—are the bread and butter of ASCAP and all of its members. Without us, they don't eat—literally. The thousands of musicians that join ASCAP rely upon the public to buy and listen to their music. So it's a catch 22—ASCAP has to gently enforce its clients' rights.

So what's the basis for ASCAP's beef? ASCAP is the agent for musicians and therefore ASCAP stands in the shoes of its members. Copyright law limits authors to six exclusive rights under 17 USC 106. These rights are separate and distinct from the rights that are afforded under patent and trademark laws. The six rights afforded to copyright owners include the exclusive right to do and to authorize any of the following:

- 1) to *reproduce* the copyrighted work;
- 2) to *prepare derivative works* based on the copyrighted work;
- 3) to *distribute copies* of the copyrighted work;
- 4) to *perform* copyrighted literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works publicly;

- 5) to *display* the copyrighted work publicly; and
- 6) in the case of sound recordings, to *perform* the copyrighted work publicly by means of digital audio transmission.

The basis of ASCAP's knock on your door is because you allegedly have violated the author's exclusive right to publicly perform the music. Napster's brush with the law was based on this statute, as is likewise the basis for the recent bout of lawsuits against college student file swappers.

So what does it mean to publicly perform music? Technically, a public performance is defined as to "perform or display at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances are gathered."² Unlicensed transmission of music via the radio, the Internet, or in restaurants could be actionable. A license is recommended with the appropriate group so as to minimize potential liability.

The law of copyrights is broad reaching, and RIAA, ASCAP, SESAC, and BMI are watching us. So the next time you are in a flea market buying a CD, or watching your youngster download a file, or listening to music in a public place, ask yourself, is that music legitimate? If not, then the copyright cops may come knocking on your door. How are you going to open that door? Will it be with trepidation, or are you ready for them? ♦

Doug LaLone is a patent attorney and shareholder of Warn, Hoffmann, Miller & Lalone, P.C., located in Auburn Hills. He has handled copyright disputes pertaining to greeting cards, characters, posters, music, software, manuals, architectural works, and building plans, as well as a host of patent, trademark, U.S. custom seizure, Internet domain name, and unfair competition cases. Hailing from Purdue and Valparaiso, he counsels clients with mechanical inventions. He is married with five children and a big black dog named Shady.

Footnotes

1. To see if a song is in ASCAP's repertory, visit <http://www.ascap.com/ace/search.cfm?mode=search>.
2. 17 USC 101.