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TOPIC:

SYNCHING YOUR TEETH INTO COPYRIGHT LAW: LEGAL AND PRACTICAL CONSIDERATIONS FOR PUBLIC PERFORMANCES OF VIDEO AND PHOTOS SYNCHRONIZED TO COPYRIGHTED MUSIC

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INTRODUCTION:

Colleges and universities increasingly seek to synchronize popular and classic songs in conjunction with photos and videos for uses such as attracting students, creating a “highlight reel” of a great sports season, or sending a holiday message. Moreover, faculty and students also increasingly use multi-media as part of teaching and learning activities, actions that may raise synchronization issues and attendant responsibilities when course materials, assignments or scholarly works are destined for posting on the Internet. When such content is destined for university servers or is part of “official” university learning activities, counsel and others may be asked for guidance on this topic. While the technology has become drastically less expensive and easier to use over the last decade, the law and practices around synchronizing music to images remain complicated, counter-intuitive, and bulky.

You can read the Copyright Act from end to end and you will see no definition of, reference to, or description of what people frequently refer to as “synchronization” or “sync” rights. There is no such thing as “synchronization” in the Copyright Act, and it is best not to identify rights where none exist. Copyright holders do have public performance rights, and they can choose to

dispose of those rights in the manner they see fit, but Congress did not imbue the synchronization of music to images with any definition or special status in the Copyright Act.

Singling out synchronization as some kind of separate element is an industry-manufactured distinction designed to generate more revenue from specialized uses. In this case, the music industry identified that the demand for using music in movies and television could generate additional revenue and, thus, charging a separate fee for using music in conjunction with images became an industry practice. This practice, which was once all about “soundtracks” for substantial commercial productions, is now being mistakenly brandished in the context of all synchronizations. Because there is no statutory definition related to synchronization, it may be difficult to know when and whether to pursue a sync license.

This NACUANOTE will explain the law and the processes for making use of songs by synchronized public performance. As we will describe, institutions must often obtain separate authorizations from multiple parties. The interplay between the parties can be complicated and generally requires delicate negotiations over the amount used, the intended audience (including whether or not the performance can be broadcast on the Internet), the duration of the license, and whether the song can be used in toto (each of which will be discussed in the Note). The Note will also explore alternative methods of obtaining synchronization licenses, and will provide real-life examples where these alternative methods were used, in some instances requiring neither permission nor payment. The Note will touch on how to successfully post licensed content on websites such as YouTube so that videos are not removed by automatic processes, and will conclude with a discussion of potential damages and injunctive relief if the rules are not carefully followed.

DISCUSSION:

A. Copyright Law

1. Copyright and Its Balance

Through the “Progress Clause”, the Constitution grants Congress the power to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”^[2] For copyright, this congressional authority is realized in Title 17 of the United States Code (the Copyright Act).^[3] To achieve the constitutional objective of promoting progress, the Copyright Act establishes specific rights for copyright holders that are designed to encourage the creation and public availability of copyrighted works; it also establishes rights and uses that limit the rights of copyright holders by authorizing uses that do not require permission from the copyright holder. Through this balance, the Copyright Act achieves the twin objectives of promoting progress and upholding the benefits of free speech under the First Amendment.

Copyright protects original works of authorship. Works of authorship—such as literary works, musical works, or sound recordings^[4]—get copyright protection when they are fixed in a tangible medium of expression.^[5] In the academy, we create, distribute, and use copyrighted works in virtually every aspect of the academic enterprise.

Under §106 of the Copyright Act, a copyright holder has the right^[6] to “do and to authorize” the reproduction, distribution, public performance, and public display of her copyrighted works, as well as the preparation of derivatives thereof.^[7] Each of these rights is separate and distinct,

and thus, “the grant of one does not waive any of the other” protected uses.^[8] For example, when a college licenses public performance uses of a work, it is not necessarily also licensing distribution uses; though, the same instrument could authorize both.^[9] Moreover, these authorizations can be broad or specific. A copyright holder could authorize your institution to publicly perform a particular song in any context, in perpetuity; or she might authorize a single public performance, in a specific context, at a precise date and time, with a variety of other constraints.

Concomitantly, there are also statutory limits on a copyright holder’s rights built into the Copyright Act.^[10] These rights and uses are authorized by Congress and exist notwithstanding the copyright holder’s §106 rights. For instance, the Copyright Act authorizes fair use,^[11] which is a right^[12] of the public and, *by definition*, “not an infringement of copyright.”^[13] Whether a particular use of a copyrighted work is a fair use is a delicate determination, which we discuss in section B.2., below. Keep in mind that many public performance uses (including synchronization uses) will require authorization, but some will not because Congress did not put those uses within the ambit of the copyright holder’s rights.

Generally, in the United States a copyright holder’s rights attach at the work’s creation and end 70 years after the death of the author (or, in the case of works made for hire, 95 years after publication).^[14] When the copyright term ends, the work no longer has copyright protection, and rises into the public domain, unfettered.

2. Copyright in Music

When thinking about the copyright in music, it is useful to realize that copyright can protect several aspects of the same musical work. Copyright protects the musical composition as well as the accompanying lyrics.^[15] Typically, the composition and lyrics merge into a single work, but there are circumstances where the rights associated with the music and words have to be considered separately,^[16] which may require interactions with separate rights holders, if you seek authorization. In addition, copyright protects sound recordings (musical or otherwise)^[17] and it is frequently the case that the copyright holder for the musical work is different than for the sound recording. Also, even if the underlying composition and/or lyrics are in the public domain, the sound recording is likely to have copyright protection. For instance, *Amazing Grace*, a 1779 Christian hymn with lyrics written by John Newton, is clearly in the public domain. But, Judy Collins’ version of *Amazing Grace* was recorded in 1967 and that sound recording has copyright protection. It is also possible for public domain works to be updated or arranged in a new way that yields a derivative work, for which the newer elements within would have copyright protection. So, for example, if an institution wanted to publicly perform a recording of the “critical edition” of a baroque sonata, there would likely be copyrighted elements in the composition (i.e., the scholarly updates to the score) and almost certainly copyright in the recording. This, however, would not prevent another institution from making its own critical edition of the same public domain sonata, adding its own copyrighted elements and making its own copyrighted recordings.

3. Public Performance

In the case of musical compositions and lyrics, a copyright holder has the right to authorize and “to perform the copyrighted work publicly.”^[18] With sound recordings, a copyright holder similarly has the right to publicly perform and to authorize the public performance of the copyrighted recording, including if it is a digital audio transmission.^[19] The performance can be of a composition (e.g., when the marching band performs Queen’s *We Will Rock You* at a field

hockey game) or of a sound recording (e.g., when the stadium announcer plays the studio recording of Queen's *We Are The Champions*).

Nonpublic performances, even those synchronized to images, are not subject to the copyright holder's rights. That said, most of the synchronization uses colleges wish to make will be public performances precisely because colleges are making the synchronizations specifically to appeal to a public audience. In this regard, the status of classroom projects could give one pause. However, faculty and students engaged in 'internal' teaching and learning activities that may involve mixing music with images for displays or sharing purely within a classroom environment have opportunities to use sections of the Copyright Acts such as §110 (1) (classroom use) and §107 (fair use) as reasonable alternatives to licensing. Of course, the underlying copyrightable material incorporated into such classroom projects must itself have been legally obtained. Furthermore, if the resulting content is destined for the web (via YouTube or other mechanism), licensing responsibilities will come right back into play.

The Copyright Act (§101) specifically defines what it means to perform a work "publicly."^[20] Generally, public performances occur where there is the reasonable capacity for people outside the family circle to experience the performance.^[21] So far, courts have typically construed public performances broadly and nonpublic performances narrowly. Performances within a home, residence hall room/suite, hotel room, and the like are not public; in most other places, though, it is worth thinking carefully about whether the space is public. Classrooms, auditoriums, presentation rooms, and the like are typically public. Residence hall lounges and hallways are a more difficult call.^[22] Television and radio transmission, open webpages, YouTube videos, and the like are, except in the narrowest cases, likely to be considered public for purposes of performance.^[23] It is likely that the university PR team is not infringing as it is preparing the commencement video synchronized to Green Day's *Good Riddance (Time of Your Life)*. However, showing the celebratory video at graduation—even where it requires an invitation to attend—is a public performance.

Campus Licensing for Public Performances without "Synchronization": ASCAP, BMI, and SESAC

Music is publicly performed on college campuses millions of times each year. To thwart what would otherwise be astronomical transaction costs, most postsecondary institutions use blanket licenses through performing rights societies, such as ASCAP, BMI, and SESAC to facilitate non-infringing public performances of music on their campuses. These organizations are collectively able to authorize^[24] public performances of millions of works, and the one-stop license covers performances by the institution as well as by students, faculty, staff, and even visitors that take place on campus or through campus broadcast media (such as the student radio station, residence hall network, etc.). These blanket licenses, however, do not typically authorize synchronization uses. They either explicitly exclude synchronization uses or indicate that the contract covers only those public performances the performing rights society is itself permitted to authorize (which, inconveniently, do not include synchronization uses).

2. Some Uses Do Not Require Authorization

Because a copyright holder's rights are limited in scope and duration, not all uses of a work require the authorization of a copyright holder. Some works, such as public domain works, do not get copyright protection and, therefore, do not require authorization to use (just remember that, in the case of music, there may be multiple aspects of the work, some that are in the public domain and some that are not). Also, some uses simply fall outside of what the copyright holder has the right to authorize for a given work. Those uses may be made without permission. For

instance, a copyright holder has no right to authorize *nonpublic* performances; so, if you are not performing it publicly, you are free to synchronize your photographs of your Alaskan cruise to *It's a Beautiful Day* by U2. Similarly, you need not seek permission if the use you are making is otherwise authorized by the Copyright Act (e.g., in §§107-122). The most common of these collegiate uses are public performances in the context of teaching and fair uses.

Public performances in the context of teaching: In today's world, it is not uncommon for instructors to synchronize music to images when teaching. It is hard to imagine teaching about copyright in music without simultaneously playing music, showing notes, and displaying other visual cues to highlight musical and legal elements. All of this is easily done through PowerPoint or other presentation technologies and in doing so, whether the instructor knows it or not, she is making a synchronization use.

Congress specifically authorized classroom public performance uses in §110(1).^[25] Whether or not synchronization is involved, instructors at nonprofit, educational institutions may publicly perform copyrighted works in their face-to-face classrooms, so long as the copies of the works they are using were acquired lawfully or were reasonably believed to have been.^[26] Moreover, there are certainly uses of music and images in concert that would likely be fair uses not requiring a synchronization license. Use of short sound clips alongside images in a talk on copyright or a lecture on music and art at a scholarly society would be classic examples of fair use, and subject to powerful fair use arguments.

Some uses, however, are less likely to be fair use. For instance, using Pharrell Williams' *Happy* as the background of a university's capital campaign video is less likely to be a fair use. While the use is still noncommercial (first factor), it is less likely to be transformative (the song is being used as a song to evoke a particular happy mood). The whole (third factor) song is quite creative (second factor) and, because this song has been used in a variety of advertisements, several films, and in other venues, there is a robust market for the work (fourth factor), especially in synchronized uses. So far, many campuses have made promotional videos (sometimes these are the efforts of students on campus) with *Happy* as the theme and we are not aware of any disputes. But this is a riskier endeavor than a conference presentation, and quite unlikely to be a fair use. In the end, fair use determinations are not always easy and each institution will have to decide in context whether it is better to seek a license or rely on fair use.

3. Synchronization Uses

It is reasonable to conclude that, when speaking of synchronization, we are calling forth some notion of the confluence of music and images, but how far this goes is unclear. We can say with some certainty that the concept applies to film and television performances in theaters and broadcast media. It is harder to conclude how synchronization applies to public performances (say, a "battle of the bands") at the student union that might take place below a large screen with video provided by the performers. In this circumstance, the college's blanket public performance licenses cover the performances of the music, but does the concurrent video invoke the need for a sync license? Would it make a difference if the video were designed to accompany the specific performance? How about if the screen is merely showing the performance so people in the back can see?

You may notice that performance licensing societies (such as BMI and ASCAP) have begun to decide that the college campus license excludes things like campus hospitals and campus exercise classes, which are beginning to require additional licensing and payments. These practices occur because the copyright holder's rights are broad and can be carved up at the copyright holder's discretion. For example, a copyright holder could, as a theoretical matter,

decide to charge different rates for authorizing public performances on specific days of the week.

In practicality, what this means is that if a copyright holder authorizes your institution to make public performances of, say, a sound recording, it would include—*unless it says otherwise* in the agreement or authorization—uses in concert with images. There is no statutory proclivity that suggests that synchronization uses must be expressly identified alongside a general authorization to publicly perform a work. Because some expectations around this subject can be less than clear,^[27] it does not hurt to be explicit, especially if you wish to avoid confusion down the road. When your institution seeks authorization to synchronize a musical work to images of the campus, it is best to be explicit about the intended use. That said, if the copyright holder has clearly authorized unencumbered performance uses, she has authorized synchronization uses.^[28]

B. Process for Acquiring a Sync License and Using Synchronized Content^[29]

1. Initial Considerations

Since synchronization licenses involve uses that are not specifically regulated by Congress—as opposed to uses licensed by the performing rights societies—the licensing process is not at all standardized across the industry. Negotiations involve many different parties using different standards, terms, and forms. There is the added complexity that many rights holders and their agents conflate industry practices with law.

Once the marketing or social media team has chosen a song (ideally, several possible songs), the first step towards obtaining a synchronization license is to visit the ASCAP Repertory page^[30] and/or the BMI Repertoire page^[31] and search for the track name or artist name. Different artists can be a member of one or the other performing rights societies for different songs. Note that “writer/songwriter/composer,” and “performer/artist,” may differ for the track you choose. You may have to accept a lengthy set of terms and conditions to continue your search.^[32] When the search results arrive, be sure that the results represent the precise track you hope to license. It is not uncommon for different artists to use the same names for songs (a search for a song called “Angel” might give you the results you are looking for, mixed in among five dozen other songs of the same name). It is also not uncommon for the same artist to have multiple recordings of the same song and, to the extent that you want to use a specific sound recording among several, you’ll want to be sure you’ve secured authorization for the correct recording—at times the same artist records the same song with different labels. The two sites display their information differently, but what you are looking for is the contact information for the publisher and the writer/composer. That can be one or two companies or it can be several who share percentage ownership of the song (many popular songs can have a team of writers who compose the track for the performer and may have several companies that hold or control portions of the rights).

Once you have the contact information, it proceeds like any other procurement negotiation. The various rights holders will quote a price and inform you of their terms, and there is some room to negotiate. Be sure to state clearly that you are negotiating on behalf of a nonprofit or public government entity educational institution, as that can significantly affect the price.^[33]

Different Types of use: Although classrooms are generally considered public for purposes of copyright, Congress specifically authorized classroom public performance uses in §110(1).^[34] Whether or not synchronization is involved, instructors at nonprofit, educational institutions may publicly perform copyrighted works in their face-to-face classrooms, so long as the copies of the

works they are using were acquired lawfully or were reasonably believed to have been.^[35] While it is likely that the types of uses described in §110(1) would be fair uses, the standard here is more straightforward than fair use, making it easier for instructors to feel comfortable making these uses—this is as true for a synchronization use as it is for any other public performance use in this context. Instructors at for-profit institutions would not be able to rely on this section, but still may make fair uses.

Instructors teaching in a non-face-to-face context also cannot rely on §110(1). Congress specifically authorized public performance uses at a distance in §110(2), the TEACH Act.^[36] This section is far less clear, useful, or reliable than §110(1). To make use of a copyrighted work under §110(2), there is a multifaceted analysis involving: copyright notices, copyright policies, accredited nonprofit educational status, saliency to the mediated instruction in the course, limitations based on the dramatic or nondramatic status of the used work, technological protections for the work, and more.^[37] North Carolina State University has a set of detailed checklists as part of its “TEACH Act Toolkit,”^[38] which may make this analysis a little easier. In general, most colleges do not rely heavily on §110(2) - although we all regularly use §110(1). Instead, we tend to look to fair use in the context of non-face-to-face teaching.

Fair use: Unlike the tailored uses authorized in §110, fair use (§107)^[39] represents a broader, more flexible category of use rights reserved for the public. As such, fair use affords a much greater variety of unauthorized public performance options, but it does so at the cost of clarity and efficiency. Fair use rights require a more complicated and less reliable analysis and, ultimately, it is the court that will decide whether a particular use is a fair use, if a college’s choice is called into question.

Whether a particular use of a copyrighted work is a fair use depends on a number of elements including the “four factors” described in the Act: “(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.”^[40] Personal, noncommercial, educational, research, and transformative uses lean toward fair use, where commercial uses typically lean against fair use. If the work used is more factual in nature, it is more likely the use will be deemed fair use. The more creative the work, the less likely it will be deemed a fair use. If the amount used is a small portion of the work, it is more likely to be a fair use; if the amount used is a large portion of the work, it is more likely not to be a fair use. The less the use affects the market for the original work, the more likely a court would lean toward calling it a fair use; the more the use affects the market, the more likely it will not be a fair use.

At bottom, the test is one of fairness: it asks how much of what kind of work was used for what purpose, and how does the use affect the market for the original? None of the factors is dispositive. It is up to the court (and to the party claiming fair use) to weigh these factors in the context of copyright’s constitutional purpose of promoting progress. There is “no specific number of words, lines, or notes”^[41] that determines whether a use is a fair use. Because it can be tricky, at times, to determine whether or not the Copyright Act authorizes a particular synchronization use, institutions should consider whether a synchronization license is a prudent option.

2. Landmines to Look Out For When Synchronizing Video and Photos to Music

If an institution needs to seek a synchronization license, rather than rely on a fair-use argument, it nonetheless should be prepared for some landmines in negotiations with copyright holders.

These landmines, if not overcome, can place significant limits on use of content and leave an institution unable to meet its vision for use of the song. When negotiating for a synchronization license, some potential landmines may undermine your objectives, while others may be overcome. They include:

A. Bans or Limits on Internet Publishing

Some companies, believing that any broadcasting of their song over the Internet will hurt record sales, will simply not license any synchronization without a requirement that the licensee will not upload the resulting video to the Internet. This is not, by any means, a uniform stance and is considered highly outdated (especially when one considers that essentially any song is available in multiple formats from multiple sources, and broadcasting this one additional, licensed use, will be but an additional drop in the bucket). For those companies that do hold this stance, however, it is, in the experience of the authors, not negotiable. If your institution is intending to upload a video with music or movies synchronized to a song via the college Web site or a commercial site such as YouTube or Vimeo, this may be a deal-breaker. Other licensors have a stated preference against this, but will negotiate. Still others will allow uploading to a college or university Web site, but will not allow the same video to be uploaded to a commercial site. In cases where an institution seeks only to create and license a video to be shown live to an audience (such as admitted students or alumni), such limitations may not be a hindrance. Experience has shown, however, that many institutions, after devoting significant resources to creating and licensing the content, do wish to share it on the Internet through one or multiple methods. In those cases, this factor can be crucial in choosing a track to synchronize. Also, remember, any prohibition on use of a synchronized song on the Internet will likely continue in perpetuity. For instance, if your institution licensed the ability to broadcast a synchronization on local television but not on the Internet, incorporating that synchronization into an Internet centennial retrospective several years later may put you in violation of your license.

B. Time Limits of Song/Interruption Requirement

Similarly, other companies will only license a song if the licensee promises to interrupt the song at certain intervals (commonly 90 seconds, but it can vary). Using this method, someone who found the file online seeking only to listen to the song, would not get a single unadulterated track, but a track with a series of interruptions. This may initially seem like a hindrance, but short interruptions can enable savvy media types to insert relevant and effective institutional images or other content that break up the piece without loss of creative continuity in the piece.

C. Temporal Limitations

While far from universal, for many songs, especially popular “top 40” hits, master or publishing^[42] rights holders will seek temporal limits on the broadcasting of the synchronized video. These temporal limits vary by company and are sometimes inconsistent among partial owners of the same track. A best practice is to work with the marketing and social media team during the negotiations to determine what the realistic goal of the institution is for how long the video will remain online. For some videos, the cost difference between one year of licensing and multiple years can be enormous (with escalating costs for each year of the license). Yet not all projects require that the video be online eternally. Having a handle on the goals at the outset can give colleges an advantage when negotiating for such uses.

D. Most Favored Nation Clauses

When negotiating for synchronization uses, colleges are often working with several companies that hold all or part of the master or publication rights for the track. Sometimes these companies work together seamlessly, though often they do not. In almost all cases, the contract will contain a “most favored nation status clause” (MFNS) that colleges should be aware of in advance. This clause can result in raised prices and diminished uses. For instance, consider a track, *NACUA Blues*, where publication control is jointly held by Bernard Records and Storch Studios, with the master licensing controlled by Morrison Recording Co. The hypothetical license contracts are:

Company	Rights Holder	License Fee	Term	Renewal Terms
Bernard Records	50% publication	\$1,500	Perpetual	N/A
Storch Studios	50% publication	\$300	1 year	\$300/year
Morrison Recording Co	100% master	\$1,000	1 year	Cost plus 3% annual escalator

In such a case, with the inclusion of a MFNS clause, the fees will be the following, \$1,500 to Bernard, \$1,500 to Storch and \$3,000 to Morrison. Each party will have one year renewals, and each will get the 3% escalator on their contract. This is because each licensor gets the best terms to which any other licensor agrees. In terms of cost, each licensor will get the best pro rata fee based on their percentage of control. The result is that an institution may negotiate a great contract with a licensor of partial rights, only to see those costs rise and terms worsen due to subsequent agreements with other partial licensors.[\[43\]](#)

E. Potential High Cost

A final land mine that institutions should be aware of is the cost of these licenses. There are no set standards or fee schedules, as there are for use of other copyrighted content. The fees are set by the licensors. They can range from free (for bands that support the educational mission and seek no compensation) to hundreds or low thousands (common for popular and back catalog tracks when it is made clear to the licensor that the use is for educational, nonprofit reasons), to “the sky’s the limit.” Sometimes the quoted fees are simply prohibitive for this type of use. Each institution has its own budget, but it should be clear going in that the final cost for such a use may be quite high. And, considering these last two landmines together, it is worth noting that if your institution ends up negotiating multiple agreements *seriatim*, only to discover that costs now exceed your budget before negotiating the later agreements, you may still be obliged to pay for licenses you will not be able to use in the earlier executed agreements.

4. Don’t Put All Your Eggs In One Basket

In any synchronization licensing process, a best practice is for the marketing and social media teams to choose several songs that they are interested in, so that if one track proves cost prohibitive, cannot be broadcast on the Internet, or comes with some other deal-killing term, there are plenty of alternatives. Due to the complexity of these negotiations and the common need to work with several companies, each with different rules and personalities, and often in different time zones, it is highly advisable to begin the process several months ahead of the time

that the institution intends to begin creating the video. Anything less may not allow necessary time to accomplish the negotiations. In such cases, institutions may wish to turn to one of the alternatives below.

5. Tips to Successfully Acquire, Use, or Avoid Synchronization Licenses:

- Start the process far in advance to allow for time spent locating the rights owners, negotiating, and completing the video. Have several song options in mind in case the terms or cost presented by the first-choice track makes the project a deal-breaker.
- Be flexible as far as interruptions in the track, which may be a required term.
- Consider music that is available via, say, a Creative Commons license.
- Consider developing a relationship with local music students or musicians who can help you develop music specifically for your purposes (at the University of Michigan, for instance, music students volunteer to write/perform original music—the students get attribution and experience and the University gets works tailored for its purposes).

6. Uploading Licensed Content to YouTube:

When or if you upload the video to YouTube that synchronizes your photos or videos to a song, in the YouTube Video Manager, the video may be flagged as either:

- “Matched 3rd party Content;” or
- “Video Blocked in Some Countries.”

This happens very quickly, often within minutes or seconds of uploading the content. YouTube has a thoughtful and complex approach to digital rights management that gives rights holders options when potentially infringing content is uploaded.^[44] You can't do much about the video blocking in some countries, but there are steps to take to ensure that your video is not blocked due to the (now licensed) presence of 3rd party content. Click on the link for “Matched 3rd Party Content” and a page will come up indicating where in the video YouTube has determined, through its automated copyright notification system, that there is a potential copyright violation. There are options to either remove the song or file a dispute.

In filing a dispute, there are several options regarding why the user believes the copyright claim is not valid:

- I own the CD/DVD or bought the song online.
- I'm not selling the video or making any money from it.
- I gave credit in the video.
- The video is my original content and I own all of the rights to it.
- I have a license or written permission from the proper rights holder to use this material.
- My use of the content meets the legal requirements for fair use or fair dealing under applicable copyright laws.
- The content is in the public domain or is not eligible for copyright protection.

Sharp-eyed readers will note that clicking any of the first three will likely not lead to success. Choices 4-7 can be appropriate based on which path detailed above that the institution has chosen. Once you make a choice and click continue, you will have to click a box stating you are “sure”^[45] that such an exception applies, and click continue again. At that point, you will have to enter an explanation (be detailed here within the word limit, and include information on the

licenses purchased), check to certify that you have a “good faith belief” in your dispute and understand that filing such a dispute fraudulently could result in termination of your YouTube account, and digitally sign your name to submit the dispute.

Ostensibly, someone at YouTube or the rights holder then reviews the dispute. Do not expect YouTube to get back in touch with you. If approved, the tag will simply disappear.[\[46\]](#)

7. Potential Penalties:

Copyright lawsuits centered on synchronization remain rare, especially when compared with the terabytes of videos created each day that synchronize music to photos and videos for personal use or uploading to the Web. Lawsuits against college campuses for such violations are rarer still, but this is not to say they cannot or will not happen.

Penalties for violation of copyright law can range from actual damages to the statutory damages amounts of \$750 to \$150,000 per infringement (with the penalty for willful infringement yielding \$30,000 to \$150,000 penalties).[\[47\]](#) Practically, actual damages are difficult or impossible to prove in a case like this, so plaintiffs would likely rely on statutory damages. Public institutions *may* be able to limit damages in such cases to injunctive relief rather than money damages.[\[48\]](#)

C. Alternatives to the Main Process

There are two main alternatives to licensing popular music to be synchronized with photos and videos: working with your own students and working with a background music vendor.

1. Working With Your Students

Your institution may have talented students who can either create new music or record music in the public domain that can be used to accompany your photos and videos. SUNY had a recent alumnus from the University at Albany who had signed with a record label, won some young musician contests, and recorded several tracks. SUNY worked with this alumnus to record a track and video for the “SUNY Anthem,” which was placed on YouTube and had over 100,000 views.[\[49\]](#) The University negotiated an agreement with the alumnus, Brendan Martin, which clearly delineated rights and included significant allowances for performance and synchronization of the song.[\[50\]](#) This path represented a win-win, in that it was an inexpensive project for the University that also allowed an alumnus to build his reputation.

2. Background Music Vendors

Another alternative path is to utilize a company that makes background music solely for licensing purposes. Many companies offer this service.[\[51\]](#) Some license traditional “elevator music” while others have teams of musicians that work to create tracks that sound similar to popular songs you may hear on the radio, but are not themselves hit songs. The significant advantage to this process is a much lower price (some companies offer memberships where a user can pay a certain fee for unlimited or significant use of different tracks), a much easier negotiation and licensing process, and more flexibility in using tracks. The downside is that none of the viewers will recognize the song used in the video.

CONCLUSION:

Although it can be complicated, licensing the ability to synchronize music to your photos and videos is achievable with a little bit of work. The licenses do not typically come alongside blanket performance licenses, but must be negotiated separately with each rights holder. If you make the effort to obtain permission, you can produce successful innovative videos for members of your college community.

But we can imagine a better solution, and the higher education community can use its voice to advocate for such improvements. For example, Section (A)(3) of the Note, above, describes the efficient system of licensing performance rights in a song through ASCAP, BMI and SESAC. But no such efficient system exists for licensing sync rights, instead they have to be negotiated individually, on a case-by-case basis. Changes in technology have made synchronization of music to photos and videos easy and inexpensive with very wide use of copyrighted material that is not licensed (and paid for). Together with the model of the blanket performance agreement, these changes lead to a conclusion that, perhaps subject to an antitrust consent decree, the music industry should develop a method of inexpensively licensing copyrighted content for synchronized use at a fair cost that would take into account the type of use (commercial use would cost more than not-for-profit, which would cost more than personal use). Those who pay for a license could receive a unique code that could be used with social media sites such as YouTube to show that a use is licensed, and thus avoid having the content taken down. Such a system would enable better teaching, learning and outreach with minimal transaction costs – something that would serve our faculty, students and communities better.

ADDITIONAL RESOURCES:

ASCAP: <http://www.ascap.com/>

BMI: <http://www.bmi.com/>

SESAC: <http://www.sesac.com/>

SoundExchange: <http://www.soundexchange.com/>

ACE: Use of Copyrighted Music on College and University Campuses: <http://www.acenet.edu/news-room/Documents/Music-use-of-copyright.pdf>

ACE: At a Glance: Music and Copyrights on Campus: <http://www.acenet.edu/news-room/Documents/Music-at-a-glance.pdf>

ENDNOTES:

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[2] U.S. CONST. art. 1, §8, cl. 8.

[3] The Progress Clause is also the source of Congress' power to make patent law. *Id. See generally* Copyright Act of 1976, as amended, 17 U.S.C.A. §§ 101–805 (2012).

[4] 17 U.S.C.A. § 102(a)(1), (2), and (7).

[5] *Id.* § 102(a).

[6] While the Copyright Act uses the term “exclusive” to describe the copyright holder's rights, *e.g., id.* § 106, it does not mean that only the copyright holder can make uses of copyrighted works. *See id.* §§ 107–122.

[7] *Id.* § 106.

[8] *Columbia Pictures Indus., Inc. v. Redd Home, Inc.*, 749 F.2d 154, 158 (3d Cir. 1984).

[9] *See id.*

[10] 17 U.S.C.A. §§ 107–122.

[11] *Id.* § 107.

[12] *Id.* § 108(f)(4).

[13] *Id.* § 107.

[14] These are the broadest categories of copyright term. For more details in chart form, see Peter B. Hirtle, *Copyright Term and the Public Domain in the United States*, Cornell Copyright Info. Ctr. (Jan. 1, 2017), <http://copyright.cornell.edu/resources/publicdomain.cfm>.

[15] 17 U.S.C.A § 102(a)(2).

[16] For instance, in the song *Happy Birthday To You*, the rights for the music and lyrics were distinguished. *See Marya v. Warner/Chappell Music, Inc.*, No. CV 13-4460-GHK (MRWx), 2015 U.S. Dist. LEXIS 129575 (C.D. Cal. Sept. 22, 2015).

[17] 17 U.S.C.A § 102(a)(7)

[18] *Id.* § 106(4).

[19] *Id.* § 106(6).

[20] 17 U.S.C.A. § 101.

[21] *Id.*

[22] Case law has not yet parsed this concept to be dispositive on all the types of spaces on campus.

[23] NACUA has some good resources to help assist with this determination such as: NACUA, *Copyright Guidelines for Exhibiting Movies and Other Audiovisual Works*, <http://www.nacua.org/documents/CopyrightMovies.pdf> (last visited Mar. 1, 2016).

[24] ASCAP and BMI operate under a consent decree with the Department of Justice, due to antitrust issues in fixing prices. *Antitrust Consent Decree Review – ASCAP AND BMI 2014*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/atr/ascap-bmi-decree-review> (last visited Mar. 13, 2017). As occasionally occurs, the consent decree is currently under review. *Id.*

[25] 17 U.S.C.A. § 110(1).

[26] *Id.*

[27] See *supra* Section A.3 for a discussion of expectations in the context of performing rights organizations.

[28] While it is beyond the scope of this NACUA Note, do keep in mind that the use of third-party copyrighted works in some contexts may imply endorsements (call to mind candidates who use musical works as part of their advertising when the artist objects) or transgress state privacy rights.

[29] Note that a synchronization license is separate and apart from a mechanical license. Mechanical rights are governed by 17 U.S.C. §115. More information may be found via the Harry Fox Agency, which generally licenses mechanical rights. *What is a Mechanical License?*, HARRY FOX AGENCY, https://www.harryfox.com/license_music/what_is_mechanical_license.html (last visited Mar. 13, 2017).

[30] *ACE Repertory*, THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS (ASCAP), <https://www.ascap.com/Home/ace-title-search/index.aspx> (last visited Mar. 13, 2017).

[31] BMI, <http://www.bmi.com/> (last visited Mar. 1, 2016).

[32] The contractual implications of accepting these terms and conditions are beyond the scope of this Note except to say it is an adhesion contract. Either you agree to their terms, or you don't search the database.

[33] See *infra*, Section B.2 on landmines.

[34] 17 U.S.C.A. § 110(1).

[35] *Id.*

[36] 17 U.S.C.A. § 110(2).

[37] *Id.*

[38] N.C. STATE UNIV., TEACH ACT TOOLKIT, <https://www.provost.ncsu.edu/copyright/toolkit/> (last visited Mar. 1, 2016).

[39] 17 U.S.C.A. § 107.

[40] *Id.*

[41] U.S. COPYRIGHT OFFICE, FL-102, FAIR USE (reviewed Nov. 2009), <http://www.rehab.alabama.gov/docs/default-document-library/fl102.pdf?sfvrsn=2>.

[42] Master rights and publishing rights are industry-created terms that do not appear in the Copyright Act. Basically, the master rights are in the actual recording of this song by this artist. It is an anachronistic concept dating to the time when a master recording wax cylinder would be used to create all phono-record copies that would be sold in stores. The publishing rights are in the words/lyrics and melodies/music of the work, regardless of who actually recorded the version you use. If a license seeker is recording their own version of a work, they do not need to seek master rights. Whether the license seeker uses the recorded version or records their own, they would still seek publishing rights.

[43] Know that the licensors are in better contact with each other than they are with you. They will likely communicate with each other what terms are being offered, and in some cases, no licensor will officially agree until all terms are set with all licensors.

[44] Margaret Gould Stewart, *How YouTube Thinks About Copyright*, TED (Feb. 2010), https://www.ted.com/talks/margaret_stewart_how_youtube_thinks_about_copyright.

[45] The contractual and representation issues here are outside the scope of this NACUANOTE.

[46] Note that for some songs, the rights holders seek to have the song blocked in its entirety, while for others, they will seek to have the song blocked on mobile devices but allowed on computers accessing YouTube.

[47] 17 U.S.C.A. § 504.

[48] See *Hans v. Louisiana*, 134 U.S. 1, 10 (1890); *Ex Parte Young*, 209 U.S. 123 (1908); *Verizon Md. Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002).

[49] The State University of New York, *B. Martin – “The SUNY Anthem”*, YOUTUBE (Feb. 27, 2013), <https://www.youtube.com/watch?v=avq1qjVpxtl>.

[50] Agreement on file and available upon email request to joseph.storch@suny.edu.

[51] The authors do not wish to endorse any one company, but a large list may be found by conducting an Internet search for the phrase “online production music library.”

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