

# As if karaoke weren't bad enough

## NOW IT'S COPYRIGHT INFRINGEMENT

By T. Earl LeVere

There seems to be no shortage of reasons not to indulge in karaoke, as tempting as it might be from time to time. Not the least among these reasons is that karaoke can be a copyright infringement as the Ninth Circuit Court of Appeals recently reaffirmed in *Leadsinger Inc. v. BMG Music Publishing*. OK, for most normal people, that COULD actually be least among the reasons not to karaoke but it is still a reason nonetheless.

The problem is not the singing in public — or at least that's not the copyright problem. Venues that offer karaoke typically protect themselves from complaints alleging infringement of the public performance copyright by purchasing catalog licenses from one or more of the three main copyright performing rights societies: BMI, ASCAP, or SESAC. Instead, the problem with karaoke machines, as the Ninth Circuit noted, arises from the machine's display of the lyrics on a video monitor in real time with the music that the machine plays. The display of video images with accompanying music implicates the copyright owner's "synchronization right." The synchronization right applies to audiovisual works (i.e., combinations of images and accompanying sounds) and is separate from the copyright owner's public performance right and from the "compulsory mechanical license" available under Section 115 of the 1976 Copyright Act for compositions embodied in phonorecords.

On January 2, 2008, perhaps after attending a New Year's Eve karaoke party, three judges from the Ninth Circuit Court of Appeals issued their decision in *Leadsinger, Inc. v. BMG Music Publishing*, which was on appeal from a California federal court. Leadsinger, Inc. manufactures karaoke machines that enable individuals to sing along with prerecorded music. At issue in the case was Leadsinger's consumer "all-in-one microphone player," which holds recorded songs in a microchip in the microphone. When the microphone is plugged into a television, the lyrics of the song appear on the television screen in real time as the song is playing, enabling the consumer to sing along with the lyrics.

BMG Music Publishing is the publishing arm of one of the "big four" record labels. Leadsinger historically paid BMG Music licenses for using the instrumental sound recordings but did not pay a synchronization license or a license for the printed copies of the lyrics that Leadsinger included with its machines. To avoid a challenge of copyright infringement, BMG Music demanded that Leadsinger pay a "lyric reprint" fee and a synchronization fee in addition for the royalty for the instrumental music.

Leadsinger refused to pay the additional royalties and filed a federal court complaint seeking a declaratory judgment that its practices did not constitute copyright infringement so long as Leadsinger continued to obtain "compulsory mechanical licenses" for the songs under Section 115 of the Copyright Act. Alternatively, Leadsinger argued that its printed and video lyrics constituted a "fair use" under the Copyright Act. Specifically, Leadsinger asked the court to resolve whether it has the right to display song lyrics visually in real time with the recorded music, as well as print song lyrics, without holding anything more than the Section 115 compulsory licenses it already possessed. The trial court rejected Leadsinger's claims and dismissed its declaratory judgment complaint. The district court concluded that the compulsory mechanical license does not grant Leadsinger the right to display visual images and lyrics in real time with the music, even though Leadsinger licensed the instrumental music. Despite Leadsinger's assertion that the karaoke machines "teach singing," the court also rejected Leadsinger's argument that copying the lyrics was a fair use of copyright. Leadsinger appealed the case to the Ninth Circuit.

The Ninth Circuit affirmed the trial court's decision, although on slightly different reasoning. The court first noted that the Section 115 compulsory mechanical royalty applies only to "phonorecords" as defined in the statute, which expressly excludes sounds "accompanying a motion picture or other audiovisual work" from the definition of phonorecords. The court then reviewed the statute's definition of "audiovisual works" and concluded that Leadsinger's use of the lyrics in real time with the music fits within the definition because Leadsinger's products "consist of a series of related

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images which are intrinsically intended to be shown by the use of machines . . . together with accompanying sounds.” As a result, being “audiovisual works,” the court concluded that Leadsinger’s products fell outside of the statutory definition of phonorecords and therefore the Section 115 compulsory mechanical royalty did not apply. Instead, the court found that Leadsinger must acquire a synchronization license for the songs and lyrics used in its products. Quoting a prior New York federal appellate case, the court stated, “A synchronization license is required if a copyrighted musical composition is to be used in ‘time-relation’ or synchronization with an audiovisual work.” Without such a license from the copyright owners, Leadsinger’s use of the lyrics in real time with the music infringed BMG Music’s rights in the songs.

The Ninth Circuit is neither the first nor the only federal appellate court to find that karaoke machines can infringe copyrights. The Second Circuit Court of Appeals reached this conclusion in 1996 in *Abkco Music, Inc. v. Stellar Records, Inc.*, holding that karaoke creates audiovisual works because it “consist[s] of a series of related images—the lyrics—together with accompanying sounds—the music.” Our own Sixth Circuit Court of Appeals held last year in *Zomba Enterprises, Inc. v. Panorama Records, Inc.* that a karaoke company’s use of copyrighted musical compositions was not a fair use and, instead, constituted a copyright infringement. Affirming a judgment of nearly \$900,000 in damages and attorneys’ fees, the Sixth Circuit found that the karaoke company’s use of the

copyrighted works was “commercial” in nature and wisely rejected the argument that karaoke is a teaching tool for aspiring vocalists.

So, if, after perhaps one too many adult beverages, your friends think it would “awesome” to take the stage and belt out a few of their high school favorites, you should consider adding copyright infringement to the already-lengthy list of reasons why that might not be such a good idea. Who knows? Taking the tempting “Oh, I dare you” approach might actually constitute “inducement” of infringement.



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